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From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights

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# THE YALE LAW JOURNAL

ROBIN WEST

## From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights

**ABSTRACT.** The Essay argues that the right to abortion constitutionalized in *Roe v. Wade* is by some measure at odds with a capacious understanding of the demands of reproductive justice. No matter its rationale, the constitutional right to abortion is fundamentally a negative right that rhetorically keeps the state out of the domain of family life. As such, the decision privatizes not only the abortion decision, but also parenting, by rendering the decision to carry a pregnancy to term a choice. It thereby legitimates a minimalist state response to the problems of pregnant women who carry their pregnancies to term and for poor parents who might need greater public support. These marginalized groups need greater community and state assistance with the demands of parenting, and the equation of reproductive justice with a right to terminate a pregnancy is in tension with a political or legal agenda for meeting those needs. The Essay then explores the possibility of creating a right to legal abortion through ordinary political means, rather than through constitutional adjudication, in such a way as not to carry these costs.

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## INTRODUCTION

The preferred moral foundations of the abortion right created in *Roe v. Wade*<sup>1</sup> and its progeny continue to shift, from marital and medical privacy,<sup>2</sup> to women's equality,<sup>3</sup> to individual liberty or dignity,<sup>4</sup> and back, in the minds of both the Supreme Court Justices and the pro-choice advocates and legal scholars that have argued or celebrated these famous cases. What has not shifted is the commitment of the pro-choice community to the right itself, and to the propriety of its judicial origin. Legal abortion, according to this near-universal pro-choice consensus, is and should be an individual, constitutional right protected against political winds, rather than simply good policy reflected in a state's laws, and it is therefore entirely fitting that we look to the courts, and to the Supreme Court in particular, for its articulation and enforcement. It is the work of the courts and their actors—judges, lawyers, litigants, amici, judicial clerks, and academic commentators—to orate the basis of this important individual right, to develop its contours, and to expand or contract it when appropriate—to subject it in effect to the ordinary and extraordinary processes of constitutional adjudication.

This Essay tabulates some of the costs to feminist ideals that are produced by our reliance on the creation of an individual right as the conceptual vehicle for legal abortion, and our reliance on adjudication as the strategic vehicle for the right's development and justification. I will argue that while the court-focused methods and the various "choice-based" arguments put forward by the pro-choice advocacy community have jointly secured for individuals a fairly robust constitutional right to legal abortion, those same arguments have ill served not only progressive politics broadly conceived, but also have ill served women, both narrowly, in terms of our reproductive lives and needs, and more generally. I ultimately will urge a broader political argument for reproductive justice in women's lives that embraces, but does not center upon, rights-based

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1. 410 U.S. 113 (1973).
  2. *Id.* at 152–53.
  3. 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) (arguing that *Roe* should have been decided on narrow Equal Protection Clause grounds); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (same); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 349–77 (1992) (same).
  4. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008) (arguing that dignity is a universal value that can structure disagreements between subcommunities on abortion).

claims, and for a reorientation of legal resources to secure those claims away from the judicial realm and to state and federal legislative arenas.

The Essay is organized as follows. The first Part asks a (somewhat) rhetorical question: why has there not been more feminist and pro-choice criticism of both *Roe v. Wade* specifically and our reproductive rights jurisprudence more generally? To be clear, there is of course plenty of criticism of *Roe* from those who abhor legal abortion on moral grounds,<sup>5</sup> as well as from legal scholars and Court watchers who object to the Court's perceived freewheeling activism in this field.<sup>6</sup> There is also a fair amount of critique of *Roe* from progressive scholars worried about *Roe*'s demonstrated propensity to create backlash against the Democratic Party and progressivism more generally.<sup>7</sup> What is missing from the massive amounts of critical commentary on *Roe* is an examination by pro-choice scholars of both the abortion right itself and the Court's central role in its creation for the possible harms done to the broader cause of reproductive justice. There is, bluntly, almost none of this scholarship.<sup>8</sup> I will argue that while there are quite understandable reasons for the reluctance of this community to offer constructive critiques, those reasons are not in the end persuasive.

The second Part argues that there are unreckoned moral and political costs of the judicially created, individualist, and negative right to an abortion—costs that ought to be troubling for all, but particularly for feminist legal scholars.

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5. See, e.g., Michael Stokes Paulsen, *Paulsen, J., Dissenting, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS RELATE AMERICA'S MOST CONTROVERSIAL DECISION* 196, 211-14 (Jack M. Balkin ed., 2005) (equating support for legal abortion with support for state-sponsored genocide).
  6. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 120-26 (1990) (arguing that *Roe v. Wade* was an illegal exercise of judicial power); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 935-36 (1973) (arguing that *Roe v. Wade* creates a right to privacy with less constitutional support than any other decision in the previous twenty years).
  7. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (arguing generally that courts were ineffectual in bringing about progressive social change in the middle and late twentieth century, using *Roe* as an example).
  8. Exceptions include works such as Ginsburg, *supra* note 3, at 385-86, which expresses the concern that *Roe* had undercut a grassroots legalization movement, inviting backlash; Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45, 51 (Jay L. Garfield & Patricia Hennessey eds., 1984), which argues that the privacy rationale of *Roe* legitimates the sexual aggression that often leads to unwanted pregnancy; and Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363, 1364-70 (1984), which uses the abortion right as exemplary of unstable features of constitutional rights.

Briefly, I look at three such costs of the abortion right, which I refer to as (1) legitimation costs, (2) democratic costs, and (3) aspirational costs. All three of these general types of costs of rights have been well developed in the various “rights critiques” produced by critical legal scholars during the 1970s and 1980s.<sup>9</sup> None, however, has been applied to the particular case of abortion rights. Individual, negative, constitutional rights, according to their critics, keep the state off our backs and out of our lives, but they also run the risk of legitimating the injustices we sustain in the insulated privacy so created; they denigrate the democratic processes that might generate positive law that could better respond to our vulnerabilities and meet our needs; and they truncate our collective visions of law’s moral possibilities. All three costs, I will argue, attend to the abortion right created by *Roe v. Wade*. The second and major Part of the Essay specifies how this is so.

The third Part of the Essay looks at opportunities for promoting reproductive justice—including legal, moral, political, and rhetorical—that the pro-choice community might have lost because of its focus on rights and Supreme Court authority in the abortion debates. The conclusion briefly points toward a reproductive justice agenda that incorporates, without centralizing, a strong political case for access to legal abortion as central to women’s equal citizenship, without compromising or undercutting other progressive and feminist aims.

## I. A MISSING CRITICAL JURISPRUDENCE

Why is there not more pro-choice criticism of *Roe*, and of its varying and various rationales? The lack of such commentary is odder than it might first seem. The liberal adjudicated victories of the Warren and Burger Courts, with the one exception of *Roe*, generated massive amounts of critical commentary from theorists purporting to speak for the interests of the victorious parties in

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9. See Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1580-81 (arguing that rights function as an impoverished connection among people that replaces genuine connection); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 399-404 (1988) (arguing that rights require an individualistic perspective on social relations, at a cost to both democracy and redistribution, and that rights shift the focus away from the question of whether the right is socially desirable, an aspirational cost); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178, 216 (Wendy Brown & Janet Halley eds., 2002) (acknowledging Marxist critique that rights serve as a fantasy resolution of conflict between collective altruism and selfish individualism, legitimizing capital exploitation); Tushnet, *supra* note 8, at 1363-64 (arguing that we ought to value rights in and of themselves, and that because of their negativity, rights impede advances by progressive social forces).

those cases and the communities they roughly represented. *Brown v. Board of Education*,<sup>10</sup> to take the most iconic example, has generated a burgeoning cottage industry of critique, eventually coalescing in the creation of an entire scholarly movement—critical race theory—that was rigorously critical, on left-wing and racial-justice grounds, of that decision’s liberal, rights-expansive, and integrationist ideals.<sup>11</sup> Thus, according to its progressive critics, *Brown* hid the massive problems of underfunded public education under the false covering of a legally reformed and racially fair integrationist ideal,<sup>12</sup> and articulated an account of de jure segregation as the evil to be addressed by civil rights law that left an insidious pattern of de facto segregation both intact and legitimated.<sup>13</sup> It birthed an entire ideology of “color blindness” that did little but undercut serious attempts at redistributive racial justice, including affirmative action programs in employment and education both.<sup>14</sup> *Brown* lent a veneer of fairness to purportedly meritocratic hierarchic orderings that result from individual and state decisionmaking and that continue to subordinate poor people.<sup>15</sup> It relied on a cramped and ungenerous vision of “rights” and “integration” that both truncated rather than generated political progress on these and other progressive causes.<sup>16</sup> All of this, again, stems from the champions of racial

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10. 347 U.S. 483 (1954).

11. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 5, 20, 127–191 (Kimberlé Crenshaw et al. eds., 1995) (identifying two of Derrick Bell’s articles on *Brown v. Board of Education* as the intellectual precursors to Critical Race Theory and presenting “Progressive Alternatives to Mainstream Civil Rights Ideology”).

12. See Derrick A. Bell, *Bell, J., Dissenting*, in WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 185, 186–87 (Jack M. Balkin ed., 2001) (arguing that *Brown v. Board*’s abolition of segregation in education does not address harm caused by unequal educational opportunity).

13. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that race discrimination law since *Brown* has served to legitimate racial subordination).

14. See DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 151–59 (2004); Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053 (2005).

15. See Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 717 (1992).

16. *Id.*; Alan D. Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 96, 114 (David Kairys ed., 1st ed. 1982) [hereinafter POLITICS OF LAW] (concluding, in this condensed version of Freeman, *supra* note 13, that “race as a historical problem of oppression . . . cannot be remedied alone unless one is willing to accept nothing more than token bourgeoisification within the structure of a presupposed system of equality of opportunity—in short, one must become part of the legitimation process. To challenge that limited view is to tackle the pretense of equality of opportunity directly, to see it for what it is in relation to class structure”).

justice, not antagonists. Other less revered but nevertheless substantial Warren, Burger, and Rehnquist Court progressive victories also have prompted scathing critiques by progressive legal scholars. *Miranda v. Arizona*<sup>17</sup> prompted worry as well as celebration among advocates for the interests of criminal defendants: the right the Court created might constitute a triumph for nothing but a formalistic and legitimating conception of interrogatory justice, setting back, rather than advancing, the cause of respectful and noncoercive treatment of criminal defendants.<sup>18</sup> Likewise, the more recent *Lawrence v. Texas*<sup>19</sup> decision prompted plenty of accolades but also its share of criticism from equality-minded legal scholars. In elevating sex into the realm of those aspects of life and identity so highly regarded as to be worthy of constitutional protection, some argued, it might further burden the work of protecting vulnerable people against sexual harassment and assault.<sup>20</sup>

Whatever the merits of the criticisms of these famously progressive cases, my point here is comparative: unlike *Brown*, *Miranda*, or *Lawrence*, *Roe v. Wade* remains largely insulated from friendly critique. Why is that? I think there are three reasons for the critical reticence. None, however, is a particularly compelling justification.

Part of the story—maybe the major part—is a widespread belief among the pro-choice community in the opinion’s relative vulnerability. This alone deters criticism of the decision by those who politically support legal abortion. *Roe*, by contrast to *Brown*, *Miranda*, and even *Lawrence*, seems to be in perpetual and great danger of being overturned.<sup>21</sup> *Roe* is a perennial—permanent?—presidential campaign issue, and has been since it was decided. Its “hanging by a thread” status, furthermore, is perhaps the one sure thing that *will not be* changed by Barack Obama’s world-altering victory in 2008. President Obama may replace the retiring liberal Justices with younger liberal Justices, but that will still leave the opinion with only five-to-four support. A Republican presidential victory in 2012 might result in a fifth vote on the Court for overturning *Roe*. Even assuming Democratic administrations far into the future, however, it does not follow that a newly constituted Court dominated by Democratic Party nominees will be committed to *Roe*. The pro-life wing of

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17. 384 U.S. 436 (1966).

18. Seidman, *supra* note 15, at 745-47.

19. 539 U.S. 558 (2003).

20. See Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1655-67 (2004) (arguing that *Lawrence* might prove overprotective of coercive sexuality).

21. See, e.g., Dawn Johnsen, *Why the 2008 Election Matters for Reproductive Rights*, Balkinization, Sept. 24, 2008, <http://balkin.blogspot.com/2008/09/why-2008-election-matters-for.html>.

the Democratic Party will likely grow, not shrink, with Democratic dominance, as will the risk that a Justice appointed by a Democratic president will see his or her way to reverse *Roe*. There is, in short, no end in sight to the compulsive vote counting with respect to *Roe v. Wade*. We are seemingly today, just as we were on November 3, 2008, one judicial appointment away from the decision's reversal.

The second reason has to do with a belief in *Roe's* efficacy. The gains secured by *Roe* seem more tangible than the gains secured by *Brown* and *Lawrence*, so the potential cost of reckless critique seems higher. *Brown* ended de jure segregation of the schools – but not de facto segregation, and much less real racial subordination: schools as well as neighborhoods remain segregated and unequal in much of the country. *Lawrence* struck from the books criminal statutes that had not been directly enforced anyway, and left untouched the unequal treatment of gay and lesbian citizens on any number of fronts, from marriage to military service, employment, and tenancy rights. There is much to criticize, if one keeps the focus on the paltry consequences of these decisions, compared with what they promised. *Roe*, by contrast, was by no means an empty victory, much less a Trojan horse. Rather, *Roe* sent a clear material and rhetorical signal to women, girls, and the larger society: women's reproductive lives should be, and henceforth would be, governed by a regime of choice – whose choice is not so clear – and not by fate, nature, accident, biology, or men.

The gains of this one decision, in terms of the autonomy and broadened options for women and girls, were felt to be enormous. With the advent of birth control and safe and legal abortion, women can avoid life- and health-threatening pregnancies, can limit the number of children they will mother, and can plan the major sequence of their lives – pregnancies, education, marriage, job, and career – so as to increase hugely their chances of succeeding at all. Without that control, women's and girls' control of these life-changing events is severely compromised. Dangerous, injurious, or simply too many pregnancies in one's teens, twenties, thirties, and forties make completion of high school, college, professional school, graduate school, or vocational training for skilled crafts much harder even to imagine, much less to accomplish. The burdens of unwanted, dangerous, or just too many pregnancies are harder to measure but just as real in private and intimate life. Dangerous pregnancies shorten lives. Too many pregnancies make for difficult and unrewarding mothering. All of it leaves the woman feeling, justifiably, hostage to fate. If she cannot control her reproductivity, she cannot control her life. Without self-sovereignty over her body, all that remains of her life – her work, her sociability, her education, her mothering, and her impact on the world – is miniaturized. She lives a smaller life.

Lastly, there may be no pro-choice criticism of *Roe* because *Roe* got so much exactly right, and it is both understood and appreciated by the pro-choice community for doing so. Criticism, then, might just seem churlish. Thus, it may simply be true that women must have a right to legal abortion if women are to be equal citizens, and it may also be true that equal citizenship is what the Constitution requires. As the political philosopher Eileen McDonagh has argued at length, where abortion is criminal, women, but not men, are required to donate body parts for a substantial part of their adult lives and at substantial risk to their own health and life, to the cause of nurturing and preserving the life of another, and they are required to do this regardless of whether they consent to this appropriation.<sup>22</sup> Women's ownership of the use of their own bodies is therefore contingent, or conditional, in a way which men's is not: another human life (the fetus) has a primary right to their bodies, and they have no right to ward off what would be a criminal assault were it a *born* child making these demands. This contingent self-sovereignty is not conducive to equal citizenship. If equal citizenship is the goal of the Constitution's declarations of equality and liberty, then women seemingly must have a right to legal abortion in order to achieve it. And equal citizenship does seem to be what our Constitution contemplates, at least as we now understand it. Whatever the problems with *Roe*'s rhetoric or rationale, that conclusion seems both important and right.

None of this, however — *Roe*'s perceived vulnerability, its consequences, or the truth it partially expresses — justifies the relative dearth of critical inquiry by pro-choice scholars into the costs of either *Roe*'s genesis in the Court or its various stated rationales. First, with respect to both the decision's vulnerability and its efficacy, the goal of the pro-choice movement should be women's access to legal and safe abortion, not preservation of a right that may be increasingly hollow. Of course, there is a danger that *Roe* could be overturned (although perhaps smaller than the pro-choice community claims<sup>23</sup>), but there is also a danger with the road we are on: we preserve the right, while growing numbers of women across large swaths of the country lose access to the service. With *Roe* on the books, we are nevertheless witnessing a gradual diminution in the availability of abortion for poor, teenaged, and rural women, as state legislatures pass, and the Court upholds, first funding restrictions,<sup>24</sup> then

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22. EILEEN L. MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996).

23. See Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318 (2009).

24. *Harris v. McRae*, 448 U.S. 297 (1980).

parental notification requirements,<sup>25</sup> and then waiting periods.<sup>26</sup> The threat to legal, safe, affordable abortion is not so much that the Court may overturn *Roe*, but that abortion will become less and less available, because of the impact of legislative and political decisions made far from the Supreme Court's doors. Either way, the challenge to legal and safe abortion comes primarily from state politics and only secondarily from court action. Fixation on the Court and the narrowing constitutional right it has created as a way to secure legal abortion is just counterproductive.

More important, even if it is true that legal abortion is necessary to women's equal citizenship, it by no means follows that a judicially created individualized constitutional right, rather than political persuasion, is the best way to achieve it, for two reasons. First, it bears emphasizing that what the Court created in *Roe v. Wade* is *not* a right to legal abortion; it is a negative right against the criminalization of abortion in some circumstances. That no more creates a genuine right to a legal abortion than *Brown* created a right to an integrated school. To be a meaningful support for women's equality or liberty, a right to legal abortion must mean much more than a right to be free of moralistic legislation that interferes with a contractual right to purchase one. It must guarantee access to one. And, for a right to legal abortion to guarantee that a woman who needs an abortion will have access to one, whether or not she can pay for it, the state must be required to provide considerable support. But the Court has consistently read the Constitution as not including positive rights to much of anything from the state,<sup>27</sup> and certainly not to abortion procedures.<sup>28</sup> It is so unlikely as to be a certainty that neither this Court nor likely any Court will commence a jurisprudence of positive constitutional rights, by beginning in the contested terrain of mandating public funds for abortions. By comparison, the state legislative arena is not so constrained: it is very much the business of state legislatures to create legislative programs to meet the positive needs of citizens. Whatever obstacles there might be to a legislative initiative to publicly fund abortions, a refusal to see "positive rights" in the Constitution is not among them.

But second, and aside from the growing doctrine that cuts against funding, even a purely negative right, assuming it exists, might be better secured

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25. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (joint opinion of O'Connor, Kennedy, Souter, JJ.).

26. *Id.* at 886-87.

27. *See, e.g., DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (stating in dicta that there is no right to government aid); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-39 (1973) (holding that there is no right to a public education).

28. *Harris*, 448 U.S. at 316-18.

through what is now sometimes called political,<sup>29</sup> popular,<sup>30</sup> or legislative constitutionalism,<sup>31</sup> rather than through the adjudicated Constitution as interpreted by courts. That is, a right to abortion might be better understood to be a part of our constitutional self-understanding that is achieved through political and legislative victories, rather than adjudicative pronouncement. It would not be the first time a right would be better secured politically rather than judicially—think of the “right” to social security, or the “right” to be free of a military draft, or for that matter women’s right to equality itself. No Supreme Court decision ever secured any of these in constitutional doctrine, yet they seem at least as secure against political change as the various unenumerated rights the Court has discovered or created. A woman’s right to legal abortion likewise might be better inferred from contemporary understandings of equality and citizenship than from any constitutional language or configuration of past cases that a court is likely to recognize as authoritative. This is, at least, a possibility we ought to consider. The academic-feminist attachment not only to *Roe*, but to its origination in the courts, and our resistance to even the suggestion that we have become overly reliant upon courts, precludes our ability to do so.

Neither the vulnerability nor efficacy of *Roe*, nor the partial truth it expresses, is a good reason *not* to engage in critique. There are also, however, costs to the reticence. The lack of such a critique, I will argue, has dulled us to the degree to which the rhetoric of adjudicated abortion rights might have weakened reproductive justice more broadly conceived. But it is also worth noting that even if feminism’s or progressivism’s or the Democratic Party’s sole goal were to strengthen this embattled right, there is a strong pragmatic case for pro-choice feminist critiques of the way that right is now constructed: by its steadfast loyalty to *Roe* the pro-choice community is in danger of losing this war by fighting—even if winning—yesterday’s battle. Pro-life movement

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29. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154 (1999) (arguing broadly against judicial exclusivity and supremacy in constitutional interpretation).
  30. NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 235-39 (2004) (arguing for the Court to play a dialogic, rather than exclusive or final role in the interpretation of the Constitution); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 247-48 (2004) (arguing for popular engagement in the search for constitutional meaning); cf. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1043 (2004) (affirming that constitutional law can endanger political participation and self-governance).
  31. See generally Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in *THE CONSTITUTION IN 2020*, at 79 (Jack M. Balkin & Reva B. Siegel eds., 2009) (arguing for a larger legislative role in determining constitutional meaning).

activists increasingly look to reduce abortions not by reversing *Roe* and criminalizing abortion, but rather through a three-pronged strategy, no part of which is dependent upon *Roe*'s reversal: first, by passing restrictions the Court will uphold even with *Roe* on the books;<sup>32</sup> second, by reducing abortion supply and demand by intimidating clinics and clinicians and shaming the women who use them;<sup>33</sup> and third, by reducing the long-range cost of pregnancy by urging more political and communitarian support for motherhood, particularly for poor women.<sup>34</sup> For pro-life constituencies, the grounds of contestation of legal abortion have shifted to the local, political, and moral, and away from the constitutional-adjudicative. The pro-choice community's fixation on the apparently never-ending project of finding adequate grounds for adjudicated abortion rights blinds it to this development.

The pro-choice community, for purely pragmatic reasons, might be well advised to take up a challenge made a few years ago by Janet Halley and Wendy Brown in a different context<sup>35</sup>—to wit, that we subject liberal constitutional victories to criticism in an unfettered way, as though we were not in fear of the wolf at the door. It is past time to apply this simple enough prescription to abortion rights. Not only is critique valuable for its own sake, but here, we thereby might push the wolf further back. The *Roe* to *Casey* line of decisions stands in need of progressive, feminist, and pro-choice critique and transformation. The first without the second may well be irresponsibly reckless, but the second without the first is impossible. And both are necessary.

## II. CRITIQUE

There are at least three major costs of the right created in *Roe* that seem to be underappreciated by the pro-choice community. All three are suggested by the 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, which were pioneered by the critical legal scholarship of the 1970s and 1980s. They are as follows: (1) choice-based arguments for abortion rights legitimate considerable injustice, both in women's reproductive lives and elsewhere; (2) the Court's active role in creating this jurisprudence exacerbates

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32. See Siegel, *supra* note 4, at 1704.

33. Johnsen, *supra* note 21.

34. See Jacqueline L. Salmon, *Some Abortion Foes Shifting Focus from Ban to Reduction*, WASH. POST, Nov. 18, 2008, at A1.

35. Wendy Brown & Janet Halley, *Introduction to LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 9, at 1, 25-33.

antidemocratic features of U.S. constitutionalism, to women's detriment; and (3) the arguments do not do justice to the aspirational goals of the women's movement's early arguments for reproductive rights.

A. *Legitimation*

"Legitimation" has come to mean many things in critical legal scholarship, but two particular meanings are of relevance to the right to abortion; the first concerns the legitimating consequences of legal change, and the second concerns the legitimating consequences of individual choice. In the case of the right to abortion, of course, these are deeply intertwined: the legal change effected by this right is an expansion of individual choice. It is nevertheless helpful to treat them separately.

By the first meaning, apparent gains in justice wrought through legal change are sometimes offset by what might be called the "legitimation costs" of the same legal breakthrough. The idea here is that a concededly just legal change will sometimes legitimate a deeper or broader injustice with the legal institution so improved, thus further insulating the underlying or broader legal institution from critique. This ought to be understood, then, as a cost of the reform—one that, in some circumstances, might be quite high. For example, although *Brown* ended de jure racial segregation of the public schools, it might have thereby legitimated an entire host of evils, including de facto segregation, unequally funded urban schools, private sphere rather than state-sponsored subordination of African Americans, and the purportedly meritocratic classifications and hierarchies of market economies themselves. All of these are left not just untouched by *Brown*, but legitimated by it. The decision's equation of injustice with state-sponsored racism carries the implicit suggestion that so long as those segregated or underfunded schools, or market-generated hierarchies of class and race privilege, are not polluted by the pernicious impact of state-sponsored racial classifications, then they are not only constitutional, but also morally and politically untroubling.<sup>36</sup> The legitimation cost of *Brown* is the possibly increased insularity against criticism and political reform of these greater injustices. The critics' claim is not that the goal of the legal breakthrough—ending de jure segregation—is undesirable. Rather, the worry is that the goal comes at the cost of legitimating deeper racial injustices. At some point, the critics worry, these legitimation costs might outweigh the benefit of the breakthrough itself.

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36. See sources cited *supra* notes 11-14.

The second meaning of “legitimation,” developed in critical scholarship of the late twentieth century, concerns the nature and role of consent and the specific impact of an individual’s consent to the perceived justice of either particular transactions or entire institutions to which consent is given. In liberal market economies and the legal orders that govern them, the act of consent generally insulates the object of consent even from criticism, much less legal challenge. Consent to the terms of a contract, for example, almost always insulates the fairness of the terms of that contract from both public scrutiny and legal attack, regardless of how harmful or injurious that contract turns out to be to any of the parties that consented to it. If the contract was consensual, it cannot possibly be unfair to execute it against a later regretful party, no matter how harmful its terms might appear to be. Widely shared norms against paternalistic legislation,<sup>37</sup> an ideological and seemingly bottomless belief in the ability of individuals to understand and act on their own welfare,<sup>38</sup> skepticism regarding the motivation of regulatory bodies or meddling individuals who would seek to upset consensual individual transactions, and at least for some, a definitional commitment to consent as that which maximizes value,<sup>39</sup> all burden attempts to intervene in or even question contract terms. They may do so through “unconscionability” or “duress” limits in the common law of contract, or through more explicitly regulatory means, such as consumer protection legislation or workers’ rights laws. I have argued elsewhere that the same dynamic increasingly limits critique of intimate sexual relations: consensual sex is viewed not only as not rape, but also as not subjected appropriately to moral or political criticism. To subject consensual sex to criticism is puritanical, moralistic, or worse.<sup>40</sup> Lastly, in the public sphere, “consent” operates similarly: the consent of the governed legitimates whatever governance follows. We can generalize from these three examples of the impact of consent in the private, intimate, and public spheres: consent cleans or

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37. The surrogacy debates of the late eighties and early nineties present a stark example of the application of this principle in policy debates. See, e.g., Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL’Y 21 (1989).
38. See, e.g., Epstein, *supra* note 37, at 2313 (arguing for a presumption favoring the validity of market exchanges because individuals know their own interests best).
39. See, e.g., Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488-89 (1980) (arguing that consensual trades increase value by definition).
40. Robin West, *The Harms of Consensual Sex*, in *THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS* 317 (Alan Soble & Nicholas Power eds., 5th ed. 2008) (arguing that according to prevailing cultural and liberal norms, consensual sex is morally unproblematic).

purifies that to which the consent is given, and thereby insulates it from political critique as well as legal challenge. Questioning the value of that to which consent has been given is politically suspect—because it is unjustifiably paternalist, logically incoherent, or both.

Perhaps the hallmark of late twentieth-century critical legal studies (CLS) writing was the claim that this widely made inference from consent to value is simply unwarranted.<sup>41</sup> People's abilities to ascertain and act on their own self-interest are limited, the critical scholars argued. The capacity of countries, institutions, multinational corporations, social forces, or simply stronger parties to create in individual subjects a willingness to consent to transactions or changes that do not in fact increase their well being is well documented.<sup>42</sup> "Consent" of the weaker can be manufactured to serve the interests of dominant parties, and when it is manufactured, it is not a good measure of the value to the weak of that to which consent was given. Neither skepticism regarding the good motives or knowledge base of the "paternalist," nor faith in the self-regarding preferences of the individual, justify the unexamined inference that a consensual change so extracted is a good one for all affected parties. The degree to which a consensual change is perceived as such is the degree to which it has been unduly legitimated by the consent that preceded it. The legitimation cost of consensual transactions, then, is the sometimes unwarranted belief in the increased value of the change to which consent was proffered.

Are these worries about the legitimating effects of either legal change on the one hand, or individual consent on the other, relevant to *Roe v. Wade*? Does the decision in *Roe*, even assuming the value of the right it created, carry legitimation costs? Placing the question in a historical context, one might recall that Catharine MacKinnon's early critiques of *Roe v. Wade* pointed to two important legitimating effects of that decision—one quite specific and the other more general. First, she argued, constitutionalizing a right to terminate a

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41. See generally Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769 (exploring examples of choices that do not increase utility); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (defending paternalism in contract law on the grounds that consensual transactions do not necessarily increase utility); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) (critiquing the conflation of utility and consensuality).

42. See Kelman, *supra* note 41; West, *supra* note 41; see also Peter Gabel & Jay M. Feinman, *Contract Law as Ideology*, in *POLITICS OF LAW*, *supra* note 16, at 172, 183 (arguing that contract law today conceals the reality that "capitalism is a coercive system of relationships" in which "our functional roles produce isolation, passivity, unconnectedness, and impotence").

pregnancy broadly legitimates the sex that produced the pregnancy—sex that might well have been less than fully consensual by both parties. It shifts the focus away from addressing the social and sexual imbalances that result in unwanted pregnancies to the unwanted pregnancy itself, and strongly suggests that the appropriate social and individual response to unwanted sex is to protect the decision to end the pregnancy. This has the effect of minimizing the social costs of sexual inequality for the strong and the weak both, rather than ending the sexual inequality itself. *Roe*, then, legitimates both unwanted sex and the hierarchies of power that generate it.<sup>43</sup> Second, MacKinnon argued, the privacy rationale of *Roe v. Wade* might have the pernicious effect of further insulating the already overly privatized world of intimate relations from either moral critique or political struggle. Men subordinate women, to a large degree, in private: in homes, in bedrooms, in hotel rooms, through pornography, prostitution, marriage, and sex. Extolling the privacy of these relations, and casting a constitutional wall of protection around them for the express purpose of warding off legal intervention or regulation, thus both insulates and valorizes—and hence legitimates—the subordination that occurs within them.<sup>44</sup>

These arguments, I think, were never answered satisfactorily by feminist supporters of *Roe v. Wade*. Completely unaddressed, however, was whether MacKinnon's critique went far enough. The question should have been not only whether MacKinnon was right to complain that *Roe v. Wade* might have the undesirable effect of legitimating, by privatizing, sexual violence, but also whether there are other legitimating costs of this decision, in addition to, and not reducible to, the problem of male sexual coercion.

I think there are such costs. The danger I want to highlight is that the individual right to terminate a pregnancy created by *Roe v. Wade* might have the effect not only of legitimating the coercive sex that might have led to it, but also of legitimating the profoundly inadequate social welfare net and hence the excessive economic burdens placed on poor women and men who decide to parent. As *Roe* and the choice it heralds to opt out of parenting become part of the architecture of our moral and legal lives, we increasingly come to think of the decision to parent, no less than the decision not to parent, as a chosen consumer good or lifestyle—albeit a very expensive one. As this shift in consciousness occurs, it may come to seem, at least for many, that the only role for a caring or just society, here as elsewhere, is to ensure that that consumer

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43. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 94-95 (1988).

44. *Id.* at 96-102.

choice to parent or not parent is well informed. Making sure that choices are well informed, after all, exhausts the role of the state in regulating consensual affairs, particularly market-based ones, in a culture that valorizes consensual market transactions.

Consumers of the choice to parent or not to parent, from this “informed consent” model of the role of the just state, should know a few things. They should know that high-quality childcare can only be obtained at a very high cost. They should know that caring for a newborn, nurturing a toddler, and then raising a child, will interfere mightily with the parent’s wage-earning potential in a working world that still valorizes the unattached laborer with no commitments to any earthly soul other than his employer.<sup>45</sup> They should know that the quality of public education is spotty—in communities where housing is affordable, the public education is abysmal, and vice versa—and that a purchased private education at elite private schools costs far more than most Americans’ paychecks. They should know that publicly funded preventative (as opposed to emergency) healthcare for one’s dependents is almost nonexistent. They should know that once the decision is made to become a parent, there is “no exit,” or turning back.<sup>46</sup> Parenting is not the sort of at-will employment from which an employee can simply walk away if the terms are not favorable; there are moral, emotional, and legal restraints on one’s ability to do so. They should know all of this. All of this increases hugely the price of parenting.

If parenting is a *choice*, however—if it is a status entered freely, as might be a very long and very binding long-term contract—its expense is not a source of injustice or even a cause for worry, so long as the choice is made knowingly. Parenting is indeed expensive. But so are private jets and graduate degrees. If the potential parent—like the potential buyer contemplating whether to buy an airplane paid for in installments and that will require a lot of upkeep—is armed with enough information about her choices, then there is no further need for intervention into the various private markets for the support services—education, healthcare, childcare—from which she might choose when it comes time to employ those services. We now have a “choice” to end a pregnancy—when we parent, no less than when we do not, we have made our choice. And, since *Roe*, many of us *do* now view parenting in this way, and we so view it not

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45. See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000) (exploring conflicts between work and family); Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 WOMEN’S RTS. L. REP. 3, 3-4 (2006) (exploring the cost of mothering).

46. See ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2004) (arguing that parents have no exit from parental work and obligations, and for greater public support of parenting).

just incidentally, but as a part of our fundamental, American, constitutional identity. As Americans, when we choose to parent, we should be well informed; we should make the choice knowing the price. At least here in America, that is no reason to publicly *subsidize* the choice. There is no further reason to help a poor mother pay for it than there is to help a would-be recreational sailor buy a boat that will allow him to sail around the world, or to help the aspiring scholar with the expense of yet another graduate degree. It is one lifestyle choice among several that happens to come with a hefty price tag.

Thus, constitutionalizing this particular right to choose simultaneously legitimates—in both of the senses noted above—the lack of public support given parents in fulfilling their caregiving obligations. By giving pregnant women the choice to opt *out* of parenting by purchasing an abortion, we render parenting a market commodity, and thereby systematically legitimate the various baselines to which she agrees when she opts *in*: an almost entirely privatized system of childcare, a mixed private and public but prohibitively expensive healthcare system, and a publicly provided education system that delivers a product, the quality of which is spotty at best and disastrously inadequate at worst. Narrowly, by giving her the choice, her consent legitimates the parental burden to which *she* has consented. A woman who is poor and chooses to parent will exacerbate her poverty by so choosing, particularly if she “chooses” to parent without a partner. If she “chooses” to parent a special needs child, she will have little assistance for the extraordinary educational, health, and care needs of her child. If she chooses to parent without a partner while she herself lives in poverty, she likewise has so chosen. The choice-based arguments for abortion rights strengthen the impulse to simply leave her with the consequences of her bargain. She has chosen this route, so it is hers to travel alone. To presume otherwise would be paternalistic. The woman’s “choice” mutes any attempt to make her claims for assistance cognizable.

More generally, the choice rhetoric of *Roe* undercuts the arguments for the development of what I have elsewhere called “caregiver rights”—the rights of caregivers, women and men both, to a level of public assistance for their caregiving work.<sup>47</sup> This has consequences for everyone who spends substantial parts of their adult lives caring for the needs of dependents, whether small children or the elderly, and who incurs substantial costs by virtue of so doing. Pregnant women, parents of small children, and the grown children of elderly parents, by virtue of their caregiving obligations, are not capable of the sort of

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47. Robin West, *The Right To Care*, in *THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY* 88 (Eva Feder Kittay & Ellen K. Feder eds., 2002).

independence that is so highly valued in a culture that prizes rugged individualism above all else. Caregivers are less independent, and therefore less autonomous, than those with no such obligations. Someone tied to the needs of others is that much less free to live the wealth-maximizing, self-regarding, autonomous life presupposed by, and valorized by, a free-market economy in the first place. The right to an abortion gives women a right not to be a caregiver, but at the cost of rhetorically making the difficulties of caregiving all the harder to publicly share, should she opt for it. For privileged women, this is not such a terrible trade off: an economically secure woman gets a right to terminate a pregnancy, and can more or less put up with the bolstered legitimacy of an overly privatized system of health and child care. She can exit the paid labor market for a few years to raise her child, or she can split those obligations with a supportive spouse or partner and continue to work part-time, or she can delegate to others the caregiving work for substantially less than she herself earns so that she need not interrupt her own wage labor. She can, through one of these routes, simply absorb the expense of these choices. The woman only marginally capable of supporting even herself, however, faces a choice between parenting and severe impoverishment, on the one hand, and forgoing children on the other. Are we truly comfortable, morally, with a world that we have created, in which only rich people can parent satisfactorily? Is it a just world, in which poor people are told that perhaps they really should not have children, particularly if they cannot find someone to marry first? The sheer cruelty of this is what the legitimating rhetoric of choice, and of individual rights to privacy, liberty, and dignity, all mask.

### B. Democracy

In the last thirty years, a growing body of scholarship from critical legal scholars and progressive political theorists has decried the political Left's heavy reliance on courts, rights, and constitutional law as vehicles for progressive victories, which might better have been secured through ordinary politics.<sup>48</sup> Several themes have emerged from this literature, some of it going back to

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48. See KRAMER, *supra* note 30, at 227-41; TUSHNET, *supra* note 29, at 154-63; Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 9 (2001); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006); Robin West, *Ennobling Politics*, in *EMPIRE OF FORCE* (H. Jefferson Powell & James Boyd White eds., forthcoming 2009).

early critiques of rights penned by the CLS movement,<sup>49</sup> some of it more contemporary and based in understandings of the workings of institutions.<sup>50</sup> Three themes in particular recur in this literature, which, I believe, are of relevance to *Roe*. I will quickly review these concerns, spell out the ways in which *Roe* is exemplary of them, and then suggest in a bit more detail a fourth.

The first concerns the logic of countermajoritarian, constitutional rights. Echoing Marxist critiques, critical scholars have argued for well over a quarter century that while constitutional rights in this country have indeed served the interests of minorities, as their celebrants claim, it has primarily been the interests, privileges, and entitlements of not particularly embattled property owners either to retain their wealth or to buy and sell assets on open markets for profit, against the wishes of those who would challenge them. What they have protected all that privilege against, primarily, is the majoritarian, democratically expressed wish of the less well off—peons, workers, renters, mobs, the poor, or the masses—for a bit of state-sponsored, democratically inspired, redistribution of wealth. With the advent of progressive rights-based movements in the nineteenth and twentieth centuries, this historical alignment of rights and privilege became mixed. Thus, whatever their propertied pedigree, rights have furthered the causes of abolition, suffrage, labor, and eventually racial justice and reproductive freedom. Nevertheless, purely as a matter of rhetoric and logic, rights are the coin of the realm of the relatively entitled, so to speak, and will likely always remain so. Regardless of content, then, rights and rights rhetoric (or “rights talk,” as it used to be called) tend to protect preexisting property entitlements to that which is owned, and contract entitlements to that which can be privately traded, even if just indirectly, by discrediting precisely the democratic, popular, majoritarian, and political deliberation and reform it would take to upend them. Rights generally protect entitlements against political encroachment rather than satisfy even dire need. Any progressive gains achieved by rights must therefore be understood as risking some degree of entrenchment of current distributions of power that favor a wealthy minority against majoritarian redistribution, simply because of the use of rights discourse.

Second, critical scholars argued forcefully that court-generated rights discourse in this country has tended to reinforce pernicious distinctions between the private and the public realms of social life, largely because of its cribbed insistence that injustice almost by definition emanates only from states

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49. See, e.g., Tushnet, *supra* note 8, at 1363-64 (developing four critiques of rights stemming from early CLS critiques: an instability critique, an indeterminacy critique, a false consciousness critique, and a legitimization critique).

50. See KRAMER, *supra* note 30, at 251-52; Waldron, *supra* note 48, at 1386-90.

and from state action rather than from private actors of any sort. What judicially discovered rights mostly give us is a way to ward off overly intrusive or irrational state involvement in our private lives.<sup>51</sup> There are two problems with this. The first has been much belabored: court-generated rights perversely protect rather than stand as a challenge to forms of oppression that are distinctively private, such as unfair employment or contract regimes, patriarchal privilege, or private sphere racism, all of which are accomplished by private actors in some “private” realm.<sup>52</sup> But second, and less noted, the valorization of the “private” realm comes at the expense of degradation of the “public.” Consequently, the public/private distinction at the heart of rights discourse feeds a distrust of the machinations of public deliberation – including processes of government, of democracy, and collective action – the use of which is essential to any sort of genuinely progressive political movement against private injustice.<sup>53</sup> For this reason as well, particularly in the economic sphere, the result is an undue, and perhaps unwitting, regressive conservatism.

The third cost of court-created rights identified by rights critics stems from concerns about the methods of reasoning courts employ. Progressive victories secured through adjudication rather than politics must be or at least aim to be consistent with past practice – they must mesh more or less seamlessly with preexisting precedent, policies, decisions, institutional arrangements, and forms. This makes the progressive victory achieved through the courts – including rights-based victories – relatively conservative, compared to what might be achieved politically: the restraint of integrity with the past makes it not even theoretically possible that the victory will be a truly radical one. At the same time, the apparent gain in permanence, depth, certainty, or profundity that seemingly comes from the adjudicative victory being secured through law – the perception that the “right” so discovered is something that has always been deeply embedded in a system of law that has its own roots in antiquity, and is therefore truly there and secured against precipitous change – is an illusion. Rights found by courts can also be abandoned by courts. The right is hostage to the whims of the people on the Supreme Court rather than a working majority of a Senate. It is nevertheless just as much hostage to

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51. See Kennedy, *supra* note 9, at 181-82; Tushnet, *supra* note 8, at 1382.

52. See, e.g., Horwitz, *supra* note 9, at 399-404; Tushnet, *supra* note 8, at 1392-93.

53. See Horwitz, *supra* note 9, at 402-03 (arguing that a “troubling aspect of natural rights discourse is its tendency to posit a sharp distinction between a public realm of coercion and a ‘natural,’ private realm of freedom”).

whimsy. It is a product of power, no less than any traffic ordinance passed by a city council, and just as subject to recall.<sup>54</sup>

These progressive critiques of judicially created rights, pressed in different ways by critical scholars over the past thirty years, all suggest limits to the progressive potential of *Roe v. Wade*. Let me take them in the order outlined above. First, the critics complained that constitutional rights, in spite of their occasional progressive potential, have tended to protect individuals' commodificationist rights to contract and property rather than to serve people's needs, and would likely continue to do so. The right created by *Roe* is no exception. *Roe's* holding, whether couched in terms of liberty or privacy, did indeed quickly devolve into a bare negative contract right to buy a particular medical service—an abortion—free of moralistic intrusion by state legislators who would paternalistically intervene into that—or any other—consensual purchase. The right became a stick in a bundle of negative rights to our bodies and labor, that we wield in order to keep the state out of our sex lives: we have a right to birth control, a right to same-sex sex, limited rights to produce and consume pornography, and a right to engage in the commercial and medical consultation necessary to secure an abortion to end the pregnancies in which all that protected sex sometimes result.<sup>55</sup> It has furthered the cause of unfettered sexuality in open markets, for purchase and otherwise, by giving us a property right in the pregnancy and a contract right to purchase the means to end it. It has done nothing, however, to further the satisfaction of the positive needs—whether understood as rights or not—of either pregnant women or parents. By relentlessly celebrating negative rights as the route to women's liberty and equality, and thereby impliedly castigating politically secured legislation as the evil against which negative rights—and hence, liberty and equality both—are constructed, it has undermined the case for the very sorts of positive legislative schemes that might do so.

Second, and as the rights critiques of the “public-private” distinction presaged, the libertarian rhetoric of the opinion has indeed focused attention on pernicious state intermeddling in women's lives, rather than either the private sphere appropriation of women's sexuality caused by male sexual aggression, or the appropriation of women's reproductive and parenting labor

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54. See MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 46-57 (1988); Kennedy, *supra* note 9, at 202-06 (arguing that the Supreme Court's reversals on rights demonstrate the manipulability of rights arguments); Tushnet, *supra* note 8, at 1373-75 (arguing that courts can always reverse rights rulings by reinterpreting the background contexts).
55. See Thomas C. Grey, *Eros, Civilization and the Burger Court*, *LAW & CONTEMP. PROBS.*, Summer 1980, at 83 (making this prediction).

in that sphere, as the primary limit on women's equality and liberty. Catharine MacKinnon warned in her early critiques of *Roe* that the pro-choice community ran the risk that it would further obfuscate both the fact and nature of private sphere sexual subordination by aggressively shrouding that sphere, and the subordination that occurs within it, in a constitutionally protected veil of laudatory privacy.<sup>56</sup> The right to abortion, she argued, might further privatize the private by constitutionalizing it, and by so doing thicken the veil of privilege around intimate life, and therefore around the sexual subordinations that occur within it. Events have not proven her wrong to have so worried. The same is true, although she did not so argue, with respect to women's labor, no less than women's sexuality, and with respect to the economic sphere, no less than the sexual. Parenting is economic activity, as well as the consequence of sexual acts that may have been coerced. By insulating the private economic realm of parental choice against public critique and intervention, the economic deprivations occasioned by overly privatized parenting are further shielded against public intervention. The effect is not only the valorization of the "private" activities of sex and parenting, but also the denigration of the public sphere of politics. The public assistance that would be required to alleviate costs borne in private is cast as unwarranted intrusion into an exalted sphere of private economic life, rather than warranted assistance with an almost impossibly privatized burden.

And third, and just as a critical sensibility should have predicted, the right has indeed proven to be both relatively regressive and seemingly unstable. This right's genesis in "law" rather than "politics" has not yielded the permanence or security or respect that law promises. *Roe*, conceived as a "right" so as to withstand the whims of hostile political opinion that would upset it, still seemingly hangs by a legal thread. The Court can broaden it, narrow it, uphold it, or overrule it. Meanwhile, and ironically, the activity it primarily protects—legal and safe abortion in the first trimester of an unwanted pregnancy—enjoys strong majoritarian political support. Rendering legal abortion a constitutional right, rather than an ordinary political one, may not have made it any more secure than it otherwise would have been. We have seemingly gained the regressive features of constitutionalizing this right, without enjoying the gain of security or stability that constitutionalism promises.

There is, though, an additional and less appreciated cost to democracy of conceptualizing legal abortion as a judicially created right that the rights critics never touched on, but is worth addressing more expansively. This cost too has particular poignancy in the domain of abortion rights. When the Court claims

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56. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 184-94 (1989).

privileged and even monopolistic access to the language of moral principle, reasoned discourse, and civil dialogue, it suggests a lesser, distasteful view of the politics it thereby limits. Representative politics is routinely construed by liberal devotees of court-generated rights as the realm of bald power: whimsical, arbitrary, emotive, unprincipled, rent seeking, horse trading, reflective of the “interests” of a basically infantile constituency that does nothing but form arbitrary preferences for unprincipled—unthoughtful—reasons.<sup>57</sup> The public whose interests and preferences are so reflected in politics, in Congress, and in the legislative branches of state governments is portrayed as prone to hysteria, as a body that acts on whims and winds of political sentiment, and as given to unpredictable moments of mob mentality. Politics, as construed by the Court and its liberal devotees, is anything but the highest art of which the species is capable, and anything but deliberative. The Court, by contrast, expresses *law*—and when it does so, it speaks in the language of principle, reason, rationality, integrity, consistency with the past, and dispassionate concern for the future. It speaks with intelligence and wisdom both; it assimilates knowledge from history and judiciously weighs—rather than reacts to—the desires of the interested parties of the present. It takes the long view. It is attentive to enduring principles. It deliberates; it does not react. It engages in civil discourse. The Court, not the Congress, is the institution that permits rational and respectful dissent. It is the Court that keeps the civil conversation going in this country. Therefore, *law*, expressed through courts, is our highest and best form of *politics*. Meanwhile, our *actual*

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57. For some of the public choice literature that so argues, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 28 (1957) (“[Politicians] act solely in order to attain the income, prestige, and power which come from being in office.”); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371-74 (1983) (describing political action as competition among interest groups); and Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 214 (1976) (theorizing regulators as driven by interest in attaining votes and dollars). *But see* Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 202 (1988) (arguing that public choice theory views the democratic arena as an “arena of theft” marked by “stagnation, wasteful rent-seeking, and negative sum games”). Liberal constitutionalists also describe the representative political branches as less principled than the judicial, although not so baldly. *See* Ronald Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247, 270 (Marshall Cohen ed., 1983) (distinguishing, in a reply to Professor Donald Regan, legal from legislative rights, on the grounds that the former but not the latter must be consistent with principles provided by the best justification of the past). Frank Michelman famously described the Court, rather than Congress, as the political institution that best fits the civic ideals of equal participation in a democracy. Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1496-99 (1988); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 74-77 (1986).

politics—what happens in Washington or Annapolis or Sacramento or downtown Wasilla—is everything this adjudicative conception of our highest politics is not. It is low life.

*Roe v. Wade* and its progeny are not, of course, responsible for the degradation of politics that has become the natural counterpart of the institution of judicial review, its high-minded justifications, and the reverence we now accord it. It does, though, exemplify it. When the Court speaks of the hallowed right to privacy in which it locates abortion, it speaks of the sanctity of marriage and family,<sup>58</sup> of individual liberty,<sup>59</sup> of equality or dignity,<sup>60</sup> of respect, and of the great and deepest mysteries of life.<sup>61</sup> It speaks of the constituents of individual identity, and of what is most important to a well-led life,<sup>62</sup> of the grand promises of the Fourteenth Amendment,<sup>63</sup> of the importance of precedent to political and social order,<sup>64</sup> of the needs of all of us to be free of a “jurisprudence of doubt,”<sup>65</sup> and of the importance of consistency, integrity, and moral principle in decisionmaking and in our law. The contrast between what the Court and commentators say when speaking of this right, and what abortion rights advocates say in the public sphere when defending or addressing the need for legal abortion, could not be starker. When advocates speak of abortion in the public sphere and outside the courts, they do not talk, for the most part, about a “jurisprudence of doubt” or the importance of precedent or of principled judicial decisionmaking, of liberty, dignity, or even equality. Rather, they most often speak of women’s bodies. They speak of the dangers to women’s health that are posed by many pregnancies. They speak of the lives that have been lost to illegal abortion. They talk a lot about

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58. See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (holding that the right to privacy extends to “activities relating to marriage,” “procreation,” and “family relationships”); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) (“[T]he rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.”).
59. *Roe*, 410 U.S. at 153 (arguing that the right to privacy is founded on personal liberty).
60. *Gonzales v. Carhart*, 550 U.S. 124, 157–60 (2007) (Kennedy, J.) (discussing the state interest in respecting the dignity of human life, while upholding the Partial-Birth Abortion Ban Act).
61. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (defining the heart of the liberty protected by due process as the “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”).
62. See *id.* at 851 (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).
63. *Id.* at 846–50.
64. *Id.* at 854–69.
65. *Id.* at 844.

hemorrhaging, and of women and girls bleeding to death in botched back-alley abortions. They speak of fear and terror. They speak of lives shortened, or narrowed, or rendered mean and uncompromising by dangerous pregnancies, or too many unplanned pregnancies, or too many children, or too much mothering. They speak of shattered dreams, or girls with low or no expectations for their own futures. They often speak of abusive stepfamily members, of domestic violence, and child rape. They speak of intentional, deeply wanted pregnancies gone wrong: they talk about diseased fetuses, miscarriages, and tragic choices. They talk about stillbirths and life-threatening complications. They speak of the earthy, present, demanding, felt, fought-over need of women to control their bodies and fate.<sup>66</sup>

The contrast on the other side of this debate, between the rhetoric of the Court and commentators on the one hand, and activists on the other, is if anything even more stark, although it is beginning to narrow somewhat, at least if *Gonzales v. Carhart* is any guide.<sup>67</sup> In the public square, pro-life advocates speak, argue, petition, canvas, and beseech us to attend to the biological lives of unborn babies. They wield pictures of fetal life and body parts. They deploy sonograms and give voice to silent screams. They push their listeners to identify with the unborn, to open their sympathies and their hearts to the least of these, to pull fetal life into the human community, to recognize us in them and them in us. Conservative legal critics of *Roe v. Wade*, on the other hand, speak rarely if at all of any of this.<sup>68</sup> Rather, they speak of originalism,<sup>69</sup> of constitutional integrity,<sup>70</sup> of the close readings of texts, of plain meaning, and of the lack of the word “privacy” in the text of the

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66. In *Webster v. Reproductive Health Services*, the National Abortion Rights Action League (NARAL) made the strategic decision to file as amici what came to be known as the “Voices Brief” in that and subsequent Supreme Court abortion cases. Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1115239. The Voices Brief allowed women to speak to the issue of legal abortion in their own voices, and on the basis of their real concerns, rather than through the distorting lens of legal doctrine. For a general discussion, see LAURA R. WOLIVER, *THE POLITICAL GEOGRAPHIES OF PREGNANCY* 88-92 (2002), which discusses the Voices Brief and NARAL’s “Silent No More” campaign. Both intended to present women’s stories of illegal abortions to the public.
67. 550 U.S. 124, 150-54 (2007) (describing partial-birth abortion, in graphic and morally charged detail).
68. There are of course exceptions. See, e.g., Paulsen, *supra* note 5, at 212 (comparing legal abortion with the Holocaust).
69. See BORK, *supra* note 6, at 143-60 (arguing for originalism).
70. See Ely, *supra* note 6, at 946-49 (arguing against the legality, as well as the correctness, of *Roe v. Wade*).

Constitution.<sup>71</sup> They worry over the integrity, identity, and future of the Constitution. There is little talk, either on the Court or in the pages of scholarly commentary that is hostile to *Roe*, about fetal life, silent screams, or unborn babies, and even less about the struggles facing women with unwanted or dangerous pregnancies. The discussion is principled, constitutional, and historical. It does not stem from a visceral identification with or sympathy for the plight of murdered babies.

This momentous gulf in the substance of pro-choice and pro-life arguments on the street, versus pro-choice and pro-life arguments on the Court, is understandable: the issue facing the Court, after all, is *not* the morality of abortion, but the power of the states to criminalize it. The contrasting substance of the arguments, however, is in turn reflected in contrasting styles and modes of discourse—and it is that contrast that I wish to problematize. The clerks and Justices of the Court craft arguments for and against legal abortion from the principles, precedent, and constitutional phrases found in the pages of past case law. They then make analogies from those principles and precedents. They reason closely or loosely from original texts—either of the Constitution or of the cases that interpret it. Public advocates of free and legal abortion as well as public advocates for criminalization of abortion speak in a different modulation entirely. They protest, march, yell, organize, canvas, petition, and carry posters depicting coat hangers and fetuses, dead women, and body parts. They make demands rather than arguments: that states either protect the least of us, or stay off our backs. And on both sides, the demands are visceral.

These contrasting modes of discourse around abortion—reasoned, from the bench, and impassioned, on the street—have fueled the perception that the Court, rather than the public square, is the necessary and proper place to decide the legality or criminalization of abortion. The Court epitomizes reason, dispassion, and principled discussion. The debate in the public square epitomizes the hysteria against which the Courts, law, and rights themselves do combat, with the sword of sweet reason. The Court and its product—opinions—jointly constitute and embody the nobility of law. The political branch that represents us, particularly at the local level, is ignoble.

Now, there is much to be said against this picture—most of it already said by the CLS scholars in the seventies and eighties. In a nutshell, they argued, the Court's reasoning is neither as rational nor as principled as might first appear.<sup>72</sup> True enough, but this argument missed and itself obfuscated what

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71. *Id.* at 927-29 (criticizing the inappropriate use of rights inferred from the Constitution).

72. *See, e.g.*, TUSHNET, *supra* note 54, at 147-68.

might be a more consequential point. The now-conventional division of labor spelt out above—that the Court exercises reason in the pursuit of principle, while the legislative branch is an escape valve for the emotive excesses of various publics and an arena for horse trading among their infantile interests and desires—is untrue, not only because it so discounts emotionality, infantilism, and horse trading on the Court, but also because it understates the seriousness, public mindedness, and capacity for reasoned discourse of legislators. Courts are less than fully reasonable, to be sure. And, Congress is more than emotive.

But even that friendly amendment understates the damage done by this liberal conception of judicial wisdom and legislative infantilism. The deeper harm is that it misstates the role of passion in politics. Politics at its best, not just its worst, is an admixture of passion and principle. Signs, pictures, and images that evoke empathy may be ingredients of mob un-think, but they are also necessary components of any movement that aims to broaden our moral compass—if we do not think of either women or fetal life as a part of us, we will not legislate, as a people, to protect them. Any politics, but certainly progressive politics, must seek to expand affective sympathies. The derogation of passionate politics, so deeply embedded in the jurisprudence of an activist, antimajoritarian, and rights-oriented Court, systematically belittles precisely the sort of politics that is obviously not sufficient, but is likely necessary to any sort of expanded progressive political vision.

Finally, the traditional identification and elevation of reasoned discourse with the Court, which is at the heart of rights-oriented constitutionalism, not only pits the principled decisionmaking, of which the Court is so proud, against passion, but also pits itself against compromise. Principle cannot abide compromise, but politics cannot proceed without it. The public discussion of abortion has become as raw as it has, in part, because of that fact. When we battle this issue out in court as a clash of principles, we develop those martial arts of the mind that are necessary to that battle. We lose, though, the arts of political compromise. We lose the ability and willingness to craft deals we can live with, the nimbleness of giving a little and getting a little, the commitment to the project of living with and under the roofs that compromise creates. There is much to worry over, of course, in compromise, but there is also much to applaud: it is neighborly, civil, and inclusive.

Adjudicating abortion rights over the last quarter century and more may have dulled our capacities and appreciation for both impassioned, engaged politics and civil compromise. It is not at all clear that the result has been a stronger rather than weaker set of reproductive rights and liberties.

### C. *Aspiration*

Roberto Unger famously complained of the truncated thinking that constitutes the core of canonical common and constitutional law texts.<sup>73</sup> The “weighing of policies” that informs common law cases in the absence of clear legal rules, for example, flattens even ordinary normative argument: policies are listed on each side, one side declared more compelling, and the case decided. This is a cartoon version of decent policy analysis. Principled decisionmaking fares no better. The same is true of what I call aspirational vision—arguments about what we should do now, based on a view of what we should ideally be, or aspire to become. Aspirational visions of what justice requires get truncated as they get litigated: they are cut to size so as to fit the demands of doctrine, of standing requirements, of what the fifth Justice might believe, and of the principles laid down by the past. Thus, *Brown* truncated the claims of racial justice that motivated those who brought the case: it was reduced to a bare right not to be irrationally discriminated against by the state on the basis of skin color. *Miranda* likewise: what was trimmed was an aspiration of a decent criminal justice system, not riddled by racism and contempt of criminal defendants. What remained after the trimming was a crude right to be “Mirandized.”

Nowhere, though, has this truncating dynamic been more on display than in the context of abortion rights and the aspirational vision of which it was originally a part. The constitutional right to abort a fetus, and the right to be left alone on which it is built, is as hollow as it is in part because it represents just such a truncation of the aspirational feminist vision of reproductive justice from which it was forged. For most of the first two-thirds of the century just passed, legal abortion was understood by feminists who sought it as a component of a conception of women’s equality that also included a demand for a robust public role in childcare, heightened protections against rape and domestic violence, equal employment opportunities, equal pay for comparable worth, and inclusion of women in the public spheres of politics and governance.<sup>74</sup> Abortion rights were a branch on a tree, the trunk of which was

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73. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 576-77 (1983).

74. See Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1395-97 (2006) (arguing that abortion advocacy shifted to liberty and privacy rationales when abortion rights became disaggregated from the equality thrust of the ERA movement); see also WOLIVER, *supra* note 66, at 82 (arguing that the emergence of abortion in the 1960s transformed birth control, family planning, and women’s health politics).

the aspiration of equal citizenship and whatever social reimagining of basic structures of work and governance would be necessary to achieve it.

At least according to contemporary social and legal historians of the time period, advocacy for legal abortion was in effect severed from its trunk largely because of the politics surrounding the Equal Rights Amendment (ERA) movement<sup>75</sup> and then transplanted into the quite different terrain of individual liberty. It then became its own “tree,” rooted not so much in women’s equality, but in marital, medical, and sexual privacy. Without second guessing the then-compelling reasons for doing so, it is clear in retrospect that this re-rooting strategy carried costs beyond even the legitimation and democratic costs outlined above—it also carried costs for our understanding of what an abortion right is and why we should have one. Understood as one of a series of Supreme Court cases, *Roe v. Wade* and the right it articulates become a chapter in a narrative authored, developed, and controlled by the Court, rather than a part of a narrative of women’s rights authored, developed, and controlled by feminists, progressives, or women’s rights devotees. Abortion rights are a part of a story consisting of Supreme Court cases, not a part of a story consisting of political victories for women’s equality, healthcare, or poor families.

And what is that story? Of course there are several narratives that can be told based on these cases, just as there are any number of patterned ways to assemble beads on a string. One might, for example, think of *Roe* as the first in a possible trajectory of future cases revitalizing a libertarian and antimoralistic strand of *Lochner v. New York*.<sup>76</sup> *Lochner* famously found a right to contract for labor in the Constitution that in turn trumped democratic control of labor markets, and *Roe* likewise found a right to contract for an abortion that trumped democratic control of markets for reproductive services. *Roe*, then, like *Lawrence v. Texas*,<sup>77</sup> might be sensibly viewed as a stepping stone toward a revitalized libertarian understanding of the relation between citizen, state, and contract. The libertarian and antimoralistic language in *Lawrence* also supports such a reading, as commentators have noted.<sup>78</sup> Perhaps the extreme administrative and legal intervention into markets that characterized so much

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75. Siegel, *supra* note 74, at 1395-97. See generally DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 293-310 (1994) (describing the conception of abortion as an individual liberty right).

76. 198 U.S. 45 (1905).

77. 539 U.S. 558, 582-83 (2003) (striking down an antisodomy law in part because of the claim that a statute resting solely on moralistic condemnation is an unconstitutional infringement of liberty under the Equal Protection Clause).

78. Randy Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2002-2003 *CATO SUP. CT. REV.* 21 (2003).

of the twentieth century, whether prompted by moralistic impulses or by redistributive impulses, is the anomaly. The norm may be an ecumenical understanding of the individual liberty protected by the substantive prong of the Due Process Clause—a liberty that arguably protects the sale and purchase of labor, contraception, abortions, subprime mortgages, high interest loans, prostitution services, surrogacy services, babies, gambling contracts, guns, or kidneys, and protects all of these contractual transactions against either moralistic or paternalistic intervention. That is one way to string the beads.

Another way to string the beads aligns *Roe* with other cases that establish what I call “lethal rights,” or defensive rights to kill. On this understanding, *Roe* is part of a narrative that also prominently includes *District of Columbia v. Heller*.<sup>79</sup> Thus, the Court in *Heller* created, or discovered, a right to own a handgun, desired not only by gun enthusiasts and hunters, but also by citizens who worry that the state will not defend them against aggressors in their home or elsewhere. The right to own a gun, read in this way, is the complement to the Court’s refusal to grant a positive right to a state’s protection against private violence<sup>80</sup>: if you do not have a right to the state’s protection against violence, but you do have a right to kill in self-defense, then it becomes quite natural that you must have a prior right to the arms necessary to exercise it. Viewed as a bead on *that* string, we might understand *Roe* as granting a right to kill fetal life, made all the more desirable by virtue of the state’s refusal to create meaningful systems of health and child care, and the Court’s refusal even to consider the possibility of creating a right to such assistance. A right to an abortion looks all the more desirable if one has no right to assistance in dealing with the economic stresses of parenting. It becomes another “defensive” lethal right, necessitated, in part, by an excessively minimalist state.<sup>81</sup> The rights created by the Court in *Heller* and *Roe* have more than a slight family resemblance.

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79. 128 S. Ct. 2783, 2793 (2008) (holding that the right to bear arms is historically a right to self-defense).

80. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195-97 (1989) (holding that due process does not impose any duty on a state to provide members of the general public with adequate protective services).

81. The controversial “right to die” might also be viewed as a right necessitated, in part, by the lack of a right to healthcare, including palliative care. See generally *THE CASE AGAINST ASSISTED SUICIDE: FOR THE RIGHT TO END-OF-LIFE CARE* (Kathleen Foley & Herbert Hendin eds., 2002) (including arguments for a right to assisted suicide as well as arguments for increased palliative care instead of a right to assisted suicide). For a criticism of the argument against assisted suicide, see Ani B. Satz, *The Case Against Assisted Suicide Reexamined*, 100 MICH. L. REV. 1380 (2002).

Of course, neither of these radically libertarian understandings of *Roe* are the narratives preferred by *Roe*'s pro-choice celebrants, or by the Court itself. Rather, the dominant narrative puts *Roe* in line with cases protecting sexual expression, not personal liberty, and not self-defense. On the dominant understanding, *Roe* is on a string of beads with *Griswold v. Connecticut*,<sup>82</sup> *Eisenstadt v. Baird*,<sup>83</sup> and *Lawrence*,<sup>84</sup> not with *Lochner*, and certainly not with *Heller*. What *Roe* does, along with *Griswold*, *Eisenstadt*, and *Lawrence*, is protect an individual's right to have nonreproductive sex. What is stressed, on this story, is the consequence for sexual freedom to be garnered from the right to be free of the risk of pregnancy.

There are undoubtedly other ways to read *Roe*. There are many ways to string a finite number of beads. Nevertheless, the class is not infinite. It is not possible, for example, to read *Roe* as protective of marital, as opposed to individual privacy.<sup>85</sup> That is foreclosed by *Eisenstadt*. It is not possible, I believe, to read *Roe* as a part of an adjudicative, narrative movement toward a robust conception of reproductive justice. That is ruled out by the right's negativity. Reproductive justice requires a state that provides a network of support for the processes of reproduction: protection against rape and access to affordable and effective birth control, healthcare, including but not limited to abortion services, prenatal care, support in childbirth and postpartum, support for breastfeeding mothers, early childcare for infants and toddlers, income support for parents who stay home to care for young babies, and high quality public education for school age children. The Court is not equipped to mandate any of that, and has stated repeatedly that it is not inclined even to suggest that a citizen might have a right to a state that does so. The negative right that it *has* recognized suggests something very different: it suggests at best a right to nonreproductive sex, and at worst, a right to end a pregnancy by killing the fetus so as to free oneself of the burden of impossible parental obligations in an unjust world. Either way, it is not all that clear that women, parents, or children are the beneficiaries.

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82. 381 U.S. 479 (1965).

83. 405 U.S. 438 (1972).

84. 539 U.S. 558 (2003).

85. See *Eisenstadt*, 405 U.S. at 453 (making clear that privacy protects individual rather than marital privacy).

### III. THE OPPORTUNITY COSTS OF CONSTITUTIONALIZED ABORTION RIGHTS

Reproductive justice is a political and moral project. The Court-created abortion right is a judicial and constitutional one. How might the world be different, if the pro-choice community focused on the former a bit more, and the latter a bit less? What opportunities have been foregone, by virtue of the constancy of the gaze on courts? What are *Roe*'s "opportunity costs"? This Part outlines three: political, rhetorical, and moral.

#### A. Political Costs

First, movement toward a broadened reproductive justice movement could prompt a fresh look at the pro-life movement, which is different than it was thirty years ago, when it coalesced around the overriding goal of reversing *Roe*.<sup>86</sup> Feminist and progressive theorists and advocates routinely characterize the pro-life movement as aimed at reversing *Roe*, and as committed to the project of requiring women to carry pregnancies to term, primarily so as to enforce restrictive and Victorian roles of motherhood, femininity, and sexuality. This depiction, however, is dated. At least parts of that movement, as expressed both by its leadership and by its members, are not single-mindedly focused on overturning *Roe* or on criminalizing abortion, and are not particularly interested in using either pregnancy or motherhood as a way to punish premarital or extramarital sexual activity. Thus, a fair amount of pro-life feminist scholarship is now focused as much on increasing public support for parenting—both for its own sake, and as a means of minimizing the number of abortions—as with minimizing abortions by criminalizing them and incarcerating the doctors that perform them.<sup>87</sup> The change is just as clear outside of the law review pages. Websites such as MomsRising<sup>88</sup> seek to organize mothers—both pro-life and pro-choice, but the focus seems to be on the former—around what have to date been almost exclusively progressive-feminist goals: paid maternity leave, publicly funded childcare, more public

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86. See Salmon, *supra* note 34 (reporting on the shift of several prominent pro-life leaders and groups against strategies focusing on criminalization of abortion, to a focus on reducing incidences through pregnancy prevention as well as lowering the cost of mothering).

87. See, e.g., Elizabeth R. Schiltz, *Should Bearing the Child Mean Bearing All the Cost?: A Catholic Perspective on the Sacrifice of Motherhood and the Common Good*, 10 LOGOS 15 (2007) (arguing for a blend of Catholic and feminist social thought on issues pertaining to support for child-raising).

88. MomsRising, <http://www.momsrising.org> (last visited Mar. 11, 2009).

assistance for single mothers, more support across the board for working families. These Internet-based movements express more interest in helping women and teens through their pregnancies and with their families, and less or no interest in punishing teenagers for premarital sex.

By putting legal abortion in its place—that is, putting it in the context of a reproductive justice agenda pursued in the legislative arena—pro-choice advocates might find common cause with pro-life movements that responsibly seek greater justice for pregnant women who choose to carry their pregnancies to term, working families, and struggling mothers. I do not mean to suggest that progressive-feminist advocates and scholars have not been actively seeking these goals. Of course they have, and for a good long while. But at the level of theory, the pro-choice movement exists in considerable tension with those goals.<sup>89</sup> And at the level of politics, the antipathy of pro-choice and pro-life advocates has veiled the possibility of coalitions on these issues, where interests are in fact aligned.<sup>90</sup> Pro-life and pro-choice movements have a common interest in reducing the incidence of abortion, both by minimizing the number of unintended pregnancies and lowering the cost of mothering. They should also have a common interest in protecting the ordinary legal rights and interests of pregnant women who complete their pregnancies—rights that also are threatened by a legal regime that generally neglects the demands of reproductive justice.<sup>91</sup> It might be time to give ordinary politics a chance to achieve common goals.

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89. For an early statement regarding the tension between the negative logic of *Roe* and the struggles of drug-addicted mothers, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1477-78 (1991) (arguing that the negative right of privacy created in *Roe* is not helpful to drug-addicted mothers).
90. Lynn M. Paltrow, Executive Director of the National Advocates for Pregnant Women, has decried the fragmentation and also has worked assiduously to bridge the gap from the pro-choice side. See Lynn M. Paltrow, *Towards a Real Culture of Life*, TOMPAINE.COM, Mar. 12, 2007, [http://www.tompaine.com/articles/2007/03/12/towards\\_a\\_real\\_culture\\_of\\_life.php](http://www.tompaine.com/articles/2007/03/12/towards_a_real_culture_of_life.php).
91. Both groups, for example, should have a joint interest in protecting the currently embattled rights of pregnant women to make choices regarding their modes of delivery, or of pregnant teenagers to a full education, of pregnant inmates not to be shackled during their deliveries, of new mothers to breastfeed, of mothers of children conceived in rape to be free of coercive pressures by their rapists, and of drug-infected pregnant women to be free of incarceration and have access to healthcare. On shackling female prisoners during pregnancy, see Geraldine Doetzer, *Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth*, 14 WM. & MARY J. WOMEN & L. 363, 372-73 (2008) (arguing that shackling inmates during childbirth is unconstitutional). On protecting the rights of mothers to control their deliveries, see April L. Cherry, *Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723, 732-36 (2004) (arguing that the structure of *Roe* has led to restrictions on

### B. Rhetorical Costs

Third, turning our attention away from the courts might prompt a profitable return to pragmatism and away from principle in the formulation of arguments for legal abortion. Principled argument on this issue, perhaps like any other, can take us only so far. It does not follow, though, that the alternative is unthinking chaos. There are pragmatic reasons that the power to make this decision should rest with the pregnant woman or girl: she is the one physically burdened for a substantial period of time by the pregnancy, she is the one faced with the decision to raise or relinquish a baby, she is the one to bear the burden of motherhood with little support from the public sphere should she carry the pregnancy to term, and so on. Giving this power over to husbands, fathers, or medical boards when the pregnant woman is the person who will bear the brunt of the decision, and when that “brunt” is as life-altering and as life-shrinking as it currently is, will result in injuries, stunted lives, and some deaths. We should be explaining the pragmatic reasons that women here and now must have control over their own reproductive lives, rather than focus as exclusively as we have on principled constitutional claims that purport to rest on timeless principle.<sup>92</sup> The need to shoehorn arguments for choice into constitutional form has not only forced the “right to an abortion” into its current truncated and negative form, with the costs noted above, it has also muted arguments for reproductive choice that are pragmatic and time-bound. De-constitutionalizing the case for legal abortion, and relocating the argument so as to appeal to legislative and popular audiences rather than judicial ones, might recenter those claims.

### C. Moral Costs

Finally, the focus on the abortion right has diverted resources not only from political and legal possibilities for promoting reproductive justice, but also from other forms of social persuasion, including moral argument, that might reduce the number of unwanted pregnancies women experience, whether they result in live births or not. Bluntly, if women and men were

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pregnant women’s medical choices in the later stages of pregnancy by creating a constitutionally protected state interest in the fetus).

92. For an example of this sort of pragmatic, and explicitly time-bound argument that is clearly intended for a public rather than judicial audience, see Joan C. Williams & Shauna L. Shames, *Mothers’ Dreams: Abortion and the High Price of Motherhood*, 6 U. PA. J. CONST. L. 818, 830-40 (2004), which argues that the high price of mothering should be understood as an argument for legal abortion.

encouraged to be more sexually responsible, there would be fewer unintended pregnancies and less need for abortions or abortion rights. There are two moral constraints in particular on individual sexual behavior that seem particularly compelling, the case for which has been neglected, in part, because of an obsessive fixation on rights.

First, it would behoove the pro-choice community to acknowledge—and then insist—that opposite-sex partners who do not intend to conceive have a compelling moral duty to use birth control. The pro-choice community has focused hard on a *right* to use birth control and much less on the duty to do so. For purposes of contrast, look at another historical moment. At the height of the AIDS epidemic, the gay male community embraced a “condom code,” the purpose of which was to influence, through moral persuasion, the use of condoms, so as to reduce the incidence of recklessly transmitted HIV.<sup>93</sup> In the straight community, there has been nothing even remotely comparable to the condom code with respect to undesired pregnancies. There ought to be. We need a moral code that makes clear that heterosexuals who do not wish to conceive have a duty to use birth control. We currently have none.

Second, a powerful array of societal forces still pushes heterosexual women and girls to have sex that they patently do not desire, some of which leads to unwanted pregnancies. Women who have sex they do not want may regard such sex as a duty, a hassle, a trauma, a bore, a mystery, a pain in the neck, or, perhaps, as something closer to rape—as the cost of staying free of violence. But whether traumatic or boring, unwanted sex that is not enjoyed is alienating to the woman who experiences it: she gives her body over—willfully, but still she gives it over—for use by a man, as a part of a bargain she has struck that gives her no pleasure. All of this, I have argued at length elsewhere, is a serious but largely unrecognized and deeply alienating harm.<sup>94</sup>

Should she then become pregnant, however, and consent to an unwanted pregnancy, the alienating harm is compounded: she now will have a comparable relation with an unwanted fetus that she initially had with the unwanted sex. Again, her body is being used for the service of another, rather than a part of an integrated self. This can be not just unpleasant but injurious down the road. When a woman who has endured an unwanted pregnancy must later reclaim use of her body, whether for remunerative market-based labor, or for sport, or even for relaxation, she might find it difficult to do. She

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93. For an excellent commentary on this development, see Marc Spindelman, *Sexuality's Law* (Jan. 16, 2009) (unpublished manuscript, on file with author).

94. See Robin West, *Sex, Law and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* (Alan Wertheimer & William Miller eds., forthcoming 2009).

might find that, having given one's body away against the sovereignty of one's own desire, it is not an easy path back. "Gifts" of one's body to sex and pregnancy are not joyous when they are deeply unwanted. The motion picture *Waitress*—in which unwanted sex leads to an unwanted pregnancy that then morphs into a wanted pregnancy, which eventually produces a loved child—was fiction.<sup>95</sup>

From this, I would argue that a girl or young woman owes a moral duty not just to herself but also to her future self not to engage in sex she does not want, and a boy or man has a duty not to engage in sex undesired by his partner. Our current sex education curricula—whether abstinence only or abstinence plus birth control—says nothing of this. Nor do the pro-marriage urban billboards that are one of the legacies of the Clinton and Bush Administrations' war on welfare mothers: the "Marriage Works" and "Virgin: Teach your kids it's not a dirty word" and "I don't give it up and I'm not giving in" messages that now dot city landscapes, as a quid pro quo for block grants to aid poor families.<sup>96</sup> These abstinence-only curricula and personal responsibility-enhancing billboards all seemingly presuppose that teenagers universally desire vaginally penetrating sex, but that this sex they all want so intensely is bad, and for various unstated reasons they should not engage in it. We do not see billboards instructing the same population that there is no reason at all not to have sex if they want it—that fully desired sex is good—but that they should indeed abstain from sex they do not desire—that they have a duty to each other and to themselves to do so. We do not see billboards conveying the message that while sex is good, un-contracepted or unwanted sex is a moral wrong. Why not? A straightforward public relations campaign, aimed at teenagers and young adults, that sought to convey both norms—that while wanted sex is a human good, one has a duty to use contraception to avoid unwanted pregnancy, and a duty to say no to unwanted sex—could not hurt, and it might do a lot of good. It might also bring down the total number of unwanted pregnancies in the world.

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95. *WAITRESS* (Fox Searchlight Pictures 2007).

96. See ROBIN WEST, MARRIAGE, SEXUALITY, AND GENDER 134-35, 173 (2007) (discussing the "Marriage Works" campaigns); Heather Harris, *Marriage Works. Or Does It?: A Pro-Marriage Campaign Pops a Lot of Questions but Provides Few Answers*, THE URBANITE MAGAZINE, Sept. 27, 2006, <http://www.urbanitebaltimore.com/sub.cfm?ArticleID=461&IssueID=39&SectionID=4>.

**IV. FROM CHOICE TO REPRODUCTIVE JUSTICE**

Pro-choice policies, from the outset, should have been generated by ordinary politics, respectful and reflective of a sex-friendly popular morality, and expressed ultimately in ordinary law. The community of advocates and scholars that held those commitments should have looked to the public, legislators, educators, and social structures, rather than to hoary constitutional principles expressed by not particularly trustworthy oracles, for their meaningful articulation, elaboration, and enforcement. The moment for developing such a politics without interference from the Court, however, has long passed. Nevertheless, both sides—pro-life as well as pro-choice—might yet reclaim at least a degree of such a focus, each from where they now stand. There are particularly compelling reasons for the pro-choice community to do so. Political arguments for reproductive justice, made in political fora and divorced from the adjudicative context, might not carry the specific costs of rights discourse theorized by critical writers and highlighted above. First, they need not rest on a commitment to negative rights and libertarian premises. Women need legal abortion not to ward off undue state interference, but in order to live better and more integrated lives in their families and workplaces both. And to live those better and more integrated lives, they require both reproductive choice and better support for their caregiving obligations, as do the men with whom they might partner. Viewed as pragmatic needs for well-led lives, rather than principled demands for rights, better supports for childcare and legal abortion are both components of an as yet unrealized reproductive justice. Only when elevated to the level of constitutional and timeless principle does the argument for one component seem to undercut the case for the other.

Nor should these arguments be put forward in the context of appeals to individual antimajoritarian rights that have the effect, whether intended or unintended, of undercutting the institutional structures of majoritarian democracy. Arguments for legal abortion have strong majoritarian appeal, and are at least as amenable to public deliberation, persuasion, and compromise as the ordinary fodder of political debate. Arguments for legal abortion in legislative and public arenas need not be made in ways that limit the movement for reproductive justice to this most individualistic and self-abdicating “right to an abortion.” They need not be “truncated.” Re-politicizing reproductive justice arguments, in other words, might not carry the costs of rights-focused constitutional rhetoric.

Finally, a shift in focus away from courts 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. We might

recapture some of those heretofore-slighted opportunities. Most modestly, it might at least break the logjam that now frustrates any sort of coalition between parts of the pro-choice and pro-life communities that undoubtedly share many common interests and goals. Substantial parts of both sides of these movements have an interest in minimizing the demand for abortion through minimizing the cost of mothering, enforcing and strengthening the rights of pregnant women, advocating the responsible use of birth control, insisting upon sensible anti-rape policies, and discouraging unwanted sex. The reproductive justice that might be achieved through these coalitions—that is, achieved through ordinary modes of political persuasion—might prove more enduring than what we have garnered to date from the Court. It also might prove more deserving.