Roe Rage: Democratic Constitutionalism and Backlash

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Progressive confidence in constitutional adjudication peaked during the Warren Court and its immediate aftermath. Courts were celebrated as "fora of principle,"[1] privileged sites for the diffusion of human reason. But progressive attitudes toward constitutional adjudication have recently begun to splinter and diverge.[2] Some progressives, following the call of "popular constitutionalism," have argued that the Constitution should be taken away from courts and restored to the people.[3] Others have emphasized the urgent need for judicial caution and minimalism.[4]

One of the many reasons for this shift is that progressives have become fearful that an assertive judiciary can spark "a political and cultural backlash that may . . . hurt, more than" help, progressive values.[5] A generation ago, progressives responded to violent backlash against *Brown v. Board of Education*[6] by attempting to develop principles of constitutional

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[1] Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

[2] Mark Kende observes: "It used to be easy. Liberals generally liked the U.S. Supreme Court. Conservatives were skeptical." Mark S. Kende, *Foreword*, 54 DRAKE L. REV. 791, 791 (2006). But now, he writes, quoting Bob Dylan, "The times, they are a-changin'." *Id.*

[3] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 281–318 (1994); Owen Fiss, *Between Supremacy and Exclusivity*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 452–67 (Richard W. Bauman & Tsvi Kahana eds., 2006); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

[4] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 54 (1999); Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997).

[5] Kende, *supra* note 2, at 792.

[6] 347 U.S. 483 (1954). For a discussion, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004) [hereinafter Siegel, *Equality Talk*] (tracing the influence of movements

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theory they hoped would justify controversial decisions.[7] Today, there are many progressives who have lost confidence in this project. They fear that adjudication may cause backlash of the kind they attribute to *Roe v. Wade*,[8] which they believe gave birth to the New Right. Stunned by the ferocity of the conservative counterattack, progressives have concluded that the best tactic is to take no action that might provoke populist resentments.

In our view the pendulum has swung too far, from excessive confidence in courts to excessive despair. In this Essay we offer a more realistic account of how courts actually function in our democracy. We propose a model that we call "democratic constitutionalism" to analyze the understandings and practices by which constitutional rights have historically been established in the context of cultural controversy. Democratic constitutionalism views interpretive disagreement as a normal condition for the development of constitutional law.[9]

The premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy, upon the Constitution's ability to inspire Americans to recognize it as *their* Constitution. This belief is sustained by traditions of popular engagement that authorize citizens to make claims about the Constitution's meaning and to oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society—when they believe that it is not respecting the Constitution. Government officials, in turn, both resist and respond to these citizen claims. These complex patterns of exchange have historically shaped the meaning of our Constitution.

Courts play a special role in this process. Courts exercise a distinctive form of authority to declare and enforce rights, which they enjoy by virtue of the Constitution and the norms of professional legal reason that they employ. Citizens look to courts to protect important social values and to constrain government whenever it exceeds constitutional limitations. Yet judicial authority to enforce the Constitution, like the authority of all government officials, ultimately depends on the confidence of citizens. If courts interpret the Constitution in terms that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments.

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for and against *Brown* on subsequent judicial interpretation of *Brown*'s meaning).

[7] This work sought to address what Alexander Bickel famously called the "countermajoritarian difficulty." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (2d ed., Yale Univ. Press 1986) (1962). For a wide-ranging survey of the effort to create constitutional theory, see Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999).

[8] 410 U.S. 113 (1973).

[9] *See, e.g.*, Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 487–502 (2000) (describing how sit-ins shaped understandings of federal civil rights power); Siegel, *Equality Talk*, *supra* note 6 (showing how the meaning of *Brown* emerged from a half century of struggles over the decision's enforcement).

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These historically recurring patterns of resistance reflect a deep logic of the American constitutional order, which is shaped by competing commitments to the rule of law and to self-governance. Democratic constitutionalism analyzes the practices employed by citizens and government officials to reconcile these potentially conflicting commitments. Such practices are everywhere around us. Through multiple channels, some explicit and others implicit, Americans have historically mobilized for and against juridical efforts to enforce the Constitution. Courts exercising professional legal reasoning resist and at times respond to popular claims on the Constitution.

Because traditional scholarship has tended to confuse the Constitution with judicial decisionmaking, it has imagined resistance to courts as a threat to the Constitution itself. This is a mistake. To criticize a judicial decision as betraying the Constitution is to speak from a normative identification *with* the Constitution. Citizens who invoke the Constitution to criticize courts associate the Constitution with understandings they find normatively compelling and believe to be binding on others. When citizens speak about their most passionately held commitments in the language of a shared constitutional tradition, they invigorate that tradition. In this way, even resistance to judicial interpretation can enhance the Constitution's democratic legitimacy.

Democratic constitutionalism thus offers a fresh perspective on the potentially constructive effects of backlash. This is not the common view in the legal academy, where law-abidingness and deference to professionals are generally prized. Backlash challenges the presumption that citizens should acquiesce in judicial decisions that speak in the disinterested voice of law. Backlash twice challenges the authority of this voice. In the name of a democratically responsive Constitution, backlash questions the autonomous authority of constitutional law. And in the name of political self-ownership, backlash defies the presumption that lay citizens should without protest defer to the constitutional judgments of legal professionals.

These two challenges go to the core of judicial review. Judges regularly assert the authority of their constitutional judgments by invoking the distinction between law and politics. They rely on professional legal reason to separate law from politics. If judges appear to yield to political pressure, the public may lose confidence in the authority of courts to declare constitutional law.

This tension between law and politics is pervasive in our constitutional democracy. We can see the same dilemma structuring debate over the confirmation of Supreme Court Justices.[10] Senate hearings must affirm the independence of Justices, so that the Supreme Court can proclaim a

[10] Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38 (2006), http://www.thepocketpart.org/2006/01/post_and_siegel.html.

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rule of law uncorrupted by merely partisan interests. Yet Senate hearings must also reassure the American people that new appointees to the Supreme Court will interpret the Constitution in ways that are responsive to the democratic will of the people.[11] These contradictory imperatives transform confirmation hearings into scenes of high drama and much confusion. When successful, Senate hearings draw Americans of disparate views into debate about the Constitution, even as they dramatize the Constitution as a foundational source of law that exists prior to political struggles over its meaning.

The political grammar of backlash is similar. Backlash expresses the desire of a free people to influence the content of their Constitution, yet backlash also threatens the independence of law. Backlash is where the integrity of the rule of law clashes with the need of our constitutional order for democratic legitimacy.

We propose the model of democratic constitutionalism as a lens through which to understand the structural implications of this conflict. We theorize the unique traditions of argument by which citizens make claims about the Constitution's meaning and the specialized repertoire of techniques by which officials respond to these claims. Democratic constitutionalism describes how our constitutional order actually negotiates the tension between the rule of law and self-governance. It shows how constitutional meaning bends to the insistence of popular beliefs and yet simultaneously retains integrity as law.[12]

Our Essay proceeds in three Parts. In Part I, we sketch the model of democratic constitutionalism, with particular emphasis on its implications for understanding the phenomenon of backlash. Although the costs of backlash are well recognized, democratic constitutionalism identifies certain underappreciated benefits of backlash. Backlash can promote constitutional solidarity and invigorate the democratic legitimacy of constitutional interpretation. Democratic constitutionalism suggests that it is neither feasible nor desirable for courts to elevate conflict avoidance into a fundamental principle of constitutional adjudication.

Because fear of backlash has become an important theme for contemporary jurisprudence, we focus in Part II on the work of three eminent theorists of backlash: Michael Klarman, William Eskridge, and Cass Sunstein. We argue that each of these theorists tends in his own way to overestimate the costs of backlash and to underestimate its benefits. Con-

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[11] *Id.*

[12] *See infra* note 24 and accompanying text. We have pursued these themes in much of our recent work. *See, e.g.*, Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 110–11 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323 (2006).

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temporary scholarly debate does not sufficiently appreciate the ways that citizen engagement in constitutional conflict may contribute to social cohesion in a normatively heterogeneous polity. Our analysis does not yield a general normative methodology for deciding constitutional cases, and indeed we doubt whether any such methodology actually exists. But democratic constitutionalism does elucidate how competing system values shape the process of constitutional decisionmaking.

For those who counsel courts to avoid controversy, *Roe* illustrates the terrible consequences of judicial decisionmaking that provokes intense opposition. Conventional legal scholarship has it that *Roe* rage was a response to judicial overreaching and that legislative reform might have liberalized access to abortion without backlash if only the Court had stayed its hand.[13] Part III reviews established research on *Roe*'s reception that questions this conventional account. Although *Roe* was immediately subject to jurisprudential critique, political mobilization against the decision expressed opposition to the liberalization of abortion law that had begun years before *Roe* was decided. Drawing on more recent scholarship, we show that mobilization against the liberalization of abortion law expanded over the decade into what we now recognize as *Roe* rage—a broad-based social movement hostile to legal efforts to secure the equality of women and the separation of church and state. *Roe* rage opposes ideals of individualism and secularism that lie at the foundation of our modern constitutional order.

Understood in this way, *Roe* rage poses hard questions for progressives who suggest that courts should systematically decide cases so as to avoid backlash. Although law professors may care deeply about professional questions of judicial technique, citizens who have mobilized against *Roe* care chiefly about matters of substance. These citizens act from a constitutional vision that is intensely concerned not only about abortion, but also about the role of women, sex, family, and religion in American life. They will use every available political means to press this constitutional vision on courts, even if progressives embrace constitutional theories that advise courts to avoid conflict.

Progressives therefore need more than a theory of constitutional conflict avoidance; they need a theory about how to protect constitutional ideals under conditions of constitutional conflict. What is more, they need substantive constitutional ideals. Just as those who supported *Brown* in the face of fierce resistance needed a vision of America living in fidelity to its constitutional commitments, so now progressives require a theory that will enable them to maintain constitutional faith in the midst of *Roe* rage.

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[13] *See, e.g.*, *infra* notes 180–182 and accompanying text.

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I. BACKLASH AND THE PRACTICE OF DEMOCRATIC CONSTITUTIONALISM

There may be constitutional provisions of which it can be said, as Larry Alexander and Frederick Schauer have written, that "an important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done."[14] Settlement enables law to elicit "socially beneficial cooperative behavior" and to generate "solutions to Prisoners' Dilemmas and other problems of coordination."[15] Settlement might well be essential with respect to constitutional provisions that establish the constitutive rules of the national government, as when the Constitution decrees that representation in the House shall be based upon population or when the Constitution stipulates that a federal law must be enacted with the concurrence of both houses of Congress. Backlash with regard to such rules might merely throw sand in the gears, frustrating the capacity of law to provide the benefits of coordination.

But there are many provisions of the Constitution that do not merely establish constitutive rules of government. Paradigmatically associated with rights contained in the Fourteenth, Eighth, and First Amendments, these provisions tend to be open ended and to invite constitutional decisionmaking that expresses national ideals. Americans have often thought it more important that constitutional law *correctly* determine the substance of these provisions than that constitutional law merely settle their content. Backlash to judicial decisions interpreting these provisions demonstrates that for some constitutional questions, authoritative settlement is neither possible nor desirable.

Legal interpretation of these open-ended provisions typically involves the expression of national values like equality, liberty, dignity, family, or faith, which establish a "realm of meaning"[16] that Robert Cover has memorably called "nomos."[17] Nomos matters because it expresses a national "identity."[18] Nomos is controversial because the American people are heterogeneous in their values and visions of a good society. This diversity is plainly visible in debates over affirmative action, abortion, and school

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[14] Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997). The full passage reads:

> Thus, an important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done. That function is performed by all law; but because the Constitution governs all other law, it is especially important for the matters *it* covers to be settled. To the extent that the law is interpreted differently by different interpreters, an overwhelming probability for many socially important issues, it has failed to perform the settlement function.

Id.

[15] *Id.* at 1371.

[16] Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 28 (1983).

[17] *Id.* at 4 (emphasis omitted).

[18] *Id.* at 28.

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prayer. Judicial decisions addressing these issues provoke popular resistance because they are topics about which Americans disagree and care passionately. Popular resistance signifies that Americans desire officials to enforce the Constitution in ways that reflect their understanding of constitutional ideals.[19] This desire cannot be ignored. A large and persistent gap between professional and popular understandings of the Constitution, about questions that matter to the public, can threaten the democratic legitimacy of constitutional law.

In this Essay we propose a model for understanding official efforts to enforce the Constitution under conditions of public controversy. We call this model "democratic constitutionalism." Democratic constitutionalism affirms the role of representative government and mobilized citizens in enforcing the Constitution at the same time as it affirms the role of courts in using professional legal reason to interpret the Constitution. Unlike popular constitutionalism, democratic constitutionalism does not seek to take the Constitution away from courts. Democratic constitutionalism recognizes the essential role of judicially enforced constitutional rights in the American polity. Unlike a juricentric focus on courts, democratic constitutionalism appreciates the essential role that public engagement plays in guiding and legitimating the institutions and practices of judicial review. Constitutional judgments based on professional legal reason can acquire democratic legitimacy only if professional reason is rooted in popular values and ideals. Democratic constitutionalism observes that adjudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning.

Our concern in this Essay is what happens when judicially elaborated constitutional law conflicts with constitutional meanings generated elsewhere within our constitutional system. Backlash is one possible result of this conflict. Viewed from the systemic perspective of the overarching American constitutional order, backlash seeks to maintain the democratic responsiveness of constitutional meaning. Viewed from the perspective of courts, backlash is a threat to the maintenance of legal authority and control. Democratic constitutionalism invites us to analyze backlash from these distinct but interdependent perspectives.

We begin from history. Americans have continuously struggled to shape the content of constitutional meaning. They did so with regard to

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[19] Which constitutional issues become controversial in this way is a matter of historical contingency and circumstance. Sometimes Court decisions intervene in "culture war[s]" about national ideals that are already fierce and ongoing. Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting). Sometimes Court decisions are used by organized groups to inspire political mobilization. Sometimes Court opinions create opposition by overturning established ways of life or by redistributing the goods of status and privilege. *See* J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997). And sometimes groups struggling for recognition and legitimacy turn to the Court to demand that they be acknowledged within constitutional doctrine. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

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questions of race in the 1960s and questions of gender in the 1970s, and we are now in the midst of such a struggle about questions of abortion, gay rights, and religion. Americans have used a myriad of different methods to shape constitutional understandings—sit-ins, protests, political mobilization, congressional use of section five powers, ordinary federal and state legislation, state court litigation, and so on. These struggles are premised on the belief that the Constitution should express a nomos that Americans can recognize as their own.

Through these struggles, Americans have consistently sought to embody their constitutional ideals within the domain of judicially enforceable constitutional law.[20] Constitutional ideals enforced by courts express national identity; they radiate gravitas and consequence. When entrenched through the professional logic of legal reason, otherwise contested understandings of the nation's ideals receive official endorsement and application by those who feel obligated to obey the law. They become guides for the juridical organization of society, wielding enormous symbolic power and shaping the social meaning of innumerable nonlegal transactions.

Americans have thus found it important that courts articulate a vision of the Constitution that reflects their own ideals. The legitimacy of the American constitutional system has come to depend on the many practices Americans have developed to ensure the democratic accountability of their constitutional law. No doubt constitutional lawmaking plays an important role in sustaining the democratic legitimacy of the American constitutional order, yet because the difficulty of lawmaking is so great and its successful achievement so infrequent, lawmaking alone cannot sustain the Constitution's democratic legitimacy. Article V amendments are so very rare that they cannot provide an effective avenue for connecting constitutional law to popular commitments.[21] And if twenty-seven constitutional amendments cannot ensure democratic accountability, neither can three or four discrete "constitutional moments."[22]

More persistent and nuanced forms of exchange are required to maintain the authority of those who enforce constitutional law in situations of aggravated dispute. Democratic constitutionalism examines the many practices that facilitate an ongoing and continuous communication between courts and the public.[23] These practices must be robust enough to prevent

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[20] *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 10–11 (2005).

[21] Because the constitutional amendment process is far easier in the states, there is a developing literature on the distinctive role of amendments in state constitutional culture. *See, e.g.*, Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999).

[22] *See generally* Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519 (1997).

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> Given the infrequency of constitutional lawmaking, the American constitutional order seems to rely on practices of participatory engagement to deliver forms of

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constitutional alienation and to maintain solidarity in a normatively heterogeneous community.

One important avenue for influencing constitutional decisionmaking is the appointment of Supreme Court Justices.[24] There can be public pressure to choose Justices who are likely to express popular commitments. Those opposed to the innovations of the Warren Court, for example, were attracted to President Reagan's pledge to halt the slide toward "the radical egalitarianism and expansive civil libertarianism of the Warren Court . . . ."[25] They threw their support behind Reagan because he pledged to nominate Justices who would adopt a "philosophy of judicial restraint."[26] It is well documented that the Reagan Justice Department self-consciously and successfully used judicial appointments to alter existing practices of constitutional interpretation.[27]

Presidential politics and Supreme Court nominations, however, are blunt and infrequent methods of affecting the content of constitutional law. A more democratically dispersed and continuous pathway is the practice of norm contestation, which seeks to transform the values that underlie judicial interpretations of the Constitution. The Reagan administration, for example, used litigation and presidential rhetoric to challenge and discredit the basic ideals that had generated Warren Court precedents.[28]

The current controversy over same-sex marriage illustrates many of the dynamics of norm contestation. Much of this controversy has transpired

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> democratic responsiveness that we often associate with formal practices of constitutional lawmaking . . . . Popular engagement in constitutional deliberation sustains the democratic authority of original acts of constitutional lawmaking and supplements constitutional lawmaking as a source of the Constitution's democratic authority.

Siegel, *supra* note 12, at 1342–43.

[24] Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); *see also* Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006) (arguing that judicial appointments have facilitated an emerging "National Surveillance State").

[25] Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986).

[26] Ronald Reagan, *Statement on Senate Confirmation of Sandra Day O'Connor as an Associate Justice of the Supreme Court of the United States*, 1981 PUB. PAPERS 819 (Sept. 21, 1981), *available at* http://www.presidency:ucsb.edu/ws/index.php?pid=44281. For a discussion, see Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

[27] *See generally* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003); Debra Cassens Moss, *The Policy and the Rhetoric of Ed Meese*, A.B.A. J., Feb. 1, 1987, at 64. For a discussion of the provisions of the 1980 and 1984 Republican Party platforms on judicial nominations and abortion, see *infra* note 221.

[28] *See* OFFICE OF LEGAL POL'Y, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3 (Feb. 19, 1988), *available at* http://islandia.law.yale.edu/acs/conference/meese-memos/guidelines.pdf; Edwin Meese, III, *A Return to the Founders*, NAT'L L.J., June 28, 2004, at 22; Meese, *supra* note 25, at 465–66.

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within the context of state court decisions applying state constitutional law.[29] Although these decisions are, as a matter of legal doctrine, irrelevant to the interpretation of the federal Constitution, state court opinions about state law are venues within which national values are continually contested and reshaped.[30] Understanding the recent controversy about same-sex marriage thus requires us to appreciate the many subtle ways that constitutional norms circulate among divergent actors in the American constitutional system, traveling along informal pathways that do not always conform to official accounts of constitutional lawmaking and interpretation.

Second-wave feminism offers a rich example of successful norm contestation. As late as 1970, it was thought that distinctions based upon sex were natural and proper, and the Equal Protection Clause was accordingly interpreted to have no particular application to sex discrimination.[31] But as women organized to contest traditional understandings of gender roles, common sense began to evolve. Discrimination based on sex came to seem unreasonable. Because judges interpret constitutional text to express their implicit understanding of the world, the Court began to read the Fourteenth Amendment to require elevated scrutiny for classifications based on sex.[32] The Court altered its understanding of the Equal Protection Clause even though the Equal Rights Amendment ("ERA"), which proposed to use the procedures of Article V to amend the Constitution to prohibit discrimination based on sex, was never ratified.[33]

Democratic constitutionalism suggests that backlash can be understood as one of many practices of norm contestation through which the

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[29] *See In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Ct. App. 2006); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Baker v. State, 744 A.2d 864 (Vt. 1999).

[30] *Cf.* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981) (arguing that jurisdictional overlap or redundancy in the American legal system persists because of its utility for litigants exercising the dispute resolution and norm articulation functions of adjudication); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993) (analyzing how state court decisions can be conceived as contributing to a common constitutional culture); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006) (observing that America's federal structure also serves as a path for the movement of international rights across borders).

National constitutional ideals are also influenced by other actors, like Congress in the enactment of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996), the various state referenda that have spoken to this question, and those who have proposed a federal constitutional amendment on the subject.

[31] *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961); Bradwell v. Illinois, 83 U.S. 130 (1872).

[32] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Craig v. Boren, 429 U.S. 190 (1976).

[33] The story is told in Siegel, *supra* note 12. These changes even affected the views of a single Justice during the course of his career. *See* Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871 (2006).

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public seeks to influence the content of constitutional law. It is a commonplace of history and political science that these practices can eventually be successful because, in the long run, our constitutional law is plainly susceptible to political influence.[34] Our "[c]onstitutional law is historically conditioned and politically shaped."[35] The democratic legitimacy of our constitutional law in part depends on its responsiveness to popular opinion.[36] The ongoing possibility of shaping constitutional meaning helps explain why Americans remain faithful to their Constitution even when their constitutional views do not prevail.[37] Democratic constitution-

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[34] *See* Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1278 (2004) ("The claim here simply is that the Court's dependence on the other branches to enforce decrees and to refrain from attacking the institution of judicial review necessarily acts as a moderating force[,]" ensuring that judicial review is never wholly independent of politics; positive analysis questions the extent to which judicial review imposes limits on majority rule and so can function either as democracy's "hope" or "threat") [hereinafter Friedman, *The Importance of Being Positive*]; Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309 (2002); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993). Originalism sometimes proffers a picture of constitutional law as entirely immune to political influence, but this picture is obviously untrue. *See* Post & Siegel, *supra* note 26.

[35] H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 6 (2002); *see* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 12 (2004); GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 45 (2003); KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 214 (2004); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 5 (2007); Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 AM. POL. SCI. REV. 483 (2003); Howard Gillman, *How Political Parties Can Use the Courts To Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512–13 (2002); Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425 (2005); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584–86 (2005); *see also* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 41–45 (1993).

[36] On the relationship between democratic legitimation and the necessity for individuals to retain the capacity to express themselves so as to "experience the state as in some way responsive to their own values and ideas," see Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 27 (2006); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1524 (1997).

[37] Siegel, *supra* note 12, at 1342–43:

> In the United States, popular confidence that the Constitution is the People's is sustained by understandings and practices that draw citizenry into engagement with questions of constitutional meaning and enable communication between engaged citizens and officials charged with enforcing the Constitution.
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> . . . .
>
> [T]he amenability of constitutional decisionmakers to influence enables public guidance of government officials, and promotes public attachment to government officials. At the same time, the prospect of influencing officials shapes the manner

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alism allows us to comprehend how the Constitution can continue to inspire loyalty and commitment despite persistent disagreement.[38]

Democratic legitimacy, however, comes at a price, because constitutional law defines its integrity precisely in terms of its *independence* from political influence. From the internal perspective of the law, the law/politics distinction is constitutive of legality. That is why courts proudly and insistently proclaim themselves to be "mere instruments of the law."[39] Their authority is to say "what the law is,"[40] and the law's content is to be determined by "essentially lawyers' work"[41] that transpires within a space of "principle and logic"[42] from which all political considerations are rigorously excluded.[43] A judge's duty is "to uphold the law and to follow the dictates of the Constitution," not to "serve a constituency."[44] "Judges . . . are not political actors . . . . They must strive to do what is legally right, all the more so when the result is not the one 'the home crowd' wants."[45]

The very practices that ensure the democratic accountability of the American constitutional system thus seem also to endanger the integrity of American constitutional law. It is no simple matter for courts to find ways of incorporating popular beliefs into the domain of legality while at the same time maintaining fidelity to the demands of professional legal reason.[46] One might imagine this process as a series of "conversations

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> in which citizens relate to government officials and to each other. Because citizens must enlist the voice and accommodate the views of others if they are to persuade officials charged with enforcing the Constitution, the quest to secure constitutional recognition may promote forms of community identification, and not merely exacerbate group division. In these and other ways, popular participation in constitutional deliberation, and the role expectations that sustain it, underwrite the legitimacy of government and the solidarity of a normatively heterogeneous community.

[38] *See* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 8–9 (2001) ("[A]n unsettled constitution helps build a community founded on consent by enticing losers into a continuing conversation.").

[39] Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 866 (1824).

[40] Cooper v. Aaron, 358 U.S. 1, 18 (1958) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[41] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 46 (1997).

[42] Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

[43] Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913, 920 (2004) (Scalia, J., sitting alone) ("To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do.").

[44] Republican Party of Minn. v. White, 536 U.S. 765, 799 (2002) (Stevens, J., dissenting).

[45] *Id.* at 806 (Ginsburg, J., dissenting).

[46]

> [T]he fascinating thing about the Supreme Court has been that it blends orthodox judicial functions with policy-making functions in a complex mixture . . . . But though the judges do enter this realm of policy-making, they enter with their robes on, and they can never (or at any rate seldom) take them off; they are both

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between the Court and the people and their representatives,"[47] but the process is rarely as civilized and orderly as a conversation. The Court must navigate a complex field of intense disagreement in order to produce an account of constitutional law that is democratically legitimate and faithful to norms of professional craft.

Exactly how the Court accomplishes this remarkable feat is insufficiently studied.[48] Traditional legal scholarship has sought to identify methods of constitutional interpretation that will justify the Court's decisions to those who might otherwise be disposed to oppose them. But while this approach may give comfort to academics, we doubt that it has much political effect. Serious constitutional controversies, like all political controversies, are not to be solved by some magical methodological trick. Disagreement will not disappear merely because the Court has chosen to frame its argument in one form or another.

Democratic constitutionalism invites us to pay close attention to how the Court actually responds to conditions of disagreement and contestation. The contemporary constitutional law of sex discrimination, for example, first appeared when the Court was able to perceive points of convergence in the nation's understanding of women as equal citizens that emerged within debates between those who opposed and those who embraced the ERA.[49] By consolidating these understandings into doctrine, the Court rapidly developed a Fourteenth Amendment gender discrimination jurisprudence that commanded astonishingly widespread support, despite the ERA's defeat.[50]

Although the American constitutional system is rife with conflict, there is nonetheless widespread interest in preserving the integrity of constitutional law. This is because citizens who seek to embody their own particular constitutional understandings in law have reason to preserve the authority of the rule of law, even as they endeavor to influence the content of judicial decisionmaking. Those who wish to change the content of constitutional law thus face a dilemma: they must sway courts to their own constitutional values and yet they must also preserve the authority of courts to speak for the Constitution in the name of an independent rule of law.[51]

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empowered and restricted by their "courtly" attributes.

McCloskey, *supra* note 20, at 12.

[47] Alexander M. Bickel, The Supreme Court and the Idea of Progress 91 (1970); *see also* Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577 (1993).

[48] Some of the implications of this discussion for norms of professional craft are discussed in Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 Cal. L. Rev. (forthcoming 2007).

[49] Siegel, *supra* note 12.

[50] *Id.*

[51] For a useful account of departmentalism that explicitly theorizes this question, see Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Con-*

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Democratic constitutionalism invites us to explore how this dilemma is actually mediated. In *Stenberg v. Carhart*,[52] for example, the Court struck down "a Nebraska law banning 'partial birth abortion'"[53] because the statute did not contain a "health exception"[54] allowing the procedure when necessary to preserve the health of a mother. Antiabortion advocates responded to *Stenberg* in a way that communicated complete disagreement with the Court and yet also conveyed respect for the Court's institutional authority to pronounce law. They pressed Congress to enact legislation resembling the Nebraska law the Court had invalidated and to support this legislation with congressional findings to the effect that facts indicate "that a partial-birth abortion is never necessary to preserve the health of a woman."[55] These dubious findings of fact[56] enabled congressional critics of *Stenberg* to dissent from the Court's precedent while at the same time preserving nominal allegiance to the rule of law.[57] Although Congress directly challenged the Court,[58] it stopped well short of outright defiance. In an opinion whose five-to-four majority comprised only Justices appointed by Presidents Reagan, Bush, and Bush—each elected on a platform pledged to appoint judges to protect the lives of the unborn and traditional family values[59]—the Court responded by deferring to the congressional legisla-

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stitutional Meaning, 33 POLITY 365 (2001).

[52] 530 U.S. 914 (2000).

[53] *Id.* at 921.

[54] *Id.* at 931.

[55] Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.S. § 1531 (LexisNexis 2006).

[56] *See, e.g.*, Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 287 (2d Cir. 2006); Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1175 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

[57] *See, e.g.*, 149 CONG. REC. H4922, H4924 (remarks of Rep. Sensenbrenner):

> In June 2000, the United States Supreme Court struck down Nebraska's partial-birth abortion ban . . . . The Court . . . held, on the basis of highly disputed factual findings of the district court, that the law was required to include an exception for partial-birth abortions deemed necessary to preserve the health of a woman.
>
> H.R. 760's new definition of partial-birth abortion addresses the Court's . . . objection to the Nebraska law by including extensive congressional findings based upon medical evidence received in a series of legislative hearings, that, contrary to the factual findings of the district court in *Stenberg*, a partial-birth abortion is never medically necessary to preserve a woman's health, poses serious risk to a woman's health, and in fact is below the requisite standard of medical care.
>
> H.R. 760's lack of a health exception is based upon Congress's factual determination that partial-birth abortion is a dangerous procedure that does not serve the health of any woman. The Supreme Court has a long history, particularly in the area of civil rights, of deferring to Congress's factual conclusions. In doing so, the Court has recognized that Congress's institutional structure makes it better suited than the judiciary to assess facts upon which it will make policy determinations.

[58] "The Act's sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*." Gonzales v. Carhart, 127 S. Ct. 1610, 1643 n.4 (Ginsburg, J., dissenting).

[59] See *infra* note 221 for the Republican Party platforms of 1980 and 1984. *See also* Republican Party Platform of 2004, *available at* http://www.gop.com/media/2004platform.

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tion (although repudiating Congress's dubious factfinding)[60] and by sounding for the first time notes of a new justification for restricting abortion: the protection of women.[61]

The American constitutional system has many such devices to allow those who disagree with the Court to express their disagreement in ways that appear to acknowledge the rule of law.[62] These devices are particularly important to study in the context of backlash and resistance.

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pdf; Republican Party Platform of 2000, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=25849 ("[T]he unborn child has a fundamental individual right to life which cannot be infringed . . . . Our purpose is to have legislative and judicial protection of that right against those who perform abortions . . . . We support the appointment of judges who respect traditional family values and the sanctity of innocent human life."); Republican Party Platform of 1988, *available at* http://patriotpost.us/histdocs/platforms/republican/rep.988.html ("We applaud President Reagan's fine record of judicial appointments, and we reaffirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.").

[60] *Carhart*, 127 S. Ct. at 1637–38.

[61] *Id.* at 1634–35. For a discussion of these new antiabortion themes, see *infra* text accompanying notes 258–260. *See also* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 ILL. L. REV. 939; Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, 2007 ILL. L. REV. 991.

[62] We have analyzed doctrinal techniques the Court employs to mediate this tension in our prior work. For example, we wrote:

> The ambiguity created by the *Katzenbach* approach had allowed the contradictory and often tension-filled relationship between political self-determination and the rule of law to persist without either perspective stifling the other. By eliminating this ambiguity and requiring Congress to speak only in the voice of a court, *Garrett* is attempting to disable an important mechanism by which the nation maintains democratic dialogue with its judicially enforced Constitution.

Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 42 (2003) (discussing the Court's deliberate deferral of the question whether civil rights statutes enacted under commerce and Section Five powers were proper exercises of Section Five authority).

> If nonjudicial actors should comply with law except in the most exceptional of circumstances, it is a matter of some significance how we draw the boundary between constitutional law and the Constitution. The broader the reach of constitutional law, the more nonjudicial actors are bound by the legal vision of courts, and the more diminished is the space for the political creation of the Constitution . . . . An important dimension of this boundary is the question of whether constitutional law subsists in the principles and reasons advanced in judicial opinions, or whether it is instead confined to the specific holdings of judicial judgments. There is at present intense controversy on this question.

Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1040 (2004) (discussing debate about the elements of a judicial decision that are binding as law on nonjudicial actors).

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II. BACKLASH AND CONSTITUTIONAL SCHOLARSHIP

The *Oxford English Dictionary* informs us that "backlash" initially referred to "the jarring reaction or striking back of a wheel or set of connected wheels in a piece of mechanism, when the motion is not uniform or when sudden pressure is applied."[63] The word very quickly became associated with undesirable and counterproductive effects, as when cotton would "'backlash' or wind and entangle itself round the rollers" of a cotton gin,[64] or a fishing reel would "backlash and snap off" a fish.[65] In the twentieth century the "fatal backlash"[66] of an angler's reel became such a common usage that advertisements boasted "Anti-back-lash"[67] reels that would cast with "Never a Backlash."[68] By the middle of the century the scope of the word had expanded so that a libel suit could "backlash"[69] and political figures could worry about "a backlash of opinion"[70] in the context of controversies involving labor strikes[71] and the Marshall Plan.[72]

The word "backlash" began to be routinely applied to the political arena during the civil rights movement, when the term developed a "wider usage"[73] that referred both to Southern resistance to civil rights—"the backlash of a mortally stricken system of inequality"[74]—and also to "the

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[63] 1 OXFORD ENGLISH DICTIONARY 867 (2d ed. 1989). For examples of this usage, see Krajewski v. Pharr, 105 F. 514, 521 (5th Cir. 1900); Lindbladh v. C.E. Sheppard Co., 7 F. Supp. 446, 453 (E.D.N.Y. 1933), *aff'd*, 72 F.2d 1015 (2d Cir. 1934); Woodworth Planing Mach. Cases (E.D. Pa. 1852), *reported in* W.L.J. Sept. 1852, at 550; *Holmes' Ship Steering Apparatus*, SCI. AM., May 9, 1857, at 273; E. M. ElBeheiry, *Contouring Error Control of Machine Tool Drives with Backlash Compensation*, 220 PROC. INST. MECHANICAL ENGINEERS PART I, J. SYSTEMS & CONTROL ENGINEERING 395, 395–410 (2006); *Laws Govern Steering*, N.Y. TIMES, Aug. 22, 1915, at X8. An 1846 *Glossary of Mechanical Terms* in the first volume of *Scientific American* defined backlash as "the hobbling movement of a wheel not fixed firm on its axis." SCI. AM., Apr. 9, 1846, at 1.

[64] *Miscellaneous Intelligence*, S. AGRICULTURIST & REGISTRAR RURAL AFF., June 1835, at 332.

[65] *A Chapter on Game Fish*, N.Y. TIMES, July 7, 1886, at 5.

[66] *Sea and River Fishing: Chicago Fly-Casting Club Open Tournament*, FOREST & STREAM, Aug. 25, 1900, at 149; *see Anglers' Club Casting Contest*, FOREST & STREAM, Dec. 8, 1906, at 908 ("Charles Stepath's practice had been so good that he was regarded as dangerous, but a backlash in his seventh cast ruined his chances.").

[67] FOREST & STREAM, Apr. 1919, at 181.

[68] FOREST & STREAM, June 30, 1930, at 446; *see* N.Y. TIMES, May 12, 1954, at 39 (advertising reel with "[a]nti-backlash patented brake").

[69] *Libel Suit Backlashes*, N.Y. TIMES, July 24, 1952, at 30. The meaning in this context appears to be approximately "boomerang." At about this time Englishman James Raisin published a "hard boiled novel" entitled *Backlash*. Marquis W. Childs, *Speed Demon*, N.Y. TIMES, Feb. 13, 1949, at BR30. An American movie about revenge set in the West, entitled *Backlash*, was directed by John Sturges. *The Screen*, N.Y. TIMES, Apr. 21, 1956, at 11. A play entitled *Backlash*, about "a revengeful man," was proposed for Broadway. Sam Zolotow, *Kern To Do Score for 'Annie Oakley,'* N.Y. TIMES, Sept. 14, 1945, at 20.

[70] Joseph A. Loftus, *President Confers on Coal Stalemate with Top Advisers*, N.Y. TIMES, May 7, 1946, at 1.

[71] *Id.*

[72] Arthur Krock, *In the Nation*, N.Y. TIMES, Feb. 25, 1949, at 22.

[73] Edward A. Stephenson, *Backlash*, 40 AM. SPEECH 156, 156–57 (1965).

[74] Harold C. Fleming, *A Southern View of the South*, N.Y. TIMES, Apr. 3, 1960, at SM23.

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white 'backlash' in the North," as evidenced particularly in George Wallace's strong showing in the presidential primaries of 1964.[75] Backlash came to designate counterforces unleashed by threatening changes in the status quo. Social scientists began to refer to what Seymour Martin Lipset and Earl Raab labeled "backlash politics," which "may be defined as the reaction by groups which are declining in a felt sense of importance, influence, and power, as a result of secular endemic change in the society."[76] The women's movement, for example, sparked a "backlash" among those who felt threatened by women's evolving role in the workplace and by their pursuit of an equal rights amendment.[77]

Legal scholars who now discuss the "Backlash Thesis" in connection with *Brown v. Board of Education*,[78] or who now lament "the disastrous backlash that occurred in the wake of *Roe v. Wade*,"[79] use the term "backlash" to focus on questions of judicial role and judicial authority. These contemporary accounts of resistance to *Brown* or to *Roe* often implicitly adopt the perspective of courts, worrying that judicial decisions have unleashed "the kind of backlash that undermines both the Court and its holdings."[80] Democratic constitutionalism resists this narrow judicial perspective on backlash.

Democratic constitutionalism conceptualizes the phenomenon of backlash not merely from the perspective of courts, but also from the point of view of the American constitutional order as a whole. It situates backlash within the dense network of communicative exchange that sustains the democratic legitimacy of the Constitution. Americans believe that constitutional meaning should be embodied in legally enforceable ways *and* that constitutional meaning should be potentially responsive to their own views. Citizens engaged in backlash press government officials to enforce what those citizens believe to be the correct understanding of the Consti-

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[75] Michael Rogin, *Wallace and the Middle Class: White Backlash in Wisconsin*, 30 PUB. OPINION Q., 98, 98–106 & n.12 (1966); *The Nation: Eyes on Goldwater*, N.Y. TIMES, May 10, 1964, at E2; *see also* John Herbers, *Critical Test for the Nonviolent Way*, N.Y. TIMES, July 5, 1964, at SM 5 (referring to the "white backlash stirred up by Gov. George Wallace of Alabama in three Northern Presidential primaries"); E. W. Kenworthy, *Civil Rights: Politics*, N.Y. TIMES, Apr. 26, 1964, at E6 ("The white back-lash is more amorphous, less organized, but plainly discernible from . . . the vote amassed by Gov. George C. Wallace of Alabama in the Wisconsin Presidential primary."); Fletcher Knebel, LOOK, Sept. 22, 1964, at 36 ("Transferred to the world of politics, the white backlash aptly describes the resentment of many white Americans to the speed of the great Negro revolution, which has been gathering momentum since the first rash of sit-ins in early 1960.").

[76] SEYMOUR MARTIN LIPSET & EARL RAAB, THE POLITICS OF UNREASON: RIGHT-WING EXTREMISM IN AMERICA, 1790–1970, at 29 (1970); *see also* Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357, 377 (2003).

[77] SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 230–31 (1991).

[78] *See, e.g.*, Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

[79] Neal Devins, *I Love You, Big Brother*, 87 CAL. L. REV. 1283, 1297 (1999).

[80] Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 636 (2003).

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tution. They press these demands so that officials will interpret the Constitution in ways that are democratically accountable.

Accounts of backlash now dominant in the legal academy do not analyze constitutional conflict from this perspective. They are instead juricentric, viewing backlash as an impediment to judicial efforts to endow constitutional ideals with legal form. In this part of our Essay, we examine the shortcomings of this approach. We analyze the views of three prominent scholars—Michael Klarman, William Eskridge, and Cass Sunstein—who do not typically write from a juricentric standpoint, yet who view backlash primarily in terms of the threat it poses to judicial authority and social solidarity.

Klarman is a historian whose work has significantly contributed to the recent interest in backlash.[81] Although Klarman does not purport to instruct courts how to decide cases, he suggests that adjudication has unique capacity to precipitate opposition, and he intimates that backlash is a sign that courts have failed properly to execute their judicial role. Eskridge and Sunstein have each developed a normative constitutional theory advising courts to decide cases in a manner that avoids certain forms of constitutional conflict. Eskridge warns against judicial review that raises the stakes of politics in ways that may drive persons out of the political process. Sunstein advances a comprehensive and influential theory—"minimalism"—that advises courts to decide cases so as to avoid contentious value choices.

Democratic constitutionalism suggests that some degree of conflict may be an inevitable consequence of vindicating constitutional rights, whether rights are secured by legislation or by adjudication. Constitutional decisions sometimes provoke resistance, especially if they threaten the status of groups that are accustomed to exercising authority and that believe resistance may avert threatened constitutional change. Where controversy is unavoidable, enforcement of a right may nevertheless be justified if the values at stake are sufficiently important.[82]

Democratic constitutionalism suggests, moreover, that controversy provoked by judicial decisionmaking might even have positive benefits for the American constitutional order. Citizens who oppose court decisions are politically active. They enact their commitment to the importance of constitutional meaning. They seek to persuade other Americans to embrace their constitutional understandings. These forms of engagement lead citizens to identify with the Constitution and with one another. Popular debate about the Constitution infuses the memories and principles of our constitutional tradition with meanings that command popular allegiance and

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[81] *See, e.g.*, Klarman, *supra* note 78; *see also* Friedman, *The Importance of Being Positive*, *supra* note 34, at 1292; Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 39 n.133 (2006). An important early influence was certainly GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

[82] *See, e.g.*, Post, *supra* note 12, at 110.

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that would never develop if a normatively estranged citizenry were passively to submit to judicial judgments.

Constitutional theorists of backlash who reason in a juricentric framework have generally been incurious about how commitment to our constitutional order is produced, and so they have tended to ignore or undervalue the forms of political engagement that create democratically legitimate constitutional meaning. A theorist who assumes that citizens identify with the Constitution and who never examines the understandings and practices that sustain this identification is likely to view backlash simply as a harm to be avoided. For these and other reasons, the model of democratic constitutionalism suggests that Klarman, Eskridge, and Sunstein may systematically overestimate the costs of backlash and underestimate its benefits.

A. Michael Klarman

Klarman has advanced an interpretation of *Brown* that holds that although *Brown* neither dismantled segregation nor inspired the civil rights movement, it nevertheless inspired "a massive backlash against racial change"[83] that was so vicious that it "in turn created a Northern backlash that contributed significantly to racial change."[84] Klarman believes that this effect is not unique to *Brown*, for "many landmark Court rulings seem to have generated backlashes rather than support."[85] "Supreme Court rulings *often* produce unpredictable backlash effects."[86] Klarman also believes, however, that the Court broadly reflects society, so that its chief tendency is "to constitutionalize consensus and suppress outliers."[87] The Court "rarely, if

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[83] Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 115 n.494 (1994).

[84] Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433, 433 n.4 (1994). Klarman offers "The *Brown* Backlash Thesis":

> *Brown* was indirectly responsible for the landmark civil rights legislation of the mid-1960s by catalyzing southern resistance to racial change. *Brown* propelled southern politics far to the right, as race was exalted over all other issues. In this political environment, men were elected to all levels of public office who were, both by personal predisposition and political calculation, prepared to use virtually any means of resisting racial change, including blatant defiance of federal authority and brutal suppression of civil rights demonstrations. The predictable consequence was a series of violent confrontations between white supremacist law enforcement officials and generally nonviolent demonstrators, which provoked an outcry from national television audiences, leading Congress and the President to intervene with landmark civil rights legislation.

Klarman, *supra* note 83, at 85.

[85] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 464 (2004).

[86] Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1182 (2001) (emphasis added).

[87] KLARMAN, *supra* note 85, at 453; *see also* Michael J. Klarman, *What's So Great*

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ever, plays" the "adventurous role" of supporting "the vanguard of a social reform movement."[88] "The justices reflect dominant public opinion too much for them to protect truly oppressed groups."[89]

Klarman must explain how such unadventurous courts can inspire such furious backlash. Klarman's explanation is significant:

> Court rulings such as *Brown* and *Goodridge* produce political backlashes for three principal reasons: They raise the salience of an issue, they incite anger over "outside interference" or "judicial activism," and they alter the order in which social change would otherwise have occurred.[90]

Of the three principal reasons he advances for backlash, Klarman identifies as "perhaps most important" that "court decisions produce backlashes by commanding that social reform take place in a different order than might otherwise have occurred."[91] The claim is comparative. Klarman seems to be suggesting that politically responsive institutions, like legislatures and executives, will ordinarily not choose to make the same backlash-producing decisions as courts.[92] He assumes that democratic politics

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About Constitutionalism?, 93 NW. U.L. REV. 145, 172 (1998).

[88] Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 445 (2005).

[89] KLARMAN, *supra* note 85, at 449.

[90] Klarman, *supra* note 88, at 473.

[91] *Id.* at 477; *see also* KLARMAN, *supra* note 85, at 465 ("Court decisions can disrupt the order in which social change might otherwise have occurred by dictating reform in areas where public opinion is not yet ready to accept it."). There are serious conceptual difficulties associated with the first two reasons articulated by Klarman. To say that the Court provokes backlash because it represents "outside interference" might be relevant in a case like *Brown*, in which Northern values were imposed upon Southern schools, but the idea cannot be generalized to decisions like *Roe* or *Lawrence*, which do not reflect the same degree of regional salience. To say that backlash is caused by antagonism to "judicial activism" is to imply that judicial decisions are inherently more likely to create backlash than legislative decisions. Klarman makes no serious effort to argue that there would be less backlash if Congress, rather than courts, were to have ended school desegregation or abolished the crime of sodomy, and the common sense of the matter is surely to the contrary. The same might be said about Klarman's point concerning salience. It seems true enough to assert, as Klarman does, that "Court rulings such as *Lawrence* and *Goodridge* forced people who previously had not paid much attention to gay-rights issues to notice what has been happening and to form an opinion on it." Klarman, *supra* note 88, at 474. But surely federal legislation recognizing same-sex marriage would also force persons to take notice of the issue, and it is not clear that a judicial opinion would generate more salience than would congressional legislation.

[92] Thus Klarman explains that in the Jim Crow South "white southerners were more adamant about preserving grade-school segregation" than they were about resisting integration "in public transportation, police-department employment, athletic competitions, and voter registration." Klarman, *supra* note 88, at 477. "Blacks, conversely, were often more interested in voting, ending police brutality, securing decent jobs, and receiving a fair share of public education funds than in desegregating grade schools." *Id.* There was therefore "space for political negotiation" that *Brown* made "untenable by forcing to the forefront an issue—racial segregation of public schools—on which most white southerners were unwilling to compromise. *Brown* thus virtually ensured a backlash among southern whites."

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ordinarily transpires in a space of "negotiation"[93] that naturally functions to avoid decisions that provoke massive resistance. Thus, it might be hypothesized that democratically responsible institutions, like Congress and state legislatures, would not have desegregated schools until the political costs of doing so were acceptable, which is to say until the possibility of creating backlash had diminished. Courts, by contrast, "often"[94] produce backlash because they respond to "the agendas set by litigants" rather than to "political negotiation."[95]

The normative implications for adjudication of Klarman's backlash thesis are deeply ambiguous. In the context of *Brown*, we might take Klarman's description of backlash to imply that school desegregation, whether ordered by a court or by a legislature, ought to have been postponed indefinitely, or at least until desegregation could have been accomplished without backlash.[96] Or we might take his positive description to suggest that because desegregation could have been peaceably accomplished through politics and legislation, the Court should not have acted to muddy the waters and provoke massive resistance.

On the former interpretation, Klarman's thesis would amount to a general caution against the enforcement of constitutional rights whenever such enforcement would produce serious controversy. Backlash avoidance on this account would entrench the existing distribution of rights. We shall not address this interpretation, except to observe that we find its excessive quietism incompatible with a commitment to enforce constitutional rights. We instead focus on the second possible interpretation of Klarman, who could be read as arguing that courts should only cautiously enforce constitutional rights because their efforts will interfere with the realization of constitutional values that might be achieved without conflict through legislation.

The idea that constitutional values can be more harmoniously realized through legislation than through adjudication is one that underlies much contemporary fear of backlash. It seems to rest on a seriously romanticized view of democratic politics. We know, for example, that "'backlash' politics by declining groups" is "a recurrent phenomenon in American politics."[97] Legislation that intervenes in entrenched status relations

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Id. at 477–78.

[93] *See supra* note 92.

[94] Klarman, *supra* note 86, at 1182.

[95] KLARMAN, *supra* note 85, at 465.

[96] We appreciate that Klarman himself would probably not draw this normative implication from his own history, because he believes that *Brown* ultimately produced such violent Southern resistance that it provoked a Northern backlash committing the nation to the path of desegregation. From Klarman's perspective, therefore, *Brown* ultimately (if indirectly) produced a socially desirable outcome. But of course this result could not be known ex ante, so that at the time of *Brown* it could not be foreseen that predictable Southern resistance would produce a contingent Northern backlash. Ex ante, therefore, the normative implications of Klarman's analysis are not obvious.

[97] *See* Seymour Martin Lipset, *Beyond the Backlash*, 23 ENCOUNTER, Nov. 1964, at 11.

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often generates countermobilization[98] and hence serious controversy.[99] The very word "backlash" acquired political salience in the context of antagonism generated by the Civil Rights Act of 1964.[100] State ratifications of the ERA also generated a powerful backlash,[101] and legislation liberalizing access to abortion sparked "significant countermobilization" in the period immediately before *Roe* was decided.[102]

Klarman might concede that legislation causes backlash and nevertheless argue that rights should be enforced by the popular branches of government, rather than by courts, because adjudication is ineffectual and precipitates costly constitutional controversy without commensurate benefit.[103] At moments Klarman seems to imply that adjudication cannot alter social practices and beliefs.[104] The implication echoes the thesis advanced by Gerald Rosenberg in 1991 that "courts can seldom produce significant social reform," although they can "mobilize opponents."[105]

The premise that adjudication is relatively unable to affect the content of social ideals and behavior is shared by some on the left.[106] But this premise contradicts much recent "sociolegal" scholarship, which "sees legal discourse, categories, and procedures as a framework through which individuals in society come to apprehend reality."[107] In Austin Sarat's influential

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[98] *See, e.g.*, Clarence Y.H. Lo, *Countermovements and Conservative Movements in the Contemporary U.S.*, 8 ANN. REV. SOC. 107 (1982); David S. Meyer & Suzanne Staggenbord, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628 (1996).

[99] *See generally* Scott Lemieux, *Constitutional Politics and the Political Impact of Feminist Litigation: Legal Challenges to Abortion Law in Comparative Perspective*, at 227–28 (2004) (unpublished Ph.D. Dissertation, University of Washington).

[100] Stephenson, *supra* note 73, at 156.

[101] *See* FALUDI, *supra* note 77; Siegel, *supra* note 12.

[102] *See* Lemieux, *supra* note 99 at 227–28; *infra* note 192 and accompanying text.

[103] We should note that on this interpretation Klarman's account would repudiate the fundamental premise of much post-New Deal liberal legal scholarship that the fundamental function of constitutional law is to repair defects in the political process. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). It is ordinarily thought that constitutional law should intervene if political outcomes are unfair because of prejudice against "discrete and insular minorities." On this interpretation of Klarman, by contrast, courts should not seek to correct the dynamics of the political process. The role of courts would instead seem to be that of suppressing outliers and consolidating conclusions reached through the political process.

[104] The legitimacy of the Court, according to Klarman, "flows less from the soundness of its legal reasoning than from its ability to predict future trends in public opinion." Klarman, *supra* note 88, at 488.

[105] ROSENBERG, *supra* note 81, at 341.

[106] *See, e.g.*, STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 218–19 (Univ. Mich. Press, 2d ed. 2004) (1974); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 813–15 (2006) ("To rely on litigation rather than political mobilization, as difficult as it may be, misunderstands both the limits of courts and the lessons of history. It substitutes symbols for substance and clouds our vision with a naïve and romantic belief in the triumph of rights over politics.").

[107] Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1140 (2002) (essay review).

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formulation, "law shapes society from the inside out by providing the principal categories in terms of which social life is made to seem largely natural, normal, cohesive and coherent."[108] This "constitutive vision of law"[109] suggests that adjudicative constitutional law can generate *both* positive commitment *and* negative antagonism.[110]

Democratic constitutionalism rests on the commonsense idea that judge-made constitutional law and democratic politics affect each other. There are good reasons why Americans have struggled for generations to embody their view of the Constitution within judicially enforced constitutional law. Democratic constitutionalism affirms that these struggles have not been for nothing. There is no theoretically cogent reason to regard adjudication as a social practice that is uniquely incapable of affecting social values. Constitutional meaning, in court-made constitutional law and in many other forms, influences and is influenced by general social beliefs and commitments.

The practical consequences of legal decisions enforcing constitutional values can be seen in Bill Eskridge's detailed examination of gay rights. Eskridge concludes that "public attitudes can be influenced by changes in the law."[111] Eskridge praises the "relative success"[112] of the Vermont Supreme Court's decision in *Baker v. State*,[113] which both recognized the rights of same-sex couples and required the state to provide same-sex couples civil unions rather than equal access to the institution of marriage. Eskridge recounts how the *Baker* decision enabled "the values of tolerance and mutual respect" to find expression in an otherwise stalemated political process.[114]

Were adjudication irrelevant to the formation of constitutional ideals, it would make sense for courts systematically to avoid the destructive effects of backlash. But because court decisions do affect constitutional values, backlash may be a necessary consequence of vindicating constitutional rights.

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[108] Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129, 134 (2000) (book review).

[109] Berman, *supra* note 107, at 1140.

[110] Of course it might be the case that in any particular decision, as for example in *Brown*, adjudication failed to produce these positive effects.

[111] William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 877 (2001) [hereinafter Eskridge, *Equality Practice*]. "While a court's options are limited by social norms, judges also can influence the evolution of those norms." William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Anti-Gay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1405 (2000) [hereinafter Eskridge, *No Promo Homo*].

[112] William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1326 (2005).

[113] 744 A.2d 864 (Vt. 1999).

[114] Eskridge, *Equality Practice*, *supra* note 111, at 881. For a detailed empirical study of that process, see WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 55–82 (2002); Eskridge, *No Promo Homo*, *supra* note 111, at 1405.

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B. William Eskridge

Reasoning about backlash in his role as scholar and as advocate,[115] Eskridge offers a larger "pluralism-facilitating theory" of the role of courts in the American constitutional system.[116] He draws on the work of John Hart Ely to develop a normative framework that would authorize courts to act to preserve healthy democratic politics in a heterogeneous nation riven by "the emergence, conflict, and triumph of normative identity-based social movements."[117]

Eskridge advises judges to issue judgments on the understanding that "pluralist democracy is dynamic and fragile."[118] A healthy pluralist democracy "depends on the commitment of all politically relevant groups to its processes. Political losers may exit the system unless they think their interests will be accommodated or their losses from exiting will exceed their gains."[119] But a pluralist democracy also "needs emerging groups to commit to its processes just as much as it needs established groups to stick to those processes."[120] These two prerequisites imply that courts must

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[115] Eskridge generally conceptualizes backlash as a possible effect of a judicial decision that must be considered like any other relevant effect. Sometimes judges should avoid backlash, while at other times they may need to issue rulings that provoke backlash. For example, Eskridge argues that "equality practice that moves too swiftly, as same-sex marriage apparently did in Hawaii and Alaska, may yield a counterproductive backlash." Eskridge, *Equality Practice*, *supra* note 111, at 878. But he also believes that a court decision "that moves too slowly risks entrenching a grating inequality." *Id.* Judges know that if "they protect [a] minority group too little, they risk their own personal and institutional legitimacy if the minority becomes an accepted part of public culture. The Court did its legitimacy no good in *Dred Scott*, *Bradwell*, and *Hardwick*." Eskridge, *No Promo Homo*, *supra* note 111, at 1400. Eskridge thus affirms that judges establishing contested constitutional meanings may properly incur backlash. *See, e.g.*, ESKRIDGE, *supra* note 114, at 80; Eskridge, *No Promo Homo*, *supra* note 111, at 1394 n.281 (conceding that *Baker* produced "a popular backlash").

[116] Eskridge, *supra* note 112, at 1301.

[117] *Id.* at 1296. Eskridge's ambition to construct judicial norms for the preservation of democratic politics could not be more antithetical to Klarman's essential premises. Compare *supra* note 103.

[118] Eskridge, *supra* note 112, at 1294.

[119] *Id.* Eskridge observes:

> Groups will disengage when they believe that participation in the system is pointless due to their permanent defeat on issues important to them or their perception that the process is stacked against them, or when the political process imposes fundamental burdens on them or threatens their group identity or cohesion.

Id. at 1293.

[120] *Id.* at 1294. Eskridge writes:

> [T]here are positive reasons to encourage all groups—new and old—to work within the democratic system. Any government depends on the cooperation of citizens in the ordinary affairs of governance. Pluralist democracy potentially engages most citizens in the affairs of governance, and that engagement encourages cooperation across the board. If a lot of Americans drop out of or never drop into our system, it will lose much of that democracy bonus.

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avoid decisions that cause established groups to exit from politics, and they must also avoid decisions upholding oppressive legislation that prevents emerging groups from becoming politically engaged.

Eskridge thus argues that courts should avoid rulings like *Roe v. Wade*[121] and *Bowers v. Hardwick*.[122] Eskridge condemns *Roe* because it recognized a right that caused traditional Americans who oppose abortion to feel "as though they had been disowned by this country":[123]

> *Roe* essentially declared a winner in one of the most difficult and divisive public law debates of American history. Don't bother going to state legislatures to reverse that decision. Don't bother trying to persuade your neighbors (unless your neighbor is Justice Powell). *Roe* was a threat to our democracy because it raised the stakes of an issue where primordial loyalties ran deep. Not only did *Roe* energize the pro-life movement and accelerate the infusion of sectarian religion into American politics, but it also radicalized many traditionalists.[124]

Eskridge condemns *Hardwick* because it failed to strike down a Georgia consensual sodomy law that symbolically stood for the proposition that "people who engage in 'homosexual sodomy' can be considered an outlaw class of citizens."[125] *Hardwick* "generated a firestorm of protest" because "it seemed like a declaration of war by the state against 'homosexuals.'"[126] It "was a judicial blunder in the same way as *Roe*."[127] If *Roe* forced traditionalists to exit from American politics, *Hardwick* prevented gays from entering it.

Eskridge's "pluralism reinforcing" theory is thus about when courts should and should not provoke backlash. His theory turns on an interpretation of the health of the American constitutional system. Eskridge asserts that decisions that drive groups out of politics, whether by upholding oppressive legislation or by constitutionalizing contentious issues, harm pluralist democracy. To assess this assertion, one would need to know precisely what it means to estrange groups from politics. Eskridge's analysis of this crucial point seems to be conceptualized almost entirely within a

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> Relatedly, the engagement of diverse groups enriches democratic discourse. When advocates must articulate and defend their proposals to a variety of perspectives and not just to their core supporters, they are more likely to moderate and universalize those proposals.

Id. at 1294–95.

[121] 410 U.S. 113 (1973).

[122] 478 U.S. 186 (1986).

[123] Eskridge, *supra* note 112, at 1312.

[124] *Id.*

[125] *Id.* at 1314.

[126] *Id.*

[127] *Id.*

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juricentric perspective that he otherwise rejects in his scholarship and advocacy.

It would surely harm democracy to prohibit groups from participating in politics; that is why political speech and association are constitutionally protected. But neither *Roe* nor *Hardwick* prevented political participation. To the contrary, each decision provoked opponents to enter the political arena. *Roe* inspired a political campaign to prohibit abortion that changed the shape of both constitutional politics and constitutional law.[128] Advocates of gay rights were likewise active and successful in the years after *Hardwick*, as Eskridge well appreciates.[129] By any ordinary descriptive measure, *Roe* and *Hardwick* seem to have increased political engagement rather than diminished it.

How, then, might Eskridge claim that these decisions forced groups out of politics? Eskridge reasons from a conventional complaint about *Roe*, which condemns the decision as the Court's creation of "a fundamental right at the expense of democratic deliberation."[130] To rely on this characterization is to mistake a political critique of the decision for a description of its actual impact. The force of the claim that *Roe* shut down politics draws on juricentric conventions that are so powerful that they obscure the obvious fact that abortion has become one of the nation's most explosive political questions. The resulting confusion is visible in Scalia's *Casey* dissent, which scores *Roe* for having "fanned into life an issue that has inflamed our national politics" and yet which simultaneously condemns *Roe* for "foreclosing all democratic outlet for the deep passions this issue arouses."[131]

Roe did restrict the ambit of potential legislation, limiting majoritarian decisionmaking in the way courts do whenever they vindicate any

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[128] *See infra* Part III. It is true, as Eskridge has observed, that "[s]ome pro-life Americans . . . abandoned state processes and mounted campaigns of private economic warfare or even violence against abortion providers." Eskridge, *supra* note 112, at 1300. But this can no more be regarded as a general exodus from politics than can the violence that accompanied resistance to *Brown*. *Cf.* Siegel, *supra* note 12, at 1356 (observing the use of "procedurally nonconforming, socially disruptive, and unlawful conduct that draws attention to [a] movement's claims").

[129] *See, e.g.*, Eskridge, *No Promo Homo*, *supra* note 111. In the immediate aftermath of *Bowers*, gay advocates remained in politics, adding direct action protest, most notably the march on Washington, to ongoing legislative efforts. *See* Karlyn Barker, *Rights March Drawing Gays to Washington: Rally on the Mall To Follow Week of Lobbying and Protests*, WASH. POST, Oct. 9, 1987, at C1; Peter Freiberg, *The March on Washington: Hundreds of Thousands Take the Gay Cause to the Nation's Capital*, ADVOC., Nov. 10, 1987, *reprinted in* WITNESS TO REVOLUTION: THE ADVOCATE REPORTS ON GAY AND LESBIAN POLITICS, 1967–1999, at 205 (Chris Bull ed., 1999); *see also* Peter Freiberg et al., *The New Gay Activism: Adding Bite to the Movement*, ADVOC., June 7, 1988, *reprinted in* WITNESS TO REVOLUTION, *supra*, at 226 (cataloguing emergence of high-profile, direct-action protest by gays and lesbians to supplement traditional lobbying efforts).

[130] Jason A. Adkins, Note, *Meet Me at the (*West Coast*) Hotel: The* Lochner *Era and the Demise of* Roe v. Wade, 90 MINN. L. REV. 500, 502 (2005).

[131] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 995, 1002 (1992) (Scalia, J., dissenting).

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constitutional right. Yet *Roe* surely did not foreclose all democratic outlet for the deep passions aroused by the question of abortion. Scalia's claims about *Roe* make sense only when they are seen as efforts to mobilize critics of the decision.[132] As Scalia well knows, the practical and expressive power of judicial decisions does not shut down politics; it can instead inspire Americans to struggle passionately to shape the exercise of judicial review.[133] Judicial review limits, channels, and amplifies democratic politics.[134] Democratic politics, in turn, shapes the institution of judicial review.[135] The plain historical fact of the matter is well described by Barry Friedman: "[A]fter all is said and done, if the fight is fought and pursued with focus, and attracts enough adherents, the law changes. *Roe* becomes *Casey*. *Bowers* becomes *Romer* and then *Lawrence*."[136]

Democratic constitutionalism invites us carefully to analyze how groups actually engage in politics over constitutional questions of this kind. As the example of federal late-term abortion legislation suggests,[137] there are numerous ways for those who dissent from a decision of the Court to signal respect for the rule of law while nonetheless registering vigorous disagreement with the Court's judgment. Such disagreement is frequently expressed in legislation, which offers countless opportunities for judicial critics to interpose practical obstacles to the realization of constitutional norms advanced by a challenged decision.

Roe has accordingly been tested by innumerable statutes that probe its reach and attack its normative underpinnings.[138] Only four years after *Roe*, the Court "explicitly acknowledged the State's strong interest in protecting the potential life of the fetus" and ruled that it was not unconstitutional

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[132] Efforts of this nature recur in Justice Scalia's dissents. *See* Post & Siegel, *supra* note 26, at 566–68.

[133] Mobilization in support or criticism of a decision is a key form of democratic engagement, even though these forms of collective deliberation do not assume the form of lawmaking, or even find expression through an institution designed to adduce democratic will:

> Collective deliberation constructs many of the practical questions that institutions of preference aggregation address; it infuses those practical questions with the kinds of symbolic significance that cause members of a polity to care about their disposition. It helps to forge the kinds of identity and attachment that would cause a population to participate in majoritarian processes.

Siegel, *supra* note 12, at 1341.

[134] *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1035–37 (2004).

[135] *See* Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 505 (2004).

[136] Friedman, *The Importance of Being Positive*, *supra* note 34, at 1293.

[137] *See supra* text accompanying notes 52–57.

[138] *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 442–49 (1983); Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

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for state medicaid programs to exclude abortions even if the programs fund childbirths.[139] *Roe* has inspired its opponents to "run the long race of politics, keeping the issue salient for long enough to push it to a place on the agenda where it influences not only the appointments process, but also public thought, so that people take the bench prepared to see change happen."[140] These struggles have produced *Casey* and now *Carhart*.[141]

In contrast to *Roe*, *Hardwick* refused to articulate a constitutional right. Those seeking to challenge *Hardwick* could not mobilize against a particular opinion as *Roe*'s critics had done. Supporters of gay rights nonetheless had to alter the common sense of sexual orientation, so that discrimination against gays, paradigmatically displayed in criminal sodomy statutes, would no longer seem reasonable or acceptable. The gay rights community successfully met this challenge.[142] Whereas in 1987, 55% of Americans thought that homosexuality between consenting adults should not be legal and 33% thought that it should be legal, by 2001 these numbers had virtually switched: 54% of Americans thought that homosexual relations should be legal and only 42% thought that they should be illegal.[143] The common sense of sexual orientation had been importantly changed,[144] a fact

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[139] Maher v. Roe, 432 U.S. 464, 478 (1977); *see* Rust v. Sullivan, 500 U.S. 173 (1991); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2144–53 (2002).

[140] Friedman, *supra* note 34, at 1294.

[141] *See supra* text accompanying notes 56–61; *infra* note 243. We resist the idea that the Court simply decides cases in ways that reflect "popular opinion" or "popular consensus." The meaning of cases is often too complex to be captured by opinion polls; courts construct as well as reflect popular opinion; politics can be too contested to be captured by any notion of consensus to which adjudication can correspond.

[142] *See* Adam Nagourney, *Gay Politics and Anti-Politics: A Movement Divided Between Push and Shove*, N.Y. TIMES, Oct. 25, 1998, at D3; Ben White, *Gay and Lesbian Groups Plan To Step Up Voter Turnout Campaigns*, WASH. POST, Sept. 22, 2000 at A16.

[143] Public Agenda, Gay Rights: Bills and Proposals, http://www.publicagenda.org/issues/major_proposals_detail.cfm?issue_type=gay_rights&list=1 (last visited May 12, 2007).

[144] As Michael Klarman describes this history:

> *Lawrence*, like *Brown*, came in the wake of extraordinary changes in attitudes and practices regarding homosexuality. In 1986, Chief Justice Warren Burger in his concurring opinion in *Bowers* recited Blackstone's condemnation of homosexuality as an offense of "deeper malignity" than rape. In the seventeen years between *Bowers* and *Lawrence*, public opinion went from *opposing* the legalization of homosexual relations by fifty-five percent to thirty-three percent to *supporting* legalization by sixty percent to thirty-five percent. Many states, either through legislative or judicial action, nullified laws criminalizing same-sex sodomy. Several states and scores of cities added protection for sexual orientation to their antidiscrimination laws. Nearly two hundred Fortune 500 companies extended job-related benefits to gay partners, as did several states and scores of municipalities for their public employees. The Hawaii Supreme Court invalidated a ban on same-sex marriage, and the Vermont Supreme Court ruled that same-sex couples must at least be permitted to form "civil unions." In the 1990s, hundreds of openly gay men and women were elected to public offices, and gays and lesbians entered mainstream culture on television, film, and music; in 1998, an openly gay man won a Pulitzer Prize for the first time. In 2003 the Episcopalian Church ordained its first openly gay bishop.

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that no doubt underlay the Court's eventual decision in 2003 to overrule *Hardwick*.

The model of democratic constitutionalism allows us to appreciate that the constitutional politics inspired by both *Roe* and *Hardwick* are the bread and butter of the American constitutional system. *Roe* and *Hardwick* can be condemned (or praised) as a matter of substantive constitutional law, but we are not persuaded that there is an independent and neutral criterion of healthy political pluralism on which it is possible to condemn them. Eskridge's normative theory of judicial review would seem to derive instead from a strong substantive vision of the kind of tolerance that ought to sustain what John Hart Ely once called the "pluralist's bazaar."[145] It can be said of Eskridge's theory, as it was convincingly said of Ely, that "[t]he representation-reinforcing enterprise is shot full of value choices," including the "(covert) choices about who is justifiably the object of prejudice and whether legislative goals are sufficiently important to warrant the burdens they impose on some members of society."[146]

C. Cass Sunstein

In contrast to both Klarman and Eskridge, Sunstein does not focus a great deal on the phenomenon of backlash. He knows, of course, that court decisions "may produce an intense social backlash, in the process delegitimating both the Court and the cause it favors."[147] But this possibility is only one of many reasons that Sunstein advances for the jurisprudence that he has so forcefully articulated during the last decade, which he calls "minimalism."[148] The "distinguishing feature" of minimalism is support for "narrow, incremental decisions, not broad rulings that the nation may later have cause to regret."[149] Minimalist decisions are "*narrow rather than wide*," because "[t]hey decide the case at hand; they do not decide other cases too unless they are forced to do so . . . ."[150] And they are "shallow rather than deep," because they "try to avoid issues of basic principle and in-

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Both *Brown* and *Lawrence* reflected, at least as much as they produced, changes in social attitudes and practices.

Klarman, *supra* note 88, at 443–44.

[145] ELY, *supra* note 103, at 152.

[146] Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 140 (1981).

[147] Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 33 (1996).

[148] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 54 (1999).

[149] CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA xiii (2005).

[150] Sunstein, *supra* note 147, at 15.

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stead attempt to reach incompletely theorized agreements."[151] Sunstein regards *Roe* as "a blunder insofar as it resolved so much so quickly."[152]

Minimalism has for Sunstein evolved into a full-fledged and free-standing account of the appropriate role of a judge in the American constitutional system.[153] Sunstein's embrace of minimalism epitomizes progressives' diminishing commitment to adjudication in American constitutionalism.[154] Although we have in other contexts been criticized for desiring "to take the Constitution away from the courts,"[155] democratic constitutionalism supports a far more robust account of constitutional adjudication than does Sunstein's minimalism.

Sunstein offers five reasons to support minimalism.[156] Minimalism reduces decision costs for courts trying to decide cases.[157] It reduces the error costs associated with mistaken judgments.[158] It reduces the difficulties associated with "bounded rationality, including lack of knowledge of unanticipated adverse effects."[159] It "helps a society to deal with reasonable pluralism."[160] And, "perhaps most important[ly]," minimalism "allows the democratic process a great deal of room in which to adapt to coming de-

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[151] *Id.* at 20.

[152] *Id.* at 31.

[153] In his earlier writings, Sunstein had stressed that "it would be foolish to suggest . . . that minimalism is generally a good strategy . . . . Everything depends on contextual considerations." SUNSTEIN, *supra* note 148, at 50; *see* Sunstein, *supra* note 147, at 28, 30 ("Minimalism is appropriate only in certain contexts. It is hardly a sensible approach for all officials, or even all judges, all of the time . . . . The choice between minimalism and its alternatives depends on an array of pragmatic considerations and on judgments about the capacities of various institutional actors."). In his most recent book, however, Sunstein categorizes minimalism as one of "the four approaches that have long dominated constitutional debates." SUNSTEIN, *supra* note 149, at xi. The other three are fundamentalism, which holds that "the Constitution must be interpreted according to the 'original understanding;'" perfectionism, which holds that "the Constitution" should be interpreted to make it "the best that it can be;" and majoritarianism, which holds that "courts should defer to the judgments of elected representatives." *Id.* at xii–xiii. Because Sunstein asserts that there are "but few supporters on the current federal courts" for perfectionism or majoritarianism, he believes that "modern constitutional disputes . . . are best understood in terms of the division between fundamentalism and minimalism." *Id.* at xi, 30.

[154] Of course this is not true of all progressives. *See, e.g.*, David J. Barron, *What's Wrong with Conservative Constitutionalism? Two Styles of Progressive Constitutional Critique and the Choice they Present*, 1 HARV. L. & POL'Y REV. (Sept. 18, 2006), http://www.hlpronline.com/2006/07/barron_01.html; William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355 (2004).

[155] Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1564 (2005); *see* Barron, *supra* note 154; Robert Post & Reva Siegel, *Democratic Constitutionalism: A Reply to Professor Barron*, 1 HARV. L. & POL'Y REV. (Sept. 18, 2006), http://www.hlpronline.com/2006/08/post_siegel_01.html.

[156] SUNSTEIN, *supra* note 148, at 53–54.

[157] *Id.* at 47.

[158] *Id.* at 49.

[159] *Id.* at 53. It is under this rubric that Sunstein explicitly places the question of backlash, which is the possibility "that a judicial ruling could face intense political opposition in a way that would be counterproductive to the very moral and political claims that it is being asked to endorse." *Id.* at 54; *see* SUNSTEIN, *supra* note 149, at 100–01.

[160] SUNSTEIN, *supra* note 148, at 51.

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velopments, to produce mutually advantageous compromises, and to add new information and perspectives to legal issues."[161]

The first three of these reasons advance pragmatic considerations that are more or less cogent depending on the circumstances of particular cases. They involve trade-offs about which little can be said in the abstract. But the final two reasons articulate more systemic justifications for minimalism. We have already discussed the last of these justifications, democracy, in our consideration of Eskridge. Sunstein believes that minimalism promotes "democratic accountability and democratic deliberation" and in this way "is self-consciously connected with the liberal principle of legitimacy."[162] But Sunstein, like Eskridge, tends to adopt the juricentric view that judicial decisionmaking is incompatible with democratic engagement. He writes that for a court to protect a constitutional right is to "rule some practices off-limits to politics."[163] Sunstein, no less than Eskridge, is in the grip of an image of constitutional law as "*democracy-foreclosing*."[164]

Democratic constitutionalism refuses to accept this image, and it thus provides a more nuanced appreciation of the actual operation of our constitutional system. *No* court, including the Supreme Court, has the capacity to rule a controversial issue "off-limits to politics."[165] As Jon Stewart ironically reports in his discussion of *Roe*, "[t]he Court rules that the right to privacy protects a woman's decision to have an abortion and the fetus is not a person with constitutional rights, thus ending all debate on this once-controversial issue."[166] Of course constitutionalization of a right alters the nature of democratic politics. It focuses debate on judicial opinions; it eliminates particular legislative outcomes; it injects constitutional principles into debate; it may, to use the language of both Eskridge and Friedman, "raise the stakes of politics."[167]

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[161] *Id.* at 53.

[162] Sunstein, *supra* note 147, at 7–8.

[163] SUNSTEIN, *supra* note 148, at 26.

[164] *Id.* at 26. "The advantage of minimalism over perfectionism should now be clear. Minimalists respect democratic prerogatives." SUNSTEIN, *supra* note 149, at 103; *cf. id.* at 104: "*Roe* . . . has long dominated debates over the future direction of the Supreme Court. In every recent presidential election, the question, *What will be the future of the Supreme Court?* is often taken, by liberals and conservatives alike, to be code for, *What will happen to the right to choose abortion?*"

[165] Waldron, *supra* note 3, at 1369.

[166] JON STEWART ET AL., AMERICA (THE BOOK): A CITIZEN'S GUIDE TO DEMOCRACY INACTION 90 (2004); *cf.* John F. Basiak, Jr., *Dangerous Predictions: Referencing "Emerging" History and Tradition in Substantive Due Process Jurisprudence in an Era of Blue State Federalism*, 15 WIDENER L.J. 135, 155 (2005) ("As a result of Roe, the United States Supreme Court removed the issue of abortion from the public debate and placed it into the nearly untouchable sphere of fundamental rights guaranteed by the Fourteenth Amendment.").

[167] Eskridge, *supra* note 112, at 1310 ("Judicial review can raise the stakes of politics by taking issues away from the political system prematurely; by frustrating a group's ability to organize, bond, and express the values of its members; or by demonizing an outgroup."); Friedman, *The Importance of Being Positive*, *supra* note 34, at 1294 (constitutional decisionmaking "raises the stakes of the debate, and intensifies it").

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Even so, it is a mistake to imagine the relationship between constitutional adjudication and democracy as a zero-sum game in which the augmentation of one necessarily entails the diminishment of the other. Although constitutionalizing a right takes certain legislative outcomes off the table, it can also invigorate and transform politics.[168] Whether and how a court should constitutionalize a right is a contextual judgment that must be evaluated at the level of discrete rights and individual cases. Certain rights, for example those of freedom of speech and association, may be required by democracy itself.[169] Other rights impose limits on democratic politics in the name of fundamental constitutional ideals; they prohibit torture or repudiate practices that perpetuate unjust status relations.

Judges vindicating constitutional rights should of course consider the effect of their decisions on democratic politics. This is what judges do in the ordinary exercise of their professional legal reason. Courts routinely determine, for example, whether constitutional values are sufficiently important to justify strict judicial scrutiny of their potential infringement, or whether constitutional values are sufficiently attenuated that courts should examine their potential violation using only rational basis review. A theory of the proper relationship between adjudication and democratic politics necessarily lies coiled at the core of every judicially defined and enforced constitutional right. (Sunstein describes how judges of different interpretive philosophies will approach this problem in his excellent contribution to this volume.)[170]

The assumption that avoiding conflict is necessary for social solidarity is visible in the fifth justification advanced by Sunstein to support minimalism, which counsels interpreting the Constitution in ways that accommodate a "reasonable pluralism." In "heterogeneous society," Sunstein notes, "reasonable people disagree on a large number of topics."[171] Because constitutional law applies to an entire heterogeneous population,[172] Sunstein believes courts should "try to economize on moral disagreement by refusing to challenge other people's deeply held moral commitments when it is not necessary for them to do so."[173] Courts ought to embrace "incompletely theorized agreements" so that they can put "disagreements to one side" and converge "on an outcome and a relatively modest rationale on its behalf."[174] "By bracketing the largest disputes, a minimalist court

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[168] *See, e.g.*, *supra* note 135 and accompanying text. *See generally* Part III.A *infra*.

[169] Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 267–72 (Richard Bellamy ed., 2006).

[170] Cass R. Sunstein, *Backlash's Travels*, 42 HARV. C.R.-C.L. L. REV. 435 (2007).

[171] SUNSTEIN, *supra* note 148, at 50.

[172] *Id.* at 50.

[173] Sunstein, *supra* note 147, at 8.

[174] *Id.* at 21. At times, Sunstein seems to back off the view that adjudication should understand the Constitution as an incompletely theorized agreement. There are points at which Sunstein candidly acknowledges that "we follow the Constitution because it is good for us to follow the Constitution." SUNSTEIN, *supra* note 149, at 75. Sunstein writes:

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attempts to achieve a great goal of such a society: making agreement possible when agreement is necessary, and making agreement unnecessary when agreement is impossible."[175] Sunstein argues that this approach is associated with two distinct social purposes: "promoting social stability and . . . achieving a form of mutual respect."[176]

Minimalism approaches conflict with the assumption that it is a threat to social cohesion and legitimacy. Democratic constitutionalism, by contrast, examines the understandings and practices that promote the social cohesion and legitimacy of our constitutional order. It considers the possibility that controversy over constitutional meaning might promote cohesion under conditions of normative hetereogeneity. Minimalism's treatment of the Constitution as an "incompletely theorized agreement" may actually be counterproductive if it inhibits forms of engagement that contribute to the very "social stability" minimalism means to promote.

Democratic constitutionalism recognizes that Americans engaged in dispute over the meaning of a shared tradition are joined by common understandings and practices. When citizens invoke the Constitution as a basis for criticizing judicial decisions, they are expressing their estrangement from government by identifying with the Constitution. To demonstrate that the Constitution vindicates their ideals, they appeal to memories and principles they share with others whom they hope to persuade. These traditions of argument guide disputants to invoke the Constitution as a powerful symbol of common American commitments. In these and other ways, backlash can strengthen social cohesion and constitutional legitimacy in a normatively heterogeneous nation like our own, which draws upon longstanding practices of argument to struggle over the meaning of a shared constitutional tradition.[177]

> [The Constitution] is legitimate because it provides an excellent framework for democratic self-government and promotes other goals as well, including liberty and also economic prosperity . . . .
>
> [S]tability is only one value, and for good societies it is not the most important one . . . . Since 1950 our constitutional system has not been entirely stable; the document has been reinterpreted to ban racial segregation, to protect the right to vote, to forbid sex discrimination, and to contain a robust principle of free speech. Should we really have sought more stability?

Id. at 76. Unless we misinterpret Sunstein, this passage assumes that a basic justification for constitutional law is to express fundamental social values. (This is what Sunstein calls perfectionism. *See supra* note 153.) Sunstein invokes these values to distinguish desirable from undesirable judicial decisions. Yet these values cannot be deduced from minimalism. They must instead be determined by reference to the ideals that the Constitution is meant to express. Courts that seek to attain only "incompletely theorized agreements" must systematically obscure the significance and guidance of these ideals. Sunstein, *supra* note 147, at 21.

[175] SUNSTEIN, *supra* note 148, at 50.

[176] *Id.*

[177] *See, e.g.*, Siegel, *supra* note 12, at 1418–19:

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Minimalism does not consider this possibility. It views controversy as a simple threat to social cohesion and recommends severing the connection between constitutional adjudication and constitutional meaning in order to avoid conflict. Miminalism would thus undercut the very practices of deliberative engagement that democratic constitutionalism identifies as potential sources of social stability.

If conflict over a shared tradition in fact supplies forms of social cohesion, then the most weighty justification for minimalism must be the second goal articulated by Sunstein, which is the need to decide cases in such a way as to maintain "mutual respect"[178] in a heterogeneous and plural polity. This is the topic to which we turn in the third and last part of this Essay.

III. DEMOCRACY AND DISAGREEMENT: ABORTION AND *ROE* RAGE

Constitutional scholarship that cautions judges to interpret the Constitution so as to avoid controversy reflects a major shift in the tone of legal scholarship, particularly on the left. No doubt this shift reflects a fear of right-wing activism by new conservative appointees to the federal judiciary. But it also expresses anxiety about the causes of contemporary conservative dominance, which many attribute to the "intense" "popular backlash against *Roe*."[179]

Progressives dread *Roe* rage. Consider Sunstein's account of *Roe*'s "enduring harmful effects on American life":[180]

> By 1973 . . . state legislatures were moving firmly to expand legal access to abortion, and it is likely that a broad guarantee of access would have been available even without *Roe* . . . . [T]he decision may well have created the Moral Majority, helped de-

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> Through most, but not all, of American history, constitutional contestation that challenges authoritative pronouncements of constitutional law has worked to vitalize rather than undermine the system. This paradoxical result obtains because vigorous challenges to pronouncements of law are generally conducted by means of a complex code that preserves respect for legal authorities and rule of law values, even as overlapping understandings of authority license dispute about constitutional meaning . . . .
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> . . . .
>
> The practice of negotiating conflict about the terms of collective life by reference to a shared constitutional tradition creates community in the struggle over the meaning of that tradition; it forges community under conditions of normative dissensus.

[178] SUNSTEIN, *supra* note 149, at 76.

[179] A. Jean Thomas, *The Hard Edge of Kulturkampf: Cultural Violence, Political Backlashes, and Judicial Resistance to* Lawrence *and* Brown, 23 QUINNIPIAC L. REV. 707, 734–35 (2004).

[180] Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389, 394–95 (1997).

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> feat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents. At the same time, *Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out longlasting solutions based upon broad public consensus.[181]

Sunstein comes very close to holding *Roe* responsible for the sweeping right-wing backlash that in recent years has devastated liberal principles across wide swaths of public policy. He is not alone in this assessment.[182] Progressives interested in appeasing *Roe* rage seem less concerned about *Roe*'s reversal than about the prospect that backlash against *Roe* might swell to engulf the entire liberal agenda.[183]

Minimalism's emphasis on the need for judicial review to maintain a "mutual respect" between groups who disagree in America's diverse pol-

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[181] Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 766 (1991).

[182] *See, e.g.*, Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759, 797–98 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) ("Politically, the Court's decision to declare abortion to be a national right served as a catalyst for the Right to Life movement. That movement, in turn, played a major role in realigning the party loyalties of millions of Americans . . . ."); David Brooks, *Roe's Birth, and Death*, N.Y. TIMES, Apr. 21, 2005, at A23 (explaining that as a result of *Roe*, "[r]eligious conservatives became alienated from their own government, feeling that their democratic rights had been usurped by robed elitists"); Cynthia Gorney, *Imagine a Nation Without Roe v. Wade*, N.Y. TIMES, Feb. 27, 2005, § 4, at 5 ("Indeed, Roe created the national right-to-life movement, forging a powerful instant alliance among what had been scores of scattered local opposition groups. What would happen to that movement, should the galvanizing target of its loathing suddenly disappear?"); Jeffrey Rosen, *The Day After Roe*, ATLANTIC MONTHLY, June 2006, at 56, 57 ("Critics of Roe v. Wade often compare it to the Dred Scott decision on slavery before the Civil War. In both cases, the Supreme Court overturned political compromises that national majorities supported, provoking dramatic political backlashes."); Benjamin Wittes, *Letting Go of Roe*, ATLANTIC MONTHLY, Jan. 2005, at 48, 51 ("[T]he Court has not backed down on abortion. Thus the pro-life sense of disenfranchisement has been irremediable—making it all the more potent. One effect of Roe was to mobilize a permanent constituency for criminalizing abortion—a constituency that has driven much of the southern realignment toward conservatism.").

[183] The views of Sanford Levinson seem representative:

> [M]y concerns about *Roe*, and whether the Democratic Party should continue to expend a great deal of political capital on keeping it on the books, have less to do with specifically legal concerns—i.e., what constitutes the best interpretation of the Constitution?—and far more to do with the politics of the abortion issue in 2005 and beyond. I am increasingly persuaded that the principal beneficiary of the current struggle to maintain *Roe* is the Republican Party. Indeed, I have often referred to *Roe* as "the gift that keeps on giving" inasmuch as it has served to send many good, decent, committed largely (though certainly not exclusively) working-class voters into the arms of a party that works systematically against their material interests but is willing to pander to their serious value commitment to a "right to life."

Sanford Levinson and Jack M. Balkin Debate, LEGAL AFF. DEBATE CLUB, Nov. 28, 2005, http://www.legalaffairs.org/webexclusive/debateclub_ayotte1105.msp.

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ity suggests that *Roe* rage might have been avoided if only courts had preserved a proper neutrality as between divergent perspectives. If courts had only been suitably modest, so the argument might run, the rise of the New Right might have been avoided. Although many find this argument compelling, its force has been substantially undermined by new historical scholarship on antiabortion mobilization in the 1970s.[184]

Scholarship on antiabortion movements in the 1970s has come in two waves. The first wave rejected the view that abortion backlash was best understood as a response to judicial overreaching. It demonstrated that political mobilization against *Roe* was part of a larger movement that opposed liberalizing access to abortion, whether authorized by legislation or by adjudication. An even more recent body of scholarship has begun to explore the normative commitments that animated opposition to abortion. It shows that over the course of the decade mobilization against *Roe* expanded into a vehicle for challenging constitutional protections for gender equality and the secular state. This second body of scholarship makes clear that the constitutional vision voiced by Americans who mobilized against *Roe* at the end of the decade is deeply incompatible with progressive constitutional commitments.[185]

We argue that in such circumstances the aspiration for "mutual respect" cannot offer much guidance in negotiating the controversies actually produced by *Roe* rage. At root, resistance to *Roe* poses a normative challenge

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[184] Justice Ginsburg's influential critique of *Roe* was published before the appearance of much of the scholarship discussed in this Part. *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); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992).

[185] *Roe*'s progressive critics often discuss the values animating the antiabortion movement in highly selective terms, as though the movement were merely about protecting a disembodied fetus. *See, e.g.*, Levinson, *supra* note 183:

> I do think that abortion is special, in much the same way that capital punishment is distinguished from ordinary punishment because, as it is often said, "death is special." Speaking personally, I have a great deal of trouble genuinely respecting those who oppose same-sex marriage or other acknowledgment of full equality for gays, lesbians, bisexuals, and transsexuals. I don't have the same trouble understanding those, like our friend Mike Paulsen, who oppose abortion. I am confident that I am not alone in this feeling. There are some issues where I'm more than willing to say, in effect, "Shut up. You're a bigot and that's all there is to it. You shouldn't expect to be able to articulate your views, and even potentially win, in the ordinary political marketplace, because they have been taken off the political table by the Constitution." But I find it difficult to say this to people I regard as on "the other side" of the abortion issue. To constitutionalize the issue is, in a profound sense, to treat them with disrespect, to say that the issue has indeed been pretermitted by lawyers interpreting a notoriously open-ended document.

Progressives who reason about the antiabortion movement in this way fail to appreciate that the movement has become politically (and therefore jurisprudentially) influential in large part because of its views about traditional family values and of the importance of religion in public life. For a discussion of the importance of this distinction, see the text accompanying note 192, *infra*; for evidence about the complex of views that today energize the political forces of *Roe* rage, see note 232, *infra*.

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for constitutional interpreters, just as resistance to *Brown* posed a normative challenge for constitutional theorists of an earlier era. *Roe* rage requires us to decide which of our constitutional ideals are worth defending.

A. The Roots of the Antiabortion Movement

Progressives who worry about backlash against *Roe* often describe the decision as if judicial overreaching alone inspired the rise of the New Right.[186] Their view seems to be that an incautious judicial misjudgment in the exercise of professional authority produced an extraordinary political reaction. Sometimes it is also suggested that this extraordinary political reaction might have been averted if access to abortion had been liberalized by legislatures instead of by the Court, which disastrously short-circuited the political process.[187] We argue in this Part of our Essay that these views oversimplify the causes and character of *Roe* rage. Mobilization against *Roe* was no simple reaction to a judicial decision, nor was it even simply about abortion.

It is true that from the moment *Roe* was decided it was criticized for judicial overreaching. *Roe*'s dissenters criticized the Court's decision as a "raw exercise of judicial power,"[188] and this criticism was extensively elabo-

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[186] *See supra* text accompanying notes 124 & 181 and *supra* note 182.

[187] *See, e.g.*, Michael Kinsley, *The Right's Kind of Activism*, WASH. POST., Nov. 14, 2004, at B7 ("Roe v. Wade is a muddle of bad reasoning and an authentic example of judicial overreaching. I also believe it was a political disaster for liberals. Roe is what first politicized religious conservatives while cutting off a political process that was legalizing abortion state by state anyway."). Cass Sunstein makes something like this claim, but not quite as robustly. *See supra* note 181 and accompanying text. For a critic of *Roe* who is more cautious than Sunstein in speculating that the law of abortion would have been extensively liberalized even if *Roe* had not been decided, see JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 95 (2006).

[188] Roe v. Wade, 410 U.S. 179, 222 (1973) (White, J., dissenting):

> As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court. The Court apparently values the convenience of the pregnant woman more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States.

Justice White apparently viewed the majority as having exerted "raw judicial power" without constitutional warrant in part because the majority protected abortions of "convenience" that could not be justified as therapeutic under the medical criteria that had emerged during the century of abortion's criminalization. *Compare id.*, *with id.* at 222–23:

> It is my view, therefore, that the Texas statute is not constitutionally infirm because it denies abortions to those who seek to serve only their convenience rather than to protect their life or health. Nor is this plaintiff, who claims no threat to her mental or physical health, entitled to assert the possible rights of those women whose pregnancy assertedly implicates their health. This, together with *United*

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rated in the legal academy and in the press.[189] But jurisprudential objection by itself is rarely sufficient to inspire a political movement capable of altering the complexion of constitutional politics. It is important to distinguish between claims that function as jurisprudential objections within professional debate and claims that function as political arguments within popular debate. The function of the former is to advance professional reason, whereas the function of the latter is to mobilize citizens to exert political pressure to alter constitutional meaning.[190] Because it is difficult for legal scholars to keep hold of this distinction,[191] they tend to confuse professional critique with the causes and goals of popular resistance.

Progressive accounts of *Roe* rage conflate professional and popular critique in just this way. Although it is commonly asserted that *Roe* rage was a response to judicial overreaching, a number of historians have demonstrated that political mobilization against the liberalization of abortion began well before *Roe* and challenged all efforts, both legislative and adjudicative, to reform criminal abortion laws.[192] Americans who entered politics

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States v. Vuitch, . . . dictates reversal of the judgment of the District Court.

[189] *See, e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 27 (1975) ("But if the Court's model statute [on abortion] is generally intelligent, what is the justification for its imposition? If this statute, why not one on proper grounds of divorce, or on adoption of children?"); Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFF. L. REV. 107 (1982) (reviewing major criticisms of the decision advanced in law reviews during the 1970s); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943 (1973) ("The problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court's business."). For similar critiques in the popular press, see, *e.g.*, David Robinson, Jr., Letter to the Editor, *Abortion and Law*, WASH. POST, Feb. 20, 1973, at A19:

> The action of the Court is one more nail in its coffin for the grand American experiment in representative democracy . . . . What has happened is that a handful of power-accustomed judges has seized control of much of the machinery for adjusting the most sensitive interactions among the 210 million citizens of the land. The Court appears to increasingly regard its freedom from public accountability for its actions as an opportunity to rule on the basis of personal preferences of a majority of its members.

[190] *See* Post & Siegel, *supra* note 26.

[191] *See, e.g.*, *supra* note 185.

[192] *See* Lemieux, *supra* note 99, at 227–28 (demonstrating that "there was significant countermobilization at the state level" in the time immediately before *Roe*, so that the "pro-life movement . . . was clearly not 'brought into being' by *Roe*"); *see also* GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES 227 (2005) ("*Roe* did not *initiate* a period of divided moral sentiment over abortion; it did not serve as a sharp break from the point where state discussions had left off."); *id.* at 227–28 ("The state-level reform process had exhausted itself . . . . Given how often claims about the need for 'judicial restraint' have *Roe* in mind, it is striking how incorrect are the empirical assertions that often form the basis of such a critique of *Roe*."); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 50–51 (1990) (questioning whether liberalization of abortion law through politics was feasible once countermobilization began; observing that between 1971 and 1973 no states voted to repeal criminal abortion statutes; and observing that a referendum liberalizing access was defeated in Michigan

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to oppose *Roe* were concerned primarily about the substantive law of abortion, not about questions of judicial technique or even about the proper role of courts in a democracy.[193]

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by antiabortion activists despite broad public support); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 520 (2001) ("The pro-life countermovement was already well under way by the time *Roe* was handed down[.]"). David Garrow is quite explicit on this point:

> We could fill a very long shelf with writings that claim that it was *only* the Supreme Court's action in *Roe v. Wade* that created an intensely energized right to life movement, and that if the Court had not gone as "far" as it did in *Roe*, then anti-abortion forces would not have mobilized in the ways that they did during the 1970s and 1980s . . . . Thus, in this fictionalized but nonetheless widely-accepted version of history, the Supreme Court, and particularly Justice Blackmun, are faulted for committing an act of "heavy-handed judicial intervention" that spurred the right to life movement and engendered much of the political strife America has witnessed over the past twenty-five years.
>
> This view is simply and utterly wrong. Not only did the New York legalization energize right to life forces, but it so energized them that they almost succeeded in legislatively repealing the New York legalization statute; only a 1972 gubernatorial veto by Nelson Rockefeller prevented such an anti-abortion triumph and kept legal abortion available in New York in the months immediately preceding the decision in *Roe*. But that New York upsurge helped stimulate a very politically influential right to life upsurge all across the country, in state after state after state, throughout 1971 and 1972. During 1971 and 1972, pro-choice forces won *no* political victories, and New York activists were worried as to whether they could continue to protect their statute from legislative repeal after Nelson Rockefeller left the governorship. In the two states that held 1972 popular vote referenda on abortion, pro-choice measures went down to heavy defeats, and in many others, legislators took the position that they could let the courts resolve the problem, that they did not need to go out on any political limbs by confronting the issue themselves. Thus, by November 1972, when Richard Nixon was overwhelmingly re-elected to the presidency after mounting a very explicitly anti-abortion general election campaign, prospects for making any sort of non-judicial headway with abortion law liberalization looked very bleak indeed. Pro-choice activists feared that more setbacks might be ahead.

David J. Garrow, *Abortion Before and After* Roe v. Wade*: An Historical Perspective*, 62 ALB. L. REV. 833, 840–41 (1999). Only some in law discuss this history, and it remains underacknowledged in the legal scholarship on backlash. *Cf.* Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739, 1751–52 (1997); Michael J. Klarman, *Rethinking the History of American Freedom*, 42 WM. & MARY L. REV. 265, 286 (2000) (reviewing ERIC FONER, THE STORY OF AMERICAN FREEDOM (1998)) ("*Roe v. Wade* not only announced a constitutional right to abortion but also mobilized a right-to-life opposition that continues to play a prominent role in American politics to the present day.").

[193] It is no small irony that the "strict constructionists" Richard Nixon put on the Court generally voted in the *Roe* majority. *See* George Will, *"Strict Construction": An Interpretation*, WASH. POST, Mar. 2, 1973, at A18:

> Strict constructionists, [President Nixon] has suggested, do not impose values other than those clearly and explicitly affirmed by the Constitution; they base their decisions on the actual words and discernible intentions of the framers; thus they would not legislate their preferences, but respect the express preferences of elected legislatures. As between Mr. Nixon's assumptions and those of the skeptics, the recent Supreme Court Ruling on a Texas abortion statute certainly seems to support the skeptics' view.

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More recently, historians have begun to analyze how a growing political coalition against abortion was forged during the 1970s. This new coalition was concerned with much more than just abortion, and its concerns evolved as the coalition expanded over the course of the decade. By reconstructing how different groups came to join the coalition against *Roe*, and by tracing the differing substantive concerns they expressed as they did so, this new body of historiography sheds light on how the normative content of antiabortion advocacy developed.

Recent scholarship shows that the Court's decision in *Roe* did not immediately prompt organization of the broad-based conservative coalition against abortion that would mobilize by the end of the 1970s. Resistance to legislative liberalization of access to abortion in the years before *Roe* was predominantly Catholic,[194] and Catholics led the way in criticizing *Roe*—something that did not escape attention at the time of the decision.[195]

When mobilization against *Roe* finally did receive official recognition in Ronald Reagan's presidency, its expression was overtly substantive. *Cf.* Editorial, *The Reagan Court*, N.Y. TIMES, Oct. 1, 1980, at A26 (objecting that "Ronald Reagan's pledge to appoint Federal judges who share his views on abortion and family relations is ominous"). At the time of *Roe*, the political slogan of "strict constructionism" was primarily coded in terms of questions of race and crime. It did not encompass the issues of gender, family, and religion that were to become salient by the decade's end.

[194] The official position of the Catholic Church prior to *Roe* was to preserve laws criminalizing abortion. *See* TIMOTHY A. BYRNES, CATHOLIC BISHOPS IN AMERICAN POLITICS 54 (1991) ("At a series of meetings in 1967, the bishops decided to denounce the [ALI Model Penal] code and actively oppose legal abortion."); *see also id.* at 57 (suggesting that *Roe* helped mobilize Catholic bishops because it moved abortion politics from state legislatures onto a national political agenda). In 1968, Pope Paul VI issued *Humanae Vitae*, an encyclical reaffirming the Church's ban on artificial means of contraception. Of course, in the Catholic community, as in any other community of belief, there was considerable disagreement about both the morality of contraception and abortion and the question of the Church's stance toward law reform in these areas. *See* Benedict M. Ashley, O.P., *The Loss of Theological Unity: Pluralism, Thomism, and Catholic Morality*, *in* BEING RIGHT: CONSERVATIVE CATHOLICS IN AMERICA 63, 64 (Mary Jo Weaver & R. Scott Appleby eds., 1995) (discussing "the controversy over *Humanae Vitae* [that] opened the floodgates for a tidal wave of public dissent from official Catholic teaching—on abortion, homosexuality, the exclusion of women from ordination, and a host of other issues").

[195] *See Catholics Warned To Avoid Abortions*, N.Y. TIMES, Feb. 15, 1973, at 20 ("Roman Catholics have been warned by church leaders that they face excommunication if they undergo or perform an abortion."); Marjorie Hyer, *Catholic Bishops Urge Defiance of Any Law Requiring Abortion*, WASH. POST, Feb. 14, 1973, at A17 ("America's Roman Catholic bishops yesterday issued a pastoral message containing unprecedented advice for disobedience of 'any civil law that may require abortion' and pronouncing excommunication on any Catholics who 'undergo or perform an abortion.'"); Lawrence Van Gelder, *Cardinals Shocked—Reaction Mixed*, N.Y. TIMES, Jan. 23, 1973, at 1 ("Reactions to the Supreme Court decision on abortion fragmented yesterday along predictable lines, as leaders of the Roman Catholic Church assailed the ruling while birth control and women's rights activists praised it."); *Vatican's Radio Criticizes Abortion Ruling by Court*, N.Y. TIMES, Jan. 24, 1973, at 14 ("The Vatican radio harshly criticized today the United States Supreme Court's decision that sharply limited anti-abortion laws yesterday."); Warren Weaver, Jr., *Landmark Ruling on Abortion*, N.Y. TIMES, Jan. 28, 1973, at E3 ("Response from the anti-abortion forces, traditionally led by the Roman Catholic Church, was bitter, angry and outspoken. One right-wing Catholic laymen's group, The Society for the Christian Commonwealth, even called for the excommunication of Justice William J. Brennan for his support of the majority."); *cf.* Lynn

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Catholics who opposed *Roe* opposed all liberalization of abortion, whether through legislation or adjudication.[196] Although few now recall it, Protestants were in fact slow to join the antiabortion movement, even after *Roe*. In the early 1970s, most Protestants did not share the Catholic Church's view of abortion.[197] Mainline Protestant groups generally approved of liberalizing access to abortion; some even supported *Roe*.[198] Evangelical groups took a

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Taylor, *Churches Not United on Question of Abortions*, CHI. TRIB., Feb. 12, 1973, at 1A5 ("The opposition of the Catholic Church to legalization of abortion and to the recent Supreme Court ruling is well known. Not so well publicized are the views held by other church groups, which span the spectrum from leadership in Right to Life groups to establishing low-cost abortion clinics.").

[196] In his 1974 testimony before Congress, a spokesperson for the United States Catholic Council declared: "'It is repugnant to one's sense of justice to simply allow as an option whether the states within their various jurisdictions may or may not grant to a class of human beings their rights, particularly the most basic right, the right to life.'" *Pro-Life Amendment for Unborn*, CHI. DEFENDER, Mar. 16, 1974, at 25. The National Conference of Catholic Bishops stated:

> Abortion is a specific issue that highlights the relationship between morality and law. As a human mechanism, law may not be able fully to articulate the moral imperative, but neither can legal philosophy ignore the moral order. The abortion decisions of the United States Supreme Court (January 22, 1973) violate the moral order, and have disrupted the legal process which previously attempted to safeguard the rights of unborn children. A comprehensive pro-life legislative program must therefore include the following elements:
>
> (a) Passage of a constitutional amendment providing protection for the unborn child to the maximum degree possible.
>
> (b) Passage of federal and state laws and adoption of administrative policies that will restrict the practice of abortion as much as possible.
>
> (c) Continual research into and refinement and precise interpretation of *Roe* and *Doe* and subsequent court decisions.
>
> (d) Support for legislation that provides alternatives to abortion.

NAT'L CONFERENCE OF CATHOLIC BISHOPS, PASTORAL PLAN FOR PRO-LIFE ACTIVITIES (Nov. 1975), *available at* http://www.priestsforlife.org/magisterium/bishops/75-11-20pastoralplanforprolifeactivitiesnccb.htm. It is important to distinguish between opposition to *Roe* and opposition to abortion itself. Thus a proposed constitutional amendment "to give states the unqualified right to make their own abortion laws" in 1973 went nowhere, while a proposed "human life amendment" that would have completely banned abortion made its way into the platform of the Republican Party in 1980. *Nullification of Abortion Ruling Sought*, WASH. POST, Mar. 27, 1973, at 14; *see* Joseph Sobran, *Amendment Fever*, WASH. POST, Aug. 14, 1979, at A1. For a history of the different versions of the human life amendment proposed between 1973 and 1983, see http://en.wikipedia.org/wiki/Human_Life_Amendment#Major_versions_of_the_Human_Life_Amendment (last visited May 12, 2007).

[197] Protestants were divided in their views on the morality of abortion, the use of criminal law to regulate abortion, the ways law should reflect religious views, and the appropriateness of political mobilization on these sorts of questions. Elliot Wright, *Protestants Split on Abortion Edict*, WASH. POST, Jan. 26, 1973, at B7 (discussing division of opinion about *Roe* in a group of four Protestant leaders, some who "wholeheartedly welcomed the decision" and others who were "strongly critical" of it, and noting that the two theologians who criticized *Roe* "stand in disagreement with the official statements of their denomination").

[198] *See id.* For example, the Presbyterian Church (USA) has supported abortion rights since 1970, when the General Assembly stated that "the artificial or induced termination of a pregnancy is a matter of careful ethical decision of the patient . . . and therefore should not be restricted by law." Presbyterian 101: Abortion Issues, http://www.pcusa.org/101/101-

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more cautious approach,[199] but even these more socially conservative groups did not at the time of *Roe* view abortion as a categorical wrong. In

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abortion.htm (last visited May 12, 2007). In 1972, the General Conference of the United Methodist Church called for "removal of abortion from the criminal code, placing it instead under the laws relating to other procedures of standard medical practice." Joretta Purdue, *United Methodists Agreed More on Abortion Issue 25 Years Ago*, UNITED METHODIST NEWS SERVICE, Jan. 21, 1998, http://www.wfn.org/1998/01/msg00077.html. Beginning in 1971, some synods of the United Church of Christ spoke out in favor of repealing legal restrictions on abortion and in support of *Roe*. *UCC General Synod Statements and Resolutions Regarding Freedom of Choice*, http://www.ucc.org/justice/choice/resolutions.htm (last visited May 12, 2007) (quoting resolutions). However, the historically black African Methodist Episcopal Church gave "limited guidance" to parishioners on abortion. Lawrence N. Jones, *The Black Churches: A New Agenda*, CHRISTIAN CENTURY, Apr. 18, 1979, at 434, *available at* http://www.religion-online.org/showarticle.asp?title=1219.

[199] Evangelical Protestant groups generally discriminated between so-called "personal convenience" abortions, which they condemned, *see supra* note 188, and therapeutically or medically indicated abortions, which they implicitly or explicitly sanctioned. *See* National Association of Evangelicals, *Abortion 1973*, http://www.nae.net/index.cfm?FUSEACTION=editor.page&pageID=154&IDCategory=9 (last visited May 12, 2007). Divisions among evangelical Protestants over abortion are visible in a series of resolutions that the largest of these groups, the Southern Baptist Convention ("SBC"), issued in the 1970s. These resolutions acknowledge continuing disagreement and stake out a position on the reform of criminal abortion laws between repeal and prohibition. In June, 1971, the SBC declared:

> WHEREAS, Christians in the American society today are faced with difficult decisions about abortion; and WHEREAS, Some advocate that there be no abortion legislation, thus making the decision a purely private matter between a woman and her doctor; and WHEREAS, Others advocate no legal abortion, or would permit abortion only if the life of the mother is threatened; Therefore, be it RESOLVED, that this Convention express the belief that society has a responsibility to affirm through the laws of the state a high view of the sanctity of human life, including fetal life, in order to protect those who cannot protect themselves; and Be it further RESOLVED, That we call upon Southern Baptists to work for legislation that will allow the possibility of abortion under such conditions as rape, incest, clear evidence of severe fetal deformity, and carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother.

Southern Baptist Convention, *SBC Resolution: Resolution on Abortion* (June 1971), *available at* http://www.sbc.net/resolutions/amResolution.asp?ID=13 (last visited May 12, 2007).

In June 1974, the SBC voted to reaffirm the 1971 statement, adding:

> WHEREAS, That resolution reflected a middle ground between the extreme of abortion on demand and the opposite extreme of all abortion as murder, and WHEREAS, That resolution dealt responsibly from a Christian perspective with complexities of abortion problems in contemporary society ... Be it further RESOLVED, that we continue to seek God's guidance through prayer and study in order to bring about solutions to continuing abortion problems in our society.

Southern Baptist Convention, *SBC Resolution: Resolution on Abortion and the Sanctity of Human Life* (June 1974), *available at* http://www.sbc.net/resolutions/amResolution.asp?ID=14. As late as 1976, the SBC condemned only the "practice of abortion for selfish nontherapeutic reasons," and added that "we also affirm our conviction about the limited role of government in dealing with matters relating to abortion, and support the right of expectant mothers to the full range of medical services and personal counseling for the preservation of life and health." Southern Baptist Convention, *SBC Resolution: Resolution on Abortion* (June 1976), *available at* http://www.sbc.net/resolutions/amResolution.asp?ID=15. Not until 1980, when fundamentalists took over the SBC in an internecine battle connected to

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1968, for example, the official publication of a symposium sponsored by the evangelical magazine *Christianity Today* declared that "the Christian physician will advise induced abortion only to safeguard greater values sanctioned by Scripture. These values should include individual health, family welfare, and social responsibility."[200]

Roe did not change this understanding; nor were those evangelical Protestants who initially criticized *Roe* moved to political action.[201] As Harold O. J. Brown, editor of *Christianity Today*, observed: "At that point, a lot of Protestants reacted almost automatically—'If the Catholics are for it, we should be against it.' . . . The fact that Catholics were out in front caused many Protestants to keep a very low profile."[202]

By the end of the decade, however, the views of Protestant evangelicals were to change markedly. Increasing numbers of evangelical Protestants joined a pan-Christian coalition opposing abortion as an expression of "secular humanism." This transformation is most often attributed to the efforts of Swiss theologian Francis Schaeffer[203] and others who popularized the critique of secular humanism.[204] That critique was widely disseminated

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the rise of the New Right, did the SBC revise its position.

[200] WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 190 (1996) (citing WALTER O. SPITZER & CARLYLE L. SAYLOR, BIRTH CONTROL AND THE CHRISTIAN xxxvi (1969)).

[201] *See Two Rulings Criticized by Baptist*, WASH. POST, June 15, 1973, at B18 ("Southern Baptist Convention President Owen Cooper Wednesday criticized Supreme Court rulings that liberalized abortions and banned capital punishment, but he said that the denomination would support abortions 'where it clearly serves the best interests of society.'"); *supra* note 199. In 1973, Harold O.J. Brown convened a meeting on abortion with C. Everett Koop, who had already begun to condemn abortion publicly, as well as Billy Graham and other evangelical leaders; the group he convened opposed both abortion and political action against it. Brown and Koop then organized the Christian Action Council to lobby Congress for abortion restrictions or a ban. Brown recalls: "We thought, 'Once people realize what's going on, there will be a spontaneous upheaval.' That didn't happen." *See* MARTIN, *supra* note 200, at 193–94. According to Brown, at the time of *Roe* Protestants viewed abortion as "one [sin] among many," not as "a crucial issue [that] affects what you think human beings are." *Id.* at 194.

[202] MARTIN, *supra* note 200, at 193.

[203] MARTIN, *supra* note 200, at 196. In 1977, Schaeffer made the film *Whatever Happened to the Human Race?* and showed it in churches around the United States, accompanied by lectures that sometimes featured C. Everett Koop. *Id.* at 194. The movie's argument was that "abortion is both a cause and a result of the loss of appreciation for the sanctity of human life," and that it would lead to infanticide and euthanasia. *Id.* The film is credited with changing the views of many Protestants about abortion. Harold O.J. Brown observed that "nothing has had an impact across-the-board that compares to the Schaeffer-Koop series." *Id.*; *see also* SUSAN FRIEND HARDING, THE BOOK OF JERRY FALWELL: FUNDAMENTALIST LANGUAGE AND POLITICS 191–94 (2000).

[204] *See* FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO 17–18 (1981). Schaeffer's text opens with:

> The basic problem of Christians in this country in the last eighty years or so, in regard to society and in regard to government, is that they have seen things in bits and pieces instead of totals.
>
> They have very gradually become disturbed over permissiveness, pornography, the public schools, the breakdown of the family, and finally abortion. But they

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in the late 1970s through a series of "Family Seminars" led by Tim LaHaye, who in 1979 would co-found the Moral Majority, and his wife, Beverly, who in 1979 would found Concerned Women for America ("CWA"), the evangelical Protestant counterpart to Phyllis Schlafly's STOP-ERA organization.[205] By 1980, the *Christian Harvest Times* was denouncing abortion in its "Special Report on Secular Humanism vs. Christianity": "To understand humanism is to understand women's liberation, the ERA, gay rights, children's rights, abortion, sex education, the 'new' morality, evolution, values clarification, situational ethics, the loss of patriotism, and many of the other problems that are tearing America apart today."[206]

> have not seen this as a totality—each thing being a part, a symptom, of a much larger problem. They have failed to see that all of this has come about due to a shift in world view—that is, through a fundamental change in the overall way people think and view the world and life as a whole. The shift has been *away from* a world view that was at least vaguely Christian in people's memory (even if they were not individually Christian) *toward* something completely different—toward a world view based upon the idea that the final reality is impersonal matter or energy shaped into its present form by impersonal chance .... These two world views stand as totals in complete antithesis to each other in content and also in their natural results—including sociological and government results, and specifically including law.

Id.

The foremost popularizer of this critique of secular humanism was Tim LaHaye, who dedicated *The Battle for the Mind* to Schaeffer. TIMOTHY LAHAYE, THE BATTLE FOR THE MIND (1980). LaHaye describes the five tenets of humanism as "atheism," *id.* at 59, "evolution," *id.* at 60, "amorality," *id.* at 64, "autonomous man," *id.* at 68, and a "socialist one-world view," *id.* at 72. Sex and gender issues fall under "amorality." LaHaye writes:

> Many do not realize that most of the leaders of the feminist movement, which presents itself as the preserver of sexual rights of women and children, are humanists .... They are really after the young, who will be the key to humanist control of the next generation. That is why—in the name of "health care," "child's rights," "child abuse," and "the Year of the Child"—they are pressuring political leaders to pass legislation taking the control of children away from their parents and giving it to the state. By the state, of course, they mean bureaucrats and social-change agents who have been carefully trained in amoral, humanistic philosophy and who will use the government's power to teach sexual activity, contraceptives, birth elimination, and permissiveness to children, whether parents want it or not. Of course, government-financed abortions will be provided for those who refuse to follow instructions.

Id. at 67.

[205] For a discussion of the LaHayes' ideas about the family in the late 1970s, see Patrick H. McNamara, *The New Christian Right's View of the Family and Its Social Science Critics: A Study in Differing Presuppositions*, 47 J. MARRIAGE & FAMILY 449 (1985) (discussing the endorsement of traditional family structure including male-headed households and the principle of feminine submission in *Spirit-Controlled Family Living* and *The Battle for the Family*); *see also* David Harrington Watt, *The Private Hopes of American Fundamentalists and Evangelicals, 1925–1975*, 1 RELIGION & AM. CULT. 155, 169 (1991) ("Evangelicals such as Tim and Beverly LaHaye lamented that the forces that were producing a general breakdown of the family were making serious inroads into the born-again community."); *see also infra* note 218 and accompanying text (discussing Beverly LaHaye's anti-ERA advocacy).

[206] *A Special Report*, CHRISTIAN HARVEST TIMES, June 1980, at 1, *quoted in* MARTIN,

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Although Catholics had initially been uneasy about invoking religious objections to abortion in the public sphere—justifying opposition to abortion instead in the language of science and civil rights[207]—evangelical Protestants felt no such qualms. They explained their newly mounting opposition to abortion in explicitly religious terms; it was precisely the declining public authority of Christianity that motivated their attack on secular humanism. Opposition to secular humanism was fueled by concern that the state was no longer recognizably Christian,[208] a concern that for many had begun with the Court's school prayer decisions and had been inflamed by the ruling in the Bob Jones case.[209] Those who came to condemn *Roe* as a reflection of secular humanism voiced displeasure at an estrangement be-

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supra note 200, at 196.

[207] *See* Michael W. Cuneo, *Life Battles: The Rise of Catholic Militancy Within the American Pro-Life Movement*, *in* BEING RIGHT: CONSERVATIVE CATHOLICS IN AMERICA 270, 275–76 (Mary Jo Weaver & R. Scott Appleby eds., 1995); *see also Pro-Life Amendment for Unborn*, CHI. DEFENDER, Mar. 16, 1974, at 25 (four American cardinals presented testimony at the United States Catholic Conference in favor of a human life amendment, asserting that "the right to life is a basic human right, proclaimed as such by the Declaration of Independence, the Constitution of the United States, and by the United Nation [sic] Declaration of Human Rights," "reject[ing] the argument that opposition to abortion is simply a Catholic concern," and "emphasiz[ing] there is no intention to impose Catholic moral teaching regarding abortion on the country").

[208] There was a belief that:

> [T]he enemies of the faith had succeeded in harnessing the power of the state to their own ends . . . evangelicals were left with a distinct impression that the American government was not checking America's drift away from its Christian moorings or its move away from the family, but rather was legitimating those changes in thousands of subtle but terribly significant ways.

DAVID HARRINGTON WATT, A TRANSFORMING FAITH: EXPLORATIONS OF TWENTIETH-CENTURY AMERICAN EVANGELICALISM 69 (1991). Sociologist Nancy Ammerman describes the dynamics of conservative religious "backlash" in another way:

> Fundamentalists are interested both in strengthening the American "moral fiber" and in protecting the other institutions they see as potentially "Christian." God has entrusted churches, homes, and schools to their care, and they are willing to enter politics if necessary to project that social territory . . . . Fundamentalists did not become politicized until they perceived that the issues with which they were concerned had become political issues.

NANCY TATOM AMMERMAN, BIBLE BELIEVERS: FUNDAMENTALISTS IN THE MODERN WORLD 201–03 (1987).

[209] *See* MARTIN, *supra* note 200, at 169, 171–73. On the school prayer decisions, see Sarah Barringer Gordon, *The Almighty and the Dollar: Protestants, Catholics, and Secularism in 20th Century America* (unpublished manuscript). Historian Sara Diamond also notes the influence of the textbook battles of the 1970s. SARA DIAMOND, NOT BY POLITICS ALONE: THE ENDURING INFLUENCE OF THE CHRISTIAN RIGHT 65 (1998). Paul Weyrich has described the battle that raged in 1978 between evangelicals and the IRS over the tax-exempt status of Bob Jones University as the birth of the religious right. "[W]hat galvanized the Christian community was not abortion, school prayer, or the ERA. . . . What changed their mind was Jimmy Carter's intervention against the Christian schools . . . on the basis of so-called de facto segregation." MARTIN, *supra* note 200, at 173. The Bob Jones case powerfully merged concerns about race, religion, family, and markets.

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tween Christianity and the federal government that had begun well before *Roe* and that would later accelerate with developments coincident with *Roe*.

Perhaps the single most provocative such development was the revolution in family and sexual mores associated with the women's movement.[210] By the 1970s the right to an abortion had increasingly come to symbolize fundamental changes in family roles. As Kristin Luker famously demonstrated through interviews of movement leaders in the 1980s, "this round of the abortion debate is so passionate and hard-fought *because it is a referendum on the place and meaning of motherhood*."[211] Linda Gordon has thus emphasized that it was the feminist embrace of the abortion right—rather than the Court's decision in *Roe*—that so provoked opponents of abortion. "A better explanation of the spread of intense antiabortion feeling was that abortion had changed its meaning through its re-interpretation by the revived women's movement."[212] "The major reason for the heightened passion about reproduction issues is precisely that they seemed to express the core aims of the women's liberation movement and thus became the major focus of the backlash against feminism."[213]

The association of abortion rights with women's liberation was reinforced by debates over the ERA, which Congress had sent to the states in 1972.[214] Phyllis Schlafly, a Catholic, mobilized opponents of the ERA by arguing that it would constitutionalize abortion and homosexuality, which she condemned as potent symbols of the new family forms that the ERA would entrench.[215] A year before the Court's decision in *Roe*, Schlafly's "STOP-ERA" newsletter attacked "women's lib" as "a total assault on the role of the American woman as wife and mother," accusing women's libbers of "promoting Federal 'day-care centers' for babies instead of homes

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[210] *See* MICHELE MCKEEGAN, ABORTION POLITICS: MUTINY IN THE RANKS OF THE RIGHT 18 (1992) ("Significantly, it was the women's movement that first galvanized born-again Christians to political action in the 1970s. After decades of political somnolence, conservative Protestants organized across the nation to defeat the ERA. Only after the amendment fizzled late in the decade did abortion become the religious right's top priority.").

[211] KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 193 (1984); *see also* Pamela Johnston Conover, *The Mobilization of the New Right: A Test of Various Explanations*, 36 W. POL. Q. 632, 634–35 (1983):

> In effect we argue that the mobilization of New Right groups such as those opposed to abortion and the E.R.A. reflects a desire to protect a threatened way of life. What is threatened? The traditional American family and the values it embodies. Who is threatening it? Feminists, humanists, and liberals in general.

[212] LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 300 (3d ed. 2002).

[213] *Id.* at 295.

[214] *See generally* PAMELA JOHNSTON CONOVER & VIRGINIA GRAY, FEMINISM AND THE NEW RIGHT: CONFLICT OVER THE AMERICAN FAMILY (1983) (demonstrating connection between beliefs about abortion and the ERA among activists and in the public at large, and tracing both to beliefs about family roles).

[215] To see how Schlafly systematically focused the ERA debate on questions of abortion and gay rights, see Siegel, *supra* note 12, at 1389–1402.

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[and] promoting abortions instead of babies."[216] She urged her audience to link abortion to daycare and to see both as feminist threats to the traditional family.

"By associating the ERA and abortion as the twin aims of 'women's liberation,' Schlafly used each to redefine the meaning of the other. Schlafly's anti-ERA frames and networks helped construct the *Roe* decision that reverberated explosively through ERA debates in the 1970s and 1980s."[217] In 1979, Beverly LaHaye consolidated these connections by founding CWA, which organized large numbers of evangelical Protestants against the ERA.[218] The connection between the ERA and abortion was emphasized in partisan struggles over the International Year of the Woman, the International Year of the Child, and President Carter's White House Conference on the Family.[219] At a CWA conference held to protest the White House Conference on the Family, critics objected that "[t]he national leaders of the women's movement, who were working so hard to ratify ERA, were the same clique promoting homosexual rights, abortion, and government child-rearing."[220] The objection illustrates the conference organizers' be-

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[216] Phyllis Schlafly, *What is Wrong with "Equal Rights" for Women*, PHYLLIS SCHLAFLY REP. (Eagle Forum, Alton, Ill.), Feb. 1972, at 3–4.

[217] Siegel, *supra* note 12, at 1392–93.

[218] Beverly LaHaye writes that she was mobilized into anti-ERA action upon hearing of the 1977 National Womens' Convention ("NWC") conference in Houston. LaHaye was horrified by the NWC's additional goals, which she summarized as "the 'right' of homosexuals and lesbians to teach in public schools and to have custody of children; federally-funded abortion on demand; approval of abortion for teen-agers without parental knowledge or consent; federal government involvement in twenty-four-hour-a-day child care centers and more." BEVERLY LAHAYE, WHO BUT A WOMAN? 25, 27 (1984).

On the ERA, LaHaye stated:

> I am not against equal rights for women. I am totally in favor of equal pay for equal work; I support a woman's right to be free from sexual harassment on the job. What I am against, however, is an amendment to the constitution that is a cleverly disguised tool to invite total government control over our lives. . . . The ERA, if passed, would literally transform every women's issue into a complex constitutional question to be decided by our liberal court system.

Id. at 53–54. For more on Concerned Women for America, see Janna Hanson, "The Role for Which God Created Them": Women in the United States' Religious Right (1997) (unpublished B.A. thesis, Radcliffe College).

[219] For a remarkably rich account of countermobilization at the decade's end, see Allen Hunter, Virtue with a Vengeance: The Pro-Family Politics of the New Right 159–68 (1984) (unpublished Ph.D. dissertation, Brandeis University); *see also* Leo Ribuffo, *Family Policy Past as Prologue: Jimmy Carter, the White House Conference on Families, and the Mobilization of the New Christian Right*, 23 REV. POL'Y RES. 325 (2006); Marjorie J. Spruill, *Gender and America's Right Turn: The 1977 IWY Conferences and the Polarization of American Politics*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S (Bruce Schulman & Julian Zelizer eds.) (forthcoming).

[220] Hunter, *supra* note 219, at 179, quoting ROSEMARY THOMSON, THE PRICE OF LIBERTY 13–15 (1978). On CWA's role in organizing the event protesting the White House Conference on the Family, see Hanson, *supra* note 218 ("Specific issues of concern were the conference's attempts to 'redefine the family' as well as efforts to pass the ERA and ensure access to abortion") (quoting LAHAYE, *supra* note 218, at 44–45); *see also supra*

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lief that Americans would mobilize against abortion because they were anxious about social changes in child rearing and sexual expression.

By the end of the 1970s, in short, conservatives mobilized against abortion in order to protect traditional family roles. That is why the 1980 Republican Party Platform pledged to "work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."[221] The construction of abortion as a threat to traditional family values was not produced by *Roe*, whose bland and blank opinion, however inartfully rule-bound,[222] emphasized doctors' prerogatives more than women's. *Roe* sought "not to be extreme, not to emphasize absolute rights, and not to favor any particular worldview."[223]

Critics of secular humanism and changing family values seized on *Roe* to produce a powerful symbol of the deep social forces they regarded as endangering their conservative constitutional vision. This vision became a coherent political movement with the assistance of Republican Party strategists, who realized that *Roe* could be used as leverage to redefine party loyalties. The association of *Roe* with the triumph of secular humanism and with the disintegration of the traditional family was envisioned and funded by the architects of a newly conservative Republican Party.[224]

In May 1979, in a moment of ecumenical fervor, Paul Weyrich (a Catholic) and Howard Phillips (a Jew) met with Jerry Falwell and other architects of the New Right to propose that Falwell organize evangelicals into

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text accompanying note 206.

[221] *See* Republican Party Platform of 1980, *available at* http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1980. In 1984, the Republican Party reaffirmed its "support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life." *See* Republican Party Platform of 1984, *available at* http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1984.

[222] *See, e.g.*, Eskridge, *supra* note 112, at 1313; *infra* note 249 and accompanying text. The internal architecture of the *Roe* opinion strongly suggests that the Justices who joined it had little idea of the inflammatory meanings that would later be attributed to it. As we have noted, *supra* note 193, the Justices whom President Nixon appointed to the Court were oriented to the political conflicts of the 1960s, which involved race and crime, and did not anticipate the controversies over gender and family values that would engulf the second half of the 1970s.

[223] BURNS, *supra* note 192, at 227.

[224] *See* MATTHEW MOEN, THE CHRISTIAN RIGHT AND CONGRESS 67–68 (1989):

> Initially, the New Right secular conservatives were clearly the leaders. The reason they were was logical enough: they were seasoned politicos giving guidance and direction to fundamentalists just entering politics. As New Right leader Paul Weyrich pointed out in 1984: 'Five years ago, the leadership was clear, and people were in a definite hierarchy . . . in 1980 the religious right's leadership was to some extent subservient; they were so new to politics they deferred to people like Howard Phillips or myself.' . . . The conclusion was all the more natural because the New Right recruiters were not themselves fundamentalists: Viguerie and Weyrich were Catholics and Phillips a Jew. As time passed, however, the view that the New Right conservatives were 'using' the fundamentalists pretty much abated.

See also Rosalind Pollack Petchesky, *Antiabortion, Antifeminism, and the Rise of the New Right*, 7 FEMINIST STUD. 206 (1981).

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a "Moral Majority."[225] In his biography of Falwell, Dinesh D'Souza recounts that "Weyrich believed that a strong anti-abortion plank in the platform would attract many Catholic voters who normally voted Democratic."[226] Falwell was enlisted to lead the Moral Majority's antiabortion crusade. Commenting on Falwell's new leadership role in 1982, Paul Brown, who with his wife Judie Brown had left the overwhelmingly Catholic National Right to Life Committee to found the American Life League, scoffed: "Jerry Falwell couldn't spell abortion five years ago."[227]

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[225] *See* MARTIN, *supra* note 200, at 199–200. In establishing the Heritage Foundation and the Committee for the Survival of a Free Congress, Weyrich was funded by Joseph Coors of the Coors Brewing Company. *Id.* at 171.

[226] MARTIN, *supra* note 200, at 200. There are now several accounts of a meeting in Lynchburg, Virginia, attended by Reverend Jerry Fallwell, Richard Viguerie, and Paul Weyrich, at which Weyrich "proposed that if the Republicans could be persuaded to take a firm stance against abortion, that would begin to split the strong Catholic voting bloc within the Democratic Party. The New Right strategists wanted Falwell to pressure the GOP via a new organization of Protestant fundamentalists." DIAMOND, *supra* note 209, at 66; *see also* CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 346 (1998):

> So it was apparently by mutual consensus, Weyrich and company advising and Falwell seeing the pragmatic and moral wisdom of the plan, that abortion—the subject likeliest to reel in conservative Catholics and disenchanted Democrats (often, but not always, the same people)—was placed at the head of the Moral Majority's sweeping agenda.

Focusing on abortion allowed the New Right to subsume seemingly disparate religious groups: "It was Weyrich's idea to blur the distinctions between secular right-wingers, fundamentalist Protestants, and anti-abortion Catholics by merging abortion into the panoply of new right, 'pro-family issues.'" MCKEEGAN, *supra* note 210, at 23. "No other social issue had the political potential to galvanize the evangelical Protestants whom Weyrich, Viguerie, and Phillips were determined to bring into the political process." *Id.* at 21–22.

[227] CONNIE PAIGE, THE RIGHT TO LIFERS 225 (1983), *quoted in* MCKEEGAN, *supra* note 210, at 25; *see also* MARTIN, *supra* note 200, at 193 (suggesting that Falwell only began preaching against abortion in 1978). In the 1980s, Falwell would write that it was *Roe* that inspired him to political action: "I will never forget the moment of January 23, 1973 . . . . [A]s I read the paper that day, I knew something more had to be done, and I felt a growing conviction that I would have to take my stand among the people who were doing it." JERRY FALWELL, IF I SHOULD DIE BEFORE I WAKE 31–32 (1986) [hereinafter FALWELL, IF I SHOULD DIE]. Evidence from other sources, however, suggests that this account should be read with caution. In the 1980s, Falwell characterized his views about abortion as a spontaneous response to *Roe*, but contemporaneous evidence from the 1970s suggests a different picture.

Susan Friend Harding's study of Jerry Falwell concludes that she "found no evidence that Falwell had preached on abortion before 1973; what evidence there is suggests that he realized the potential and importance of the abortion issue gradually during the late 1970s and early 1980s." HARDING, *supra* note 203, at 304 & n.18. Falwell's CAPTURING A TOWN FOR CHRIST: SATURATION EVANGELISM IN ACTION 53 (1973), ghostwritten by Elmer Towns, contains one reference to abortion as "murdering an unborn child." *Id.* at 303 & n.5. In Falwell's "I Love America" crusade of 1976, abortion was "just one among many other sins, not the cause célèbre it was to become." *Id.* Towns claims to have written Falwell's first pro-life sermon, reprinted in Falwell's HOW YOU CAN HELP CLEAN UP AMERICA (1978). *Id.* That sermon carefully asks its audience to oppose laws "legalizing 'abortion-on-demand,'" FALWELL, HOW YOU CAN HELP CLEAN UP AMERICA, *supra*, at 9, 59, rather than to object to abortion more generally. Strikingly, Falwell's 1979 book, *America*

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In this way a new relationship emerged among Protestant evangelicals, the Catholic right-to-life movement, and the ascendant conservatives of the New Right:

> The New Right was embracing Right to Life, with the state-by-state volunteer networks and the dedicated core of prerequisite voters; and Right to Life was in turn embracing the New Right, with the direct-mail expertise, the money-funneling PACs, and the splendid surge of fresh reinforcements the New Right leaders appeared to have summoned from the ranks of the Protestant evangelicals.[228]

Michele McKeegan observes:

> With the 1980 elections only a year away, the new right geared up its machinery to mobilize conservative Protestants behind the anti-abortion flag. The first step was to capitalize on entrenched fundamentalist opposition to the ERA. Thus, several pamphlets were produced to underline the connection between the ERA and abortion: Phyllis Schlafly's *The Abortion Connection* and Eileen Vogel's *Abortion and the Equal Rights Amendment*, a John Birch Society publication.[229]

The social meaning of opposing abortion was decisively shaped by this new political alliance. Earlier in the decade Phyllis Schlafly had sought

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Can Be Saved!, "does not mention abortion," HARDING, *supra* note 203, at 303 & n.5, even when Falwell lists the "seven things [that] are corrupting America." JERRY FALWELL, AMERICA CAN BE SAVED! 42 (1979). In *America Can be Saved!*, Falwell instead focuses on "America's Lawlessness: Who's to Blame and How It Can be Stopped!!," *id.* at 85, which he understands in explicitly racial terms. *Id.* at 86 ("Blacks . . . are simply the instruments being used at this time by wicked men with wicked motives . . . . Without any question, the Communist conspiracy is definitely the agent or cause behind the effects of lawlessness now being seen."). Falwell's "first extended treatment" of abortion in print is in 1980's *Listen, America!*. HARDING, *supra* note 203, at 303 & n.5. In 1986, Falwell asserted that after *Roe* he "compared abortion to Hitler's 'final solution' for the Jews and the Court's decision to setting loose a 'biological holocaust' on our nation." FALWELL, IF I SHOULD DIE, *supra* at 33. A comparison to the German Holocaust does appear in *Listen, America!*, at page 253, but neither *America Can be Saved!* nor *How You Can Help Clean Up America* contains any such reference.

[228] GORNEY, *supra* note 226, at 347. The New Right had good reason to want access to the antiabortion network: "The predominantly Catholic anti-abortion movement offered many of the same advantages as the fundamentalist churches: a large pool of potential GOP converts and a ready-made organizational structure. Additionally, the movement was supported by the healthy financial and organizational resources of the Catholic church." MCKEEGAN, *supra* note 210, at 22.

[229] MCKEEGAN, *supra* note 210, at 21. Similarly, the Liberty Court, which became the coordinating group for the pro-family movement, focused on single-issue groups that opposed abortion and the ERA in an effort to draw them together. PAMELA ABBOTT & CLAIRE WALLACE, THE FAMILY AND THE NEW RIGHT 40 (1992).

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to create a grassroots coalition of those opposed to abortion and those opposed to the ERA. But it was not until the construction of abortion as a problem of secular humanism at the decade's end, and not until the infusion of antiabortion advocacy with the goals of the New Right, that opposition to abortion took on the conservative social meaning that we today take for granted. Lost in this transformation was an earlier Catholic association of a "pro-life" position with liberal ideals of social justice.[230]

In summary, recent scholarship on the 1970s suggests that resistance to the liberalization of abortion began before *Roe* as a largely Catholic movement; that it was not until some years after *Roe* that significant numbers of Protestant evangelicals joined a pan-Christian movement opposing abortion as a symbol of secular humanism and disintegrating family values; and that this movement assumed political shape with the leadership and resources of conservative Republican strategists like Paul Weyrich. The antiabortion backlash that has so traumatized liberals reflects a constitutional vision that would preserve traditional family roles and resist secularization of the American state.[231] Weyrich, Schlafly, and other politically sophisticated actors were able symbolically to associate this vision with opposition to *Roe*. This constitutional vision continues to structure *Roe* rage today.[232]

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[230] The political salience of abortion changed appreciably in the years after the *Roe* decision. In 1978 Thea Rossi Brown, the National Right to Life Committee's Washington lobbyist who had been urging the organization to "separate the Equal Rights Amendment from the Human Rights Amendment," was replaced by Judie Brown, a "confidante" to Weyrich. Mark Winiarski, *National Right to Life, Political Right Interlink*, NAT'L CATHOLIC REP., Nov. 10, 1978, at 1, 4; *see also* Laurie Johnston, *Abortion Foes Gain Support as They Intensify Campaign*, N.Y. TIMES, Oct. 23, 1977, at 1; Joe Margolis, *Should It Be Called 'Life for the Right?,'* CHI. TRIB., May 6, 1979, at A6. Many liberal Catholics were dismayed by these conservative connections and by what they saw as a fundamental disconnect between the antiabortion movement and other pro-life issues such as opposition to poverty and the death penalty. In 1978, *The National Catholic Reporter* quoted from a study entitled *Are Catholics Ready?*, asserting that "Views on an anti-abortion amendment were much more strongly associated with views about sex and marriage than with opinions on 'pro-life issues' such as the death penalty." Mark Winiarski, *Anti-Abortion Does Not Equal Pro-Life—Study*, NAT'L CATHOLIC REP., Nov. 10, 1978, at 5.

[231] Consider, for example, President Reagan's press conference of January 31, 1983, where he announced that he was to declare 1983 the Year of the Bible:

> It's my firm belief that the enduring values, as I say, presented in [the Bible's] pages have a great meaning for each of us and for our nation . . . . [W]hen I hear the first amendment used as a reason to keep the traditional moral values away from policy-making, I'm shocked . . . . I happen to believe that one way to promote, indeed, to preserve those traditional values we share is by permitting our children to begin their days the same way the Members of the United States Congress do—with prayer. The public expression of our faith in God, through prayer, is fundamental . . . .

President Ronald Reagan, Remarks at the Annual Convention of the National Religious Broadcasters (Jan. 31, 1983), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=40550&st=abortion&st1.

[232] Conservative groups that oppose abortion generally also campaign against same-sex

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marriage. At the Protecting Life and Marriage Rally in support of referendum provisions banning abortion and same-sex marriage on the South Dakota ballot in November 2006, keynote speaker Alan Keyes called abortion and same-sex marriage "one and the same issue." "Abortion does at the physical level what homosexual marriage does at the institutional level," he said, explaining that "both go against what God intended." Ryan Woodward, *Speakers Rally Against Abortion, Gay Marriage*, RAPID CITY J., Oct. 17, 2006, *available at* http://www.rapidcityjournal.com/articles/2006/10/17/news/local/news01a.txt. For a sample of multi-issue conservative groups opposing abortion that also oppose same-sex marriage, see the websites of Focus on the Family, http://www.family.org/socialissues/A000000464.cfm, Eagle Forum, http://www.eagleforum.org/topics/marriage/, Concerned Women for America, http://www.cwfa.org/coreissues.asp, the Heritage Foundation, http://www.heritage.org/Research/features/issues/issuearea/SSMarriage.cfm, and the Free Congress Foundation, http://www.freecongress.org/commentaries/2007/070122.aspx.

The antiabortion movement's views about sex are perhaps most visibly expressed in the movement's vocal support of abstinence-only curricula, which urge sexual abstinence outside marriage while withholding from students both sex education and education in contraception. Cristina Page suggests that "there is not one pro-life group in the United States that supports the use of birth control." CRISTINA PAGE, HOW THE PRO-CHOICE MOVEMENT SAVED AMERICA 9, 20 (2006) ("From the seemingly mainstream to the scariest and extreme pro-life groups, the anti-birth control message is seamlessly blended with their so-called mission against abortion."). Page shows that the pro-life movement systematically opposes sex education curricula in schools in favor of abstinence only programs: "The abstinence movement is often the pro-life movement acting as federally sanctioned 'educators.'" *Id.* at 73. See the websites of the Heritage Foundation, http://www.heritage.org/research/abstinence/, Focus on the Family, http://www.citizenlink.org/FOSI/abstinence/, Eagle Forum, http://www.eagleforum.org/alert/2005/03-08-05.html, Free Congress, http://www.freecongress.org/commentaries/2005/050929.aspx, http://www.freecongress.org/commentaries/2005/050216.aspx, and the Howard Center for Family, Religion, and Society, http://www.profam.org/docs/acc/thc_acc_sellout.htm?search=contraception&opt=EXACT1.

The Howard Center has authored a natural family manifesto that embeds opposition to abortion in convictions concerning proper sexual and parenting roles. ALLAN C. CARLSON & PAUL T. MERO, HOWARD CTR. FOR FAMILY, RELIGION, & SOC'Y, & SUTHERLAND INST., THE NATURAL FAMILY: A MANIFESTO (2005), *available at* http://familymanifesto.net (registration necessary, copy on file with authors). For example, the *Manifesto* asserts that "each newly conceived person holds rights to life, to grow, to be born, and to share a home with its natural parents bound by marriage." *Id.* at 16. The *Manifesto* has been endorsed by a large number of conservative advocacy groups. *See* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1002–06.

On the connection between *Roe* rage and resistance to secularization, Focus on the Family writes:

> The federal courts have created a number of "privacy rights" that in turn are used to mandate new social policies, such as the right to abortion, the right to homosexual sex, the right to publish obscenity, as well as trampling on First Amendment religious freedoms. This type of activism (indeed, judicial legislation) by unelected and unaccountable judges was never contemplated by our Founding Fathers and poses grave threats to sanctity of life, the sanctity of marriage, states' rights, separation of powers, and religious freedoms. The only way to reverse this unconstitutional and ungodly trend is to appoint judges whose judicial philosophy is the same as that intended by the Founding Fathers; judges who will apply existing law and not scribble in the margins of the Constitution when it suits their ideological agenda.

Focus on the Family, Federal Judicial Appointments: Article Overview, http://www.family.org/socialissues/A000000468.cfm (last visited May 12, 2007).

The Eagle Forum wrote:

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B. Minimalism and Abortion

The history we have considered suggests that much more than judicial overreaching is responsible for *Roe* rage. The backlash to *Roe* draws on a far-reaching constitutional vision that transcends the technique or impact of any single judicial decision. This vision exposes an ambiguity in the meaning of minimalism: Does minimalism advise courts to avoid constitutional decisions that might cause controversy, or does minimalism advise that courts refrain from constitutional decisions that are inconsistent with "mutual respect"?[233]

On the first interpretation of minimalism, *Roe* was incorrectly decided because the abortion right was controversial, even if the abortion right might otherwise be constitutionally justified. Although this account of minimalism is consistent with Sunstein's desire to avoid social conflict, it is not credible. It would mean, for example, that *Brown*, which was surely as controversial as *Roe*, was incorrectly decided.

We are led, therefore, to the second interpretation of minimalism, which would mean that *Roe* was incorrectly decided because it was inconsistent with the "respect" that the Court ought to have shown toward Catholics and others who in 1973 vigorously supported the right to life. The concept of "respect" must thus do important work, for minimalism does not argue that the abortion right is otherwise unworthy of constitutional protection. Everything depends on the exact meaning of "respect." Strikingly, Sunstein himself does not explain what minimalism means by "respect."[234]

One possible meaning of "respect" is that courts should remain neutral as between competing and antagonistic constitutional visions. But our

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> The basic meaning of the Constitution's provisions can be altered only by the people, who are the ultimate HUMAN source of the Constitution. There are, however, limits to the people's power. We must follow the formal amendment process specified in Article V. of the Constitution, and we can alter the document only within the limits allowed by the Judeo-Christian value system. Federal judges must recognize fully that civil law/government is only one societal institution among several (the other primary institutions being the family and the church). A balance of power and responsibility, undisturbed by federal judges, must be maintained among these institutions.

Virginia Armstrong, Eagle Forum, The Constitutionalist Manifesto, http://www.eagleforum.org/court_watch/alerts/2003/may03/Manifesto.shtml.

Concerned Women for America stated: "The mission of CWA is to protect and promote Biblical values among all citizens—first through prayer, then education, and finally by influencing our society—thereby reversing the decline in moral values in our nation." Concerned Women for America: About CWA, http://www.cwfa.org/about.asp (last visited May 12, 2007).

[233] SUNSTEIN, *supra* note 149, at 76.

[234] The meaning of "respect" within the context of cultural diversity is in fact highly obscure. *See* Robert Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTL. J. LEGAL PHIL. 185 (2000).

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analysis of *Roe* rage suggests that there may be circumstances in which no such position of neutrality exists. Progressives regard questions of family roles and religious faith as individual decisions that should not be imposed by the state in a pluralistic community. Conservatives leading the backlash against *Roe* regard the protection of individualism as disrespectful of *their* view of traditional family values and traditional faith. A court must choose between these incompatible constitutional ideals. Progressives would not find the Court to be "neutral" were it now to seek to placate anxieties about religion and the family by reversing core constitutional decisions forbidding bible instruction in public schools or protecting principles of gender equality.

An alternative interpretation of "respect" is that courts ought not to decide cases in ways that antagonistic groups might find objectionable. But this interpretation of respect means that courts should articulate only those constitutional rights that express uncontroversial values. For reasons we have discussed, this interpretation of "respect" is not plausible. It implies that the Court should not have decided *Brown* because desegregation was inconsistent with the "respect" that the Court should have shown toward the Southern way of life. Just as ordinary legal reason considers the proper relationship between adjudication and democratic politics before judicially enforcing a constitutional right,[235] so ordinary legal reason also considers the proper relationship between cultural disagreement and adjudication before judicially enforcing a constitutional right.[236] It is not clear what the idea of "mutual respect" is supposed to add to this consideration.

Minimalism's appeal to "respect," therefore, seems chiefly to serve as a covert judgment about the strength of the relevant constitutional values. For a court to refuse to enforce a constitutional right because of the "respect" due to those who might be offended seems to be an indirect way of saying that the relevant constitutional value is insufficiently important to merit judicial protection.[237] If this is what the idea of "respect" means in the context of minimalism, it appears to be an invitation to do substantive constitutional work without engaging in substantive constitutional analysis.[238]

We do not deny, of course, that avoiding conflict—especially unnecessary conflict—may be prudent. It may be proper for judges to anticipate popular responses to controversial rulings in order more effectively to fulfill discrete constitutional values.[239] But democratic constitutionalism

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[235] *See supra* text accompanying note 168.

[236] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997); Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting); Trop v. Dulles, 356 U.S. 86, 100–101 (1958) (plurality opinion); Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485 (2003).

[237] A good example may be found in the observations of Levinson in note 183, *supra*.

[238] A good example may be found in the observations of Sunstein in note 174, *supra*.

[239] *See, e.g.*, Sunstein, *supra* note 170.

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suggests that conflict avoidance should not become a master constraint on adjudication, trumping a judge's best professional understanding of a constitutional right. Professional legal craft requires a judge to assess the strength of relevant constitutional values, which ordinarily demands exquisite sensitivity to context. Minimalism, by contrast, purports to be a transcontextual methodology that seeks to avoid backlash regardless of the specific right at issue or the circumstances of its application.

Minimalism would thus weaken essential attributes of professional practice lest the ordinary exercise of craft unleash social conflict. We are not cavalier about the costs of bitter constitutional conflict. Yet we also recognize the constructive social functions of disagreement. So long as groups continue to argue about the meaning of our common Constitution, so long do they remain committed to a common constitutional enterprise. It has been rightly observed that our constitutional system consists of "an historically extended tradition of argument" whose "integrity and coherence . . . are to be found in, not apart from, controversy."[240] Except in extraordinary and extreme conditions, like those that led to our Civil War, common practices of argument within our constitutional order channel disputes in ways that can generate conviction and commitment.[241] Given the extraordinary diversity of the American constitutional order, the only practical alternative to constitutional disagreement is constitutional anomie.

Professional legal reason in fact possesses significant resources for domesticating controversy within the forms of constitutional law. Whatever *Roe* might reveal about the Court's implicit hope of settling the abortion debate in 1973, this possibility was plainly beyond the Court's power when it decided *Planned Parenthood v. Casey*[242] nineteen years later.[243] By 1992

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[240] POWELL, *supra* note 35, at 6; *see* Balkin, *supra* note 135, at 508 ("What gives the system of judicial review its legitimacy, in other words, is its responsiveness—over the long run—to society's competing views about what the Constitution means.").

[241] Siegel, *supra* note 12, at 19–21 (discussing "steering" and "attaching" as democratic goods produced by constitutional dispute).

> [Constitutional dispute] allows citizens to experience law, with which they disagree, as emanating from a demos of which they are a part . . . it may strengthen law precisely as it unsettles it, enabling—and, on occasion, moving—those who pronounce law to do so in deeper dialogue with the concerns and commitments of those for whom they speak.

Id. at 97.

[242] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). For an appreciation of *Casey*, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 37–39 (1994).

[243] As President Reagan appointed Justices during the 1980s and the Court moved ever closer to reversing *Roe*, the changing structure of the conflict prompted countermobilization by *Roe*'s defenders. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 665–66 (documenting the rise of pro-choice activism during the 1980s and following the Court's decision in *Webster*) ("In *Webster*, Justice Scalia commented specifically on the political activity designed to influence the Court."). The resulting voter turnout affected state and federal elections. *See* Alan I. Abramowitz, *It's Abortion, Stupid: Policy*

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it was clear that the Court would have to deploy its judicial authority to channel dispute rather than to seek to end it. *Casey*'s goal was to draw those engaged in the abortion controversy into a common discussion about the meaning of the Constitution.

Strikingly, *Casey* sought to accomplish this task by advancing what is in many ways the opposite of a minimalist decision. *Casey* does not offer a shallow, incompletely theorized agreement that brackets "the largest disputes."[244] It instead articulates with great eloquence the ideals of both proponents and opponents of abortion. *Casey* proclaims that a woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[245] Yet *Casey* also affirms:

> [T]he State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and in-

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Voting in the 1992 Election, 57 J. POL. 176 (1995) (showing that attitudes toward abortion had a significant effect on the 1992 presidential election and that many pro-choice Republicans defected from their party to vote for a pro-choice liberal candidate); Elizabeth Adell Cook, Ted G. Jelen & Clyde Wilcox, *Issue Voting in Gubernatorial Elections: Abortion and Post-*Webster *Politics*, 56 J. POL. 187, 187 (1994) (analyzing statistics from the 1989 and 1990 gubernatorial elections' exit polls to show that abortion had a significant impact on voting patterns and "was a stronger predictor than even partisanship in Pennsylvania"). Scholars have speculated that the pro-choice mobilization that helped ensure the election of Bill Clinton may also have had an impact on the Court. Barry Friedman writes:

> Although one might quibble with the plurality's understanding of stare decisis in constitutional cases—the dissent certainly did—it seems hard to gainsay that the plurality [in *Casey v. Planned Parenthood*] understood that the eyes of the public were on them, and that they acted accordingly. Extrajudicially, Justice O'Connor has been quite explicit in pointing out that in the long run it is public opinion that accounts for change in politics, and in judicial doctrine.

Friedman, *The Importance of Being Positive*, *supra* note 34, at 1302. Neal Devins observes:

> [N]o longer willing to pay the price for its absolutist ruling in Roe, the Court sought to win popular approval by steering a middle ground on abortion rights. Remarkably, the Court came close to conceding this point. Acknowledging that its power lies "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary," the Court seemed to believe that "the public belief in the Court's institutional legitimacy enhances public acceptance of controversial Court decisions." This emphasis on public acceptance of the judiciary seems proof positive that Supreme Court Justices, while not necessarily following the election returns, cannot escape those social and political forces that engulf them.

Neal Devins, *Reflections on Coercing Privacy*, 40 WM. & MARY L. REV. 795, 801 (1999).

[244] SUNSTEIN, *supra* note 148, at 50.

[245] *Casey*, 505 U.S. at 852.

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> stitutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.[246]

In passages like these, *Casey* accords great respect to both sides of the abortion controversy.

If minimalism seeks to suppress disagreement by avoidance, *Casey* aspires to channel disagreement by acknowledgment. It is precisely on the basis of its forthright articulation of competing constitutional ideals that *Casey* stakes its claim to call upon "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[247] By coupling this invitation to a broad and accommodating "undue burden" standard, *Casey* authorizes the Court to respond to both sides of the abortion dispute by fashioning a constitutional law in which each side can find recognition. *Casey* famously concludes both that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed"[248] and that "the rigid trimester framework of *Roe*"[249] should be overturned, thus authorizing for the first time fetal protective regulations throughout pregnancy.[250]

This Janus-faced holding represents the exact point of contradiction between the need of the American constitutional system for a constitutional law that is democratically responsive and the need of our constitutional system for a constitutional law that can maintain professional autonomy from political control. *Casey* understands its authority to rest "on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[251] Yet *Casey* also frankly acknowledges that the "divisiveness" of *Roe* "is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense."[252]

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[246] *Id.* at 872.
[247] *Id.* at 867.
[248] *Id.* at 846.
[249] *Id.* at 878.
[250] *Id.* at 874, 876.
[251] The Court explained:

> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

Id. at 865–66.

[252] *Id.* at 869. The *Casey* Court worried that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question" because it would suggest "a surrender to political

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Casey insists on the independence of law even as it subjects law to democratic pressure by dismantling the trimester system of *Roe*. *Casey* illustrates how a constitutional decision can be politically responsive at the same time as it affirms a commitment to the law/politics distinction. The decision demonstrates how our constitutional system negotiates the tension between judicial independence and democratic legitimacy. The maintenance of this tension is compatible with a full-throated commitment to the judicial function, as expressed in *Casey*'s willingness to "accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents."[253]

We do not endorse *Casey*'s application of the undue burden standard or even the undue burden standard itself. Yet we do believe that the Court's decision in *Casey* powerfully suggests that backlash may at times be more effectively addressed by directly facing moral controversy than by avoiding it. *Casey* displays juridical resources for social integration that neither minimalism nor fear of backlash fully appreciate. It shows how judges can use flexible constitutional standards to channel and mediate conflict, guiding public dialogue about hotly controverted social practices and endeavoring to shape the social meaning of competing claims.[254]

Casey demonstrates that judicial review and disagreement are not incompatible. It illustrates how the substance of constitutional law emerges from the furnace of political controversy. If progressives shun controversy, either in adjudication or politics, they abandon the hope of shaping the content of constitutional law. Democratic constitutionalism suggests that in the end our constitutional law will be made by those willing to run "the long race of politics."[255] Minimalism, like all undue fear of backlash, removes progressives from the race.

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pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance." *Id.* at 867.

[253] *Id.* at 901.

[254] *See* Alec Stone Sweet, *Judicialization and the Construction of Governance*, *in* ON LAW, POLITICS, & JUDICIALIZATION (Martin Shapiro & Alec Stone Sweet eds., 2002); *see also* Siegel, *supra* note 6, at 1546 (analyzing decades of debate over the meaning of the anticlassification principle: "[A] norm that can elicit the fealty of a divided nation forges community in dissensus, enabling the debates through which the meaning of a nation's constitutional commitments evolves in history"); Reva B. Siegel, *Siegel, J., concurring*, *in* WHAT *ROE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 63, 82 (Jack M. Balkin ed., 2005) (rewriting *Roe* to hold that "government may not deny women effective access to abortion, and all regulation of the practice must be consistent with principles of equal citizenship"); Reva B. Siegel, Comment, *in Comments from the Contributors*, *in* WHAT *ROE* SHOULD HAVE SAID, *supra*, at 244, 248 (observing that the alternative opinion is based on a "dialogic understanding of judicial review" and is "drafted on the assumption that the right it enunciates will have to be taken up, defended, and elaborated in judicial and popular fora and that this process is an integral part of the practice of declaring rights—a collaborative process through which the nation's understanding of its constitution evolves").

[255] Friedman, *The Importance of Being Positive*, *supra* note 34, at 1294.

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IV. CONCLUSION

As this Essay was going to press, the Court decided *Gonzales v. Carhart*,[256] in which five Justices upheld a federal statute banning a late-term procedure polemically labeled "partial-birth abortion." *Carhart*'s rhetoric is striking. In stark contrast to *Casey*, which took great pains to signal to both sides of the controversy that the Court can be trusted to craft a form of constitutional law that acknowledges their values, *Carhart* conspicuously affirms the concerns of antiabortion advocates without signaling similar respect for the concerns of abortion rights advocates. As recently as the previous Term a unanimous Court had affirmed that the Constitution protects a woman's right to abortion procedures necessary for her health,[257] but *Carhart* holds that legislatures should have "discretion" to regulate this right. The decision intimates that courts should only review such regulations through "as applied" challenges generally thought too cumbersome to respond to the need for emergency medical procedures.

Carhart offers a new woman-protective justification for these restrictions, premised in part on a claim about women's capacity and in part on a claim about women's roles. Emphasizing "the bond of love the mother has for her child," the decision justifies restricting abortion to protect a woman against a mistaken decision to end a pregnancy that she might later regret.[258] In a passionate opinion penned by the only remaining woman on

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[256] 127 S. Ct. 1610 (2007).

[257] Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006) ("New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are '"necessary, in appropriate medical judgment, for preservation of the life or health of the mother."'") (internal citations omitted).

[258] *Carhart*, 127 S. Ct. at 1634 (internal citations omitted):

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22–24. Severe depression and loss of esteem can follow.

Citing an antiabortion amicus brief and common sense as authority that women make mistaken decisions about abortion, *Carhart* concludes that law banning a late-term abortion procedure vindicates the state's interest in informing a woman's choice:

> The State has an interest in ensuring so grave a choice is well informed. 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.
>
> . . . The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a

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the Court, four Justices in dissent object to this gender-paternalist justification. They accuse their brethren of invoking a stereotypical view of women that is incompatible with a long line of cases recognizing women as equal members of the polity.[259] The Court refuses to acknowledge the dissent's objection as to the facts or norms of women's capacity, asserting instead that its view of women is grounded in "unexceptionable" common sense, a proposition for which it cites an ardent amicus brief submitted by an antiabortion advocacy group.[260]

We expect that *Carhart* will inflame political controversy rather than diminish it. This will be true even though the opinion *upheld*, rather than struck down, legislation. *Carhart*'s ratification of a federal ban on a late-term procedure will inspire antiabortion advocates to push for ever more far-reaching restrictions on abortion, and it will provoke abortion rights advocates to renewed mobilization, especially now that the debate over women's agency and women's roles has been expressly joined. Escalating conflict will spill into all arenas of politics, in legislation, litigation, campaign debate, and judicial appointments, as Americans struggle over whether government may promote hotly contested views about the role of women, faith, and family in American life.[261] In a constitutional democracy, such disputes cannot be resolved by fiat, judicial or otherwise. By grounding their objections in guarantees of equality as well as liberty, the dissenting Justices make clear their view that constitutional controversy will persist even if *Roe* is reversed.[262]

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late-term abortion.

Id.

[259] Justice Ginsburg's dissent appeals directly to the Court's sex discrimination cases, objecting, "This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited." *Id.* at 1649 (Ginsburg, J., dissenting); *see also* Siegel, *supra* note 61, at 1029–50 (analyzing the stereotypes about women's agency and women's roles that make woman-protective antiabortion argument persuasive); Reva B. Siegel & Sarah Blustain, *Mommy Dearest*, AM. PROSPECT, Oct. 2006, at 22 (showing how the stereotypes in woman-protective antiabortion argument make restrictions on abortion seem reasonable, while diverting attention from remedies that are responsive to the concerns that lead women to abort pregnancies).

[260] *Carhart*, 127 S. Ct. at 1634; *see* Linda Greenhouse, *Adjudging a Moral Harm to Women from Abortions*, N.Y. TIMES, Apr. 20, 2007, at 18 (discussing a passage of the *Carhart* opinion citing a brief that contains "post-abortion" affidavits of a kind employed to justify an abortion ban in South Dakota); *see also* Siegel, *supra* note 61 (tracing the rise and spread of woman-protective justifications for abortion restrictions and analyzing their gender-based reasoning); *id.* at 1025–26 (discussing amicus briefs advancing woman-protective arguments like those expressed in the *Carhart* decision). For a discussion of the relationship between woman-protective arguments for regulating abortion and religious beliefs, see Post, *supra* note 61, at 953–68.

[261] *See supra* note 232 (discussing advocacy of antiabortion groups today in matters concerning same-sex marriage, abstinence-only education, contraception, family roles, and the separation of church and state).

[262] The sex equality claim for the abortion right has a long lineage, reaching back to the ERA dispute and beyond. *See* Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. (forth-

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The controversies about religion, family, and gender that animate *Roe* rage are now joined in politics and in judicial decisionmaking. They cannot be escaped by strategies of conflict avoidance. Respect for individual choice is viewed in the context of abortion as a *partisan* position dubbed "secular humanism"[263] by those committed to appointing "judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."[264] If the dissenting Justices in *Carhart* were to turn minimalist, they would simply cede ground to the fervently held constitutional vision of those who, like the *Carhart* majority, are attuned to the voice of antiabortion advocates. The question is *which* constitutional vision will influence the Court; it is not *whether* the Court will express a constitutional vision.

This Essay offers a jurisprudential model, democratic constitutionalism, that explores the deep and inevitable interdependence of constitutional law and politics. Democratic constitutionalism suggests what *Carhart* so vividly illustrates: Constitutional law embodies a nomos, and fidelity to that nomos demands engagement that is both legal and political.

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coming 2007) (discussing legal expression of the sex equality argument for reproductive rights in the 1960s and 1970s). Justice Ginsburg began publishing articles urging that the abortion right be understood as a sex equality right in the 1980s, immediately after the period for the ERA's ratification expired. *Id.* It was in this era that "equality reasoning began to emerge as the dominant rationale for the abortion right in the legal academy." *Id.*

[263] *See supra* notes 203–206 and accompanying text; text accompanying note 206 (quoting a "Special Report on Secular Humanism vs. Christianity" in the *Christian Harvest Times* denouncing abortion: "To understand humanism is to understand women's liberation, the ERA, gay rights, children's rights, abortion, sex education, the 'new' morality, evolution, values clarification, situational ethics, the loss of patriotism, and many of the other problems that are tearing America apart today.").

[264] *See supra* text accompanying note 221 (quoting 1980 Republican Party Platform); *supra* note 221 (quoting 1984 Republican Party Platform); *see also supra* note 59 (quoting 1988, 2000, and 2004 Republican Party Platforms).

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