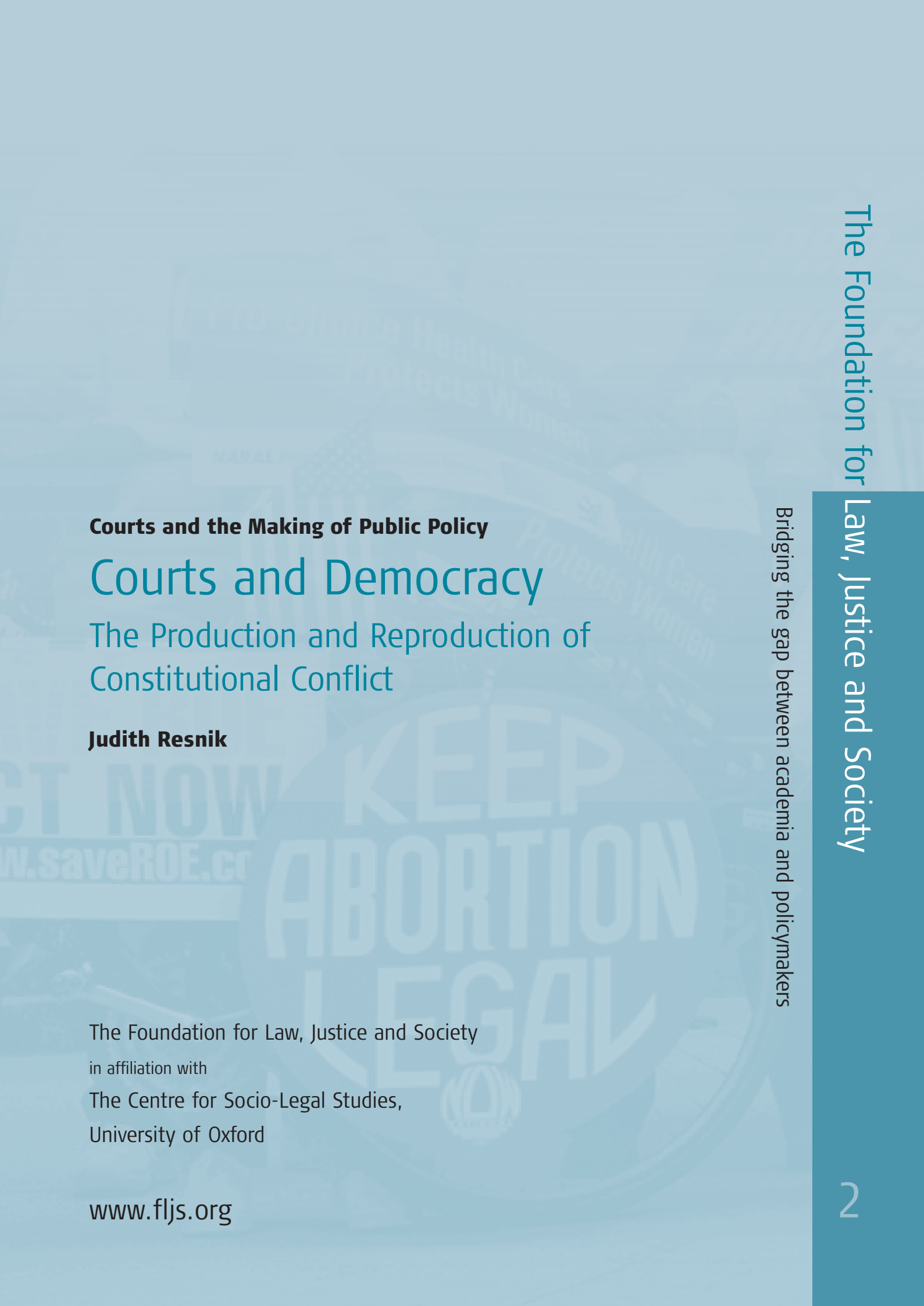

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Courts and the Making of Public Policy

Courts and Democracy

The Production and Reproduction of Constitutional Conflict

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Executive Summary

- In 2007, the United States Supreme Court issued the *Carhart* decision, the first since the 1973 ruling of *Roe v. Wade* to uphold the facial validity of a statute that limits access to abortion without express provision of an exception for a woman's health, as contrasted with her life.
- *Carhart* offers broad lessons about the role of courts in democracy, the effects of national and transnational movements on the meaning of law, and the autonomy of women, health professionals, Congress, and judges, including those sitting on the Supreme Court.
- A brief foray into comparative and transnational law finds the debate about abortion in courts, legislatures, and intergovernmental bodies around the world.
- By considering the bases of the judgments from these various jurisdictions, one sees that analyses of abortion have moved beyond the framework of privacy, liberty, and equality, which are the frequently proffered premises for supporting women's abortion rights in the United States.
- Transnationally, the issue of reproduction is framed in relation to health and safety; to the human rights of dignity and autonomy, nondiscrimination on the basis of race, age, and gender; economic opportunity; and to freedom of speech, conscience, and religion.
- Instead of presuming that judicial review displaces or silences democratic processes, the interaction of *Roe*, *Carhart*, and the transnational exchanges make plain that the practices of democracies depend on dialogic interaction among the many groups within and across social orders.
- Rather than presume courts are a problem for democracy, they should be seen as resources. Legal generativity, from all sides of the political spectrum, is an artefact of adjudication in democratic polities.

Courts and Democracy

The Production and Reproduction of Constitutional Conflict

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

In 2007, constitutional lawyers in the United States got a new shorthand – *Carhart* – the first decision since the 1973 ruling to uphold the facial validity of a statute that limits access to abortion without express provision of an exception for a woman's health (as contrasted with her life).[2] The statute at issue, named by Congress the 'Partial-Birth Abortion Ban Act of 2003',[3] subjects doctors who 'knowingly' perform a particular kind of abortion (designed to reduce the risk of infection to women) to criminal sanctions including prison terms of up to two years.

One might be tempted to assign *Carhart* to a particularly contentious corner of law and morality in the United States and, absent interest in reproductive rights, turn away. But *Carhart* offers broader lessons, about the role of courts in democracy; the evocative power of constitutional claims; the relevance of texts and precedents to constitutional judgments; the effects of national and transnational movements on the meaning of law; and the autonomy of women, of health professionals, of Congress, and of judges, including those sitting on the Supreme Court.

Instead of presuming that judicial review displaces or silences democratic processes, *Roe* and *Carhart* demonstrate the dependency of democracies on dialogic interaction among the many groups within a social order. Legal generativity, from across the political spectrum, is an artefact of adjudication in democratic polities.

The instability of Carhart

To appreciate how *Carhart* engenders, rather than quiets, constitutional debate, elaboration of the arguments and conflicts within is needed.

At first glance, *Carhart* might be viewed as a minor ruling that does not mark a major retreat from *Roe v. Wade*. On its face, both the Act in question and the decision rendered have a limited reach. The 'Partial-Birth Abortion Act' does not preclude abortions, even when late-term and after viability. Rather, as the Court explained, the Act bans 'only' one method by which abortions take place: the deliberate and knowing delivery of a 'living fetus' killed after the 'fetal trunk past the navel is outside the body of the mother' or 'in the case of a head-first presentation, the entire fetal head is outside the body of the mother.'[4]

The doctor's crime thus has an 'anatomical landmark' related to a 'mother's' body which, as Justice Kennedy's plurality opinion held, meant that the Act's definition of the crime was not unconstitutionally vague. Were a doctor to get past that critical point by 'accident or inadvertence', a criminal conviction ought not follow. The opinion thus left open a defence to a prosecution and the option of seeking a court's declaration of legality in advance upon a demonstration that a specific abortion was necessary given 'a particular condition'. Were doctors willing to risk criminal sanctions and repeatedly test the boundaries of the ruling, its import could be narrowed. Moreover, as the plurality opinion insisted, the procedure at issue is atypical. Eighty-five to ninety per cent of the 1.3 million abortions recorded annually in the United States take place during the first three months of a pregnancy.

But the dissent, the concurrence, and the bulk of the Kennedy plurality opinion tell another story, making plain the distance that *Carhart* stands from *Roe* and

from judgments in between. Justice Ruth Bader Ginsburg, moved to read excerpts of the dissent from the bench when *Carhart* was rendered in April of 2007, called it 'alarming'. A brief concurrence by Justices Thomas (joined by Justice Scalia) spoke plainly to the larger stakes. In the wake of the death of Chief Justice William Rehnquist and the departure of Justice Sandra Day O'Connor, some had hoped that a new majority of five would rule what the Thomas concurrence proposed: that 'the Court's abortion jurisprudence . . . has no basis in the Constitution'.[5]

The 'facts': medical and congressional

Carhart prompts an outcry because it is the first decision that has 'blesse[d]' a prohibition of abortion that does not include provisions 'safeguarding a woman's health'.[6] Moreover, the Court did so by ratifying a purported 'factual finding' made by Congress, which concluded that a medical consensus viewed this method of abortion as both 'inhumane' and 'never medically necessary'. The Court preferred the expertise of members of Congress to the judgments of the American College of Obstetricians and Gynecologists, which had provided evidence that, on occasion, such procedures were needed both to protect a woman's health and her future procreative possibilities. As one of the appellate courts overturned by the Supreme Court had put it, the 'Constitution requires legislatures to err on the side of protecting women's health by including a health exception'.[7]

The Supreme Court's deference to Congress on questions of 'medical necessity' was particularly perplexing given that the record created in Congress before the Act's passage was rife with other 'findings' devoid (as the plurality opinion acknowledged) of accuracy. For example, Congress had 'found' that no medical school in the United States taught doctors how to perform the procedure. But, in fact, several major teaching institutions do. Moreover, in other cases, the Court had been energetic in overseeing congressional fact-finding and had struck legislative remedies for failing to be proportionate and congruent to the harms identified.

In contrast to the one-sided investigation by Congress (a 'polemic' as the dissenters put it), the trial courts had spent weeks hearing from medical experts. Those evidentiary explorations were the predicates to lower court conclusions that, as a matter of 'fact', women who had various medical conditions (such as certain forms of heart disease) were at less risk of infection, scarring, and subsequent infertility if doctors aborted through 'intact dilation and evacuation (D & E)' (the medical term, rather than the politically freighted but medically meaningless 'partial-birth abortion' that Congress had chosen). Adding its own political freight, the Kennedy decision repeatedly chose to label surgeons whose speciality is gynecology and obstetrics with the term 'abortion doctors', over the objection of the dissent that such nomenclature was pejorative.

'Promoting fetal life' by 'protecting' women from making decisions

The dissent took on the Court's opinion in another respect: its analysis of the government's 'legitimate and substantial interest in preserving and promoting fetal life'.[8] As the dissent explained, the Act does not preserve fetal life per se but instead precludes the ending of fetal life by a particular procedure. What appeared instead to be animating Justice Kennedy's approach can be found in the two facets of the plurality's remarkable narration: its sense of abortion as unmitigated violence and its characterization of women as mothers in need of protection.

The opinion begins by positioning all types of abortion as terrible acts of aggression in a fashion reminiscent of the detailed descriptions of crimes that open many of the Court's rulings upholding convictions. Much of the plurality's specific and gruesome discussion of 'dismemberment' is legally superfluous; the procedures detailed ('vacuum aspiration,' the medicine RU 486, and others) were not challenged. Indeed, the Court's decision to uphold a ban on extraction of a fetus intact left 'dismemberment' a method of abortion that remains legal.

But perhaps not for long. The decision acknowledged that the 'standard D & E' procedure was 'in some respects as brutal, if not more,' than the intact D & E method banned, thereby potentially inviting state and federal legislatures to address these other 'brutal' procedures as they assert their interest in

protection of fetal life. Moreover, not mentioned in the plurality opinion are the reasons (risk of infection, preservation of future childbearing capacity) why women and their physicians chose the intact D & E when facing the disaster of a pregnancy gone wrong with a fetus terribly injured or deformed.

The second remarkable feature of the opinion is the characterization of pregnant women as mothers who, given 'the bond of love the mother has for her child', are inevitably in need of protection. The opinion relied heavily on an amicus filing that argued that women suffer something called 'post-abortion syndrome' caused by regret, shame, and loss of self-esteem. Although acknowledging that 'no reliable data to measure the phenomenon' existed, Justice Kennedy proffered a view of a pregnant woman that has become a signature of the decision.

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used. . . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[9]

Prisoners of their sex

Missing in this discussion is a comparable claim, made on behalf of fathers, that they too would feel anguish and loss when prospective parenthood is precluded. That absence coupled with the description of women, even those who had had abortions, as 'mothers' prompted the dissenters to object to their colleagues' understanding of women's citizenship. The dissent insisted on women's right to function as economic and social actors equal to men. As Justice Ginsburg's opinion detailed, the prior abortion jurisprudence had been founded on recognition of a woman's 'personhood', 'autonomy', and individual 'dignity', which required that the decision to bear child was hers to make. While 'ancient notions' of women had placed her inevitably as a mother in a family to be protected by men, contemporary laws and constitutional commitments saw women as actors owning their own 'destiny'.[10]

Given the plurality's view that doctors might be reluctant to provide all relevant information and that women would not press for details, one would have expected a different denouement. The Court could have rejected the ban but suggested that it would uphold regulation to insist on disclosures of risks and benefits as a predicate to legally sufficient consent. (That approach is also controversial, with challenges pending to state statutes directing health care providers to give pregnant women very specific information; doctors claim those directions violate their medical ethics and freedom of speech as well as women's privacy and liberty.) But rather than promote regulation of decision-making, *Carhart* upheld a ban precluding women, men, and doctors of either sex from making judgments about how to proceed.

Carhart is thus momentous in that it marks the emergence in constitutional doctrine of what Reva Siegel has called a 'woman-protective' rationale.[11] This approach, promoted by a significant social movement, relies on the language of women's rights to frame arguments that anti-abortion statutes are themselves pro-women by enabling the fulfillment of women's roles as mothers through protecting them from their own ill-informed judgments about abortion.

Yet as one can see from the excerpt by Justice Kennedy, another apt description would be the title of Norman Mailer's book, *Prisoners of their Sex*, for women are confined to a maternal role presumed to render them incompetent decision-makers. Prisoners are the only other adults treated, because of a different form of confinement, as unable to give consent for certain voluntary procedures. Law takes away their agency on the theory that their condition, incarceration, renders them subject to misjudgments.

The rationale proffered by the Kennedy opinion is that women are another category of persons to be told by law that they can have no volition because their situation, pregnancy, makes them incompetent to act

on their own behalf. The opinion goes further: in the face of maternal grief, doctors too will be unnerved. ('In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used.') Law thus divests both doctors and women of their autonomy.

In this respect, *Carhart* is a judicial foray into psychology as well as religion, for the plurality opinion is an amalgam of presumptions about the emotions and motivations of mothers and of doctors (fathers remain missing in action) interspersed with moral or religious views about when life begins and what a pregnancy means for a woman. The plurality opinion is rich with its own sense of what is self-evident and uncontestable about human nature and life.

These aspects of the opinion raise new questions. If women are at risk of making the wrong decisions and if the government has a legitimate interest in fetal life, can the state prevent women from eating certain foods or from drinking alcohol while pregnant? What about affirmative (as well as negative) obligations, such as requiring that women submit to fetal monitoring, ultrasounds, or Caesarian sections under certain circumstances? Could legislation oblige women to consume foods and vitamins that promote fetal growth?

Such questions may sound dramatic or fanciful but they have real-world analogues. Women have been prosecuted criminally in some jurisdictions for failures to protect a fetus.[12] In 1999, the South Carolina Supreme Court upheld the conviction and twenty-year sentence of a mentally retarded, cocaine-addicted woman who had been charged with murder when her child was stillborn. In other states, women accused of substance abuse have been subjected to civil confinement and guardians have been appointed for fetuses.

Further, the idea of the fetus as an independent person in-being has been nurtured under some state and under several provisions of federal law. As of 2002, federal regulations in the Department of Health and Human Services redefined 'children' eligible for health insurance under federal law to include 'an individual under the age of 19 including the period from conception to birth'.[13] In 2004, the 'Unborn Victims of Violence Act' made it a federal crime to injure or cause death to a fetus if committing another federal offence; the Act defined unborn child as 'a member of the species *homo sapiens*, at any stage of development, who is carried in the womb'.[14] While current proposals do not aim to prevent men from endangering their sperm, voters in Colorado may be asked to enact a constitutional amendment to provide that 'inalienable rights, due process rights and equality of justice rights' apply to 'any human being from the moment of fertilization'.[15]

Constitutional predicates

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

The Commerce Clause has been used before as a basis for regulating morality, such as for a turn-of-the-twentieth century statute, the 'Mann Act' (named for its sponsor), prohibiting the transport of women, interstate, for sexual purposes. But in the last fifteen years, the Court has read the scope of the Commerce Clause more narrowly. For example, a 2000 decision by then Chief Justice Rehnquist writing for a five-person majority held that Congress lacked the power under both the Commerce Clause and the Fourteenth Amendment to enact a 'Civil Rights Remedy' in the Violence Against Women Act to permit victims of violence 'motivated by gender bias' to bring civil damage actions in federal court.[16] In a 1996 case, the Court held that Congress could not rely on the Commerce Clause to prohibit guns within a thousand feet of schools.

While the ban at issue in *Carhart* was keyed to doctors working in interstate commerce, the justification, interest in fetal life, is less obviously related to interstate commerce. That point was noted by Justice Thomas's concurrence. He has been a consistent

advocate of a narrow reading of the Commerce Clause, arguing that it serves only as the basis for Congress to regulate the purchase and sale of goods.

What then would be the predicate for congressional action if not the Commerce Clause? If one takes the position that the national legislature has no general welfare powers and only limited Commerce Clause authority, where can one look for congressional power to promote or protect fetal development? Would one have to argue that a fetus is a 'person' or another form of life protected by the Fifth and Fourteenth Amendment that prohibits government from depriving persons of 'life, liberty, and property' without 'due process of law'? In addition to ensuring procedural fairness, this clause is sometimes interpreted to impose substantive limits on the state's power. Can those negative prohibitions on state power become a springboard for positive obligations to protect fetal life? Such are the questions of the sources, nature, and proper exercises of government power over fertile or pregnant women and men that now hang, in *Carhart's* wake.

Judicial review subject to revision

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

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

This phenomenon can be found in many areas of constitutional jurisprudence. Another illustration comes from three centuries of conflict over slavery and its residue. One can chart a path from the 1856 Supreme Court ruling that a slave who had escaped to a free state had to be returned as a fugitive (*Dred Scott v. Sandford*)[17] to its rejection through the Civil War. The consequences of that struggle included amendments to the United States Constitution to end involuntary servitude and to create rights of due process and of equal protection.

But another tragic decision, the 1896 ruling in *Plessy v. Ferguson*,[18] upheld segregated seating for passengers on railroad cars. That judgment prompted decades of efforts by groups dedicated to equality. Successes came in various venues, including the 1949 executive order by President Harry Truman that ended segregation in the military. By then, the United States had joined the United Nations, and some state courts read the obligations of the UN 1946 charter to prohibit race-based limits on property ownership.

The Supreme Court's 1954 judgment in *Brown v. Board of Education*[19] did not rely expressly on transnational rights but instead reinterpreted the federal Constitution to prohibit certain forms of discrimination. In the 1960s, Congress, working with the Executive, passed critical civil rights legislation, and lower courts implemented the mandate of *Brown*, all demonstrating that the Fourteenth Amendment, once read to tolerate segregation, could be reread to mean that the government could not mandate (*de jure or de facto*) the separation by race.

Yet even the pillar of *Brown* has proven vulnerable as opposition mounted to its implementation through school busing and affirmative action. In response to long histories of segregation, local school boards in Louisville, Kentucky and Seattle, Washington had each crafted voluntary efforts to promote racial diversity in their schools. But in 2007, five justices (who also came together in Carhart) ruled in *Parents Involved in Community Schools v. Seattle School District No.1*[20] that the local efforts impermissibly took race into account.

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

In fact, *Roe/Carhart, Plessy/Brown, and Brown/ Seattle School District* teach that constitutional rulings may inspire, rather than derail, political engagement. While some constitutional rulings rest easy, seeming both inevitable and inviolate, others serve as a source for mobilization for social movements both domestic and transnational. Given the high visibility of decisions made by the Supreme Court, they can readily become shorthands for committed social activists to use. Within the legal academy, Professors Siegel and Post have named this pattern 'democratic constitutionalism' to capture their point that 'the authority of the Constitution depends on its democratic legitimacy', and that legitimacy in turn is evidenced by popular engagement, making claims on behalf of or contesting the meaning of particular provisions.[21]

National and transnational social movements

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

In contrast, in 1988, the Supreme Court of Canada struck a criminal prohibition that was mitigated by provisions for abortions if approved by medical panels at hospitals. That Court held that the statute violated Canada's Charter of Rights and Freedoms, specifically article 7 on protection of a right to 'life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.[22] The Justices reasoned that 'security of the person' included access to medical care for life or health 'without fear of criminal sanction', and that the delays in processing requests infringed on fundamental rights. The Justices saw the provision as unduly impinging on women's autonomy to make their own life choices and their freedom of religion. Law could not force 'women to carry a foetus to term contrary to their own priorities and aspirations' nor could law, by placing requirements that resulted in serious delays, impose such physical and psychological trauma on women hoping to qualify for abortions.

Within the last few years, several other countries have addressed the question. In 2006, the Constitutional Court of Colombia held that an abortion could not be a criminal act if a woman's life, or physical or mental health was at stake, if fetal malformations made unviable life, or if the pregnancy had resulted from rape or incest. Underlying the judgment were commitments to women's health, welfare, equality, dignity, liberty, and reproductive autonomy. In contrast, during the same year, the legislature in Nicaragua voted fifty-two to zero to criminalize all abortions, thereby superseding a law that had permitted abortions for rape, incest, or risks to a woman's life or health.[23]

One relevant transnational instrument, now supported by more than 185 nations, is the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). While committing to the equal treatment of women and men in health, employment, politics, and other facets of public and private life, CEDAW's silence on abortion rights reflects the contentiousness of the issue. Yet CEDAW's guarantee in Article 12 of women's right to health and well-being specifies rights of access to medical services including family planning. The Committee that oversees CEDAW's implementation explained in its General

Recommendation 24 ('Women and Health') that, to fulfill their obligations under Article 12, signatories must provide for women's safety and protect against the risk of stigma from unwanted pregnancies.

In terms of transnational rulings, in 2007 the European Court of Human Rights held that its Article 8 requirements (that individuals not be subjected to 'arbitrary interference by public authorities') were violated when Poland failed to provide an abortion for a woman who had severe myopia, had two children, and was told that her eyesight was put at risk from a pregnancy.[24] In November 2007, in *Karen Noelia Llantoy Huamán v. Peru*, the United Nations Human Rights Committee concluded that denying access to abortion for a seventeen-year-old carrying a fetus with severe brain anencephaly violated her basic human rights under the International Covenant on Civil and Political Rights. There, the Committee focused on requirements that persons be free 'from cruel, inhuman and degrading treatment', as well as protection for privacy and the need to pay special attention to minors' rights.[25] And, in a recent report that relied on the CEDAW, the rapporteur on the Rights of Women of the Inter-American Commission on Human Rights recognized the need for health services to ensure that women's lives are not threatened through unsafe abortions.[26]

Questions of access to abortion are thus being posed worldwide. Given that the proponents and opponents are part of transnational networks ranging from religious orders to nongovernmental organizations, their efforts do not stop at a particular nation's border. Legal principles migrate, and judiciaries are one of the many mechanisms for the import and export of law.[27]

By considering the analytic bases of the judgments from these various jurisdictions, one can see the discussion around abortion move beyond the frameworks of privacy, liberty, and equality, which are the frequently proffered premises for supporting women's abortion rights in the United States. The issue of reproduction is located in broad sets of questions related to women's health and work, as the problem is addressed in terms of 'human rights' to health and safety; to nondiscrimination on the basis of race, age, and gender; to economic opportunity; to freedom of speech, conscience, and religion; to autonomy and dignity.[28]

Courts as constitutive elements of democracies

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

Long before the creation of modern democracies, rulers relied on adjudication to enforce their laws and maintain security. In those pre-democratic eras can be found proto-democratic practices inside courts. Even when working for monarchs, judges were required to 'hear the other side' so as not to impose arbitrary decisions. Further, judges worked in public, demonstrating that the rulers had the power to enforce legal obligations.

Commitments to democracy have transformed the 'rites' of adjudication by turning them into 'rights' of access to open and public courts in which disputants are supposed to be treated with equal respect. As women gained juridical voice, courts have had to consider how to recognize and honour their citizenship, autonomy, and liberty. Because of these commitments to participatory parity and transparency, courts are regular contributors to the public sphere, and they serve as one of several venues for debating and developing norms.

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

Endnotes

1. 410 US 113 (1973); see: Post, R. and Siegel, R. (2007) 'Roe Rage: Democratic Constitutionalism and Backlash', *Harvard Civil Rights–Civil Liberties Law Review* 42: 373–433.

2. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

3. Codified at 18 USC § 1531.

4. 18 USC § 1531(b)(1)(A).

5. 127 S Ct at 1639.

6. Id. at 1641 (Ginsberg, J., dissenting).

7. 413 F 3d 791, 796 (8th Cir. 2005), reversed by *Carhart*.

8. 127 S Ct at 1647 (Ginsberg, J., dissenting).

9. Id. at 1634.

10. Id. at 1640 (Ginsberg, J., dissenting).

11. See: Siegel, R. (2007) 'The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions', *University of Illinois Law Review* 991–1053.

12. See: Fentiman, L. (2006) 'The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children', *Denver University Law Review* 84: 537–599; *State v. McKnight*, 576 SE 2d 168, 171 (SC 2003).

13. 42 CFR § 457.10 (2007).

14. Pub L No 108–212, 118 Stat 568 (2004) (codified at 18 USC § 1841).

15. Johnson, K. 'Proposed Colorado Measure on Rights for Human Eggs', *New York Times*, (18 November 2007), A23.

16. *United States v. Morrison*, 529 US 598 (2000);.see: Resnik, J. (2001) 'Categorical Federalism: Jurisdiction, Gender, and the Globe', *Yale Law Journal* 111: 619–680.

17. 60 US (19 How) 393 (1857).

18. 163 US 537 (1896).

19. 347 US 483 (1954).

20. 127 S Ct 2738 (2007).

21. Post and Siegel, supra Fn 1, at 374.

22. Compare R. v. *Morgentaler*, [1988] SCR 30, with BVerfGE [Federal Constitutional Court] 25 February 1975, 39, 1 (FRG), and BVerfGE [Federal Constitutional Court] 28 May 1993, 88, 203 (FRG), 'The German Abortion Decisions', excerpted in V. Jackson and M. Tushnet, *Comparative Constitutional Law*, pp. 110–129. New York: Foundation Press.

23. Decision C-355/06, Constitutional Court of Colombia, 10 May 2006; Law No. 603, 26 October 2006, Act Waiving Article 165 of the Penal Code In Force, La Gaceta [LG], 17 November 2006 (Nicar).

24. *Tysiac v. Poland*. Eur Ct HR, app no 5410/03 (20 March 2007).

25. *Karen Noelia Llantoy Huamán v. Peru*. Communication No. 1153/2003, UN Doc CPR/C/85/D/1153/2003 (2005).

26. Inter-American Commission on Human Rights, Report on the Status of Women in the Americas, OEA/Ser.L/V/II.100, Doc 17 (13 October 1998).

27. See: Resnik, J. (2006) 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry', *Yale Law Journal* 115: 1564–1670

28. Cook, R. and Dickens, B. (2003) 'Human Rights Dynamics of Abortion Law Reform', *Human Rights Quarterly* 25: 1–59.

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