

Introduction

This volume brings together important cases involving the state regulation of sex, childbearing, and parenting. These twelve cases, some canonical and some far less known, span topics involving contraception, abortion, pregnancy, and parenthood. The chapters tell their stories using a wide-lens perspective that illuminates the complex ways law is forged and debated in social movements, in representative government, and in courts.

As a field, “reproductive rights and justice” is relatively new, and its contours are quite broad, encompassing the various ways law shapes the decision “whether to bear or beget a child”¹ and the conditions under which families are created and sustained. Some of the cases included in this volume are very much part of the constitutional law canon; more are not. Until recently, these cases have not often been conceived of as part of a unified *field* of law.²

This volume remedies that oversight. Reading this group of cases together makes visible forms and effects of reproductive regulation that are less evident when the cases are read in isolation or in their more familiar doctrinal contexts. The framework of “reproductive justice” highlights the intersecting relations of race, class, sexuality, and sex that shape the regulation of reproduction. It examines the many ways law shapes the choice to have, as well as to avoid having, children. The volume addresses decisionmaking about contraception and abortion—the traditional subject matter of “reproductive rights”—in this larger reproductive justice framework, and locates this body of law alongside cases that consider a wider range of issues, including sterilization, assisted reproductive technology, pregnancy discrimination, the criminalization of pregnancy, and access to reproductive health care.

This “Law Stories” book is nontraditional in a second sense. Many of its chapters narrate the cases in ways that de-center courts. To be sure, the chapters tell stories about the individual litigants and lawyers behind important cases. But the stories recognize courts as but one of many institutions in our constitutional democracy, and they show how conflicts over law unfold in the institutions of civil society (medicine, religion, media), in democratic politics (social movements, political parties, and representative government), as well as in the courts. The stories feature ordinary women and men struggling with laws that

¹ Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

² The publication of the first casebook on the topic, MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE (2015), was an important development for the field; this volume complements and furthers that project.

govern the ways they make families, and show how members of the community, government officials, lawyers, and judges respond. In the process, these stories situate litigation histories in a larger social field, revealing the interplay of bottom-up and top-down forces that provoke, shape, and legitimate judicial decisions, and the role that struggle over courts and rights plays in forging new norms.³

This book is being published at a pivotal moment for this area of law. In 2018, Justice Anthony Kennedy, a long-standing voice in the U.S. Supreme Court's disposition of reproductive rights and justice cases, retired, and was replaced by Brett Kavanaugh. Past changes in the Court's membership have deeply shaped this body of law, as stories in this volume show. The retirement of Justice Kennedy and his replacement by Justice Kavanaugh will surely shape the dynamics of the Supreme Court in ways that will have important repercussions for this field. But the account of law and social change contained within these pages suggests that while the Supreme Court is an important player in these debates, it cannot settle the future of this body of law today any more than it could a generation ago. As importantly, many of the law stories in this volume involve questions of reproductive rights and justice in areas of constitutional law, employment discrimination law, and family law that will be less dramatically affected by the change in the composition of both the Supreme Court and the lower federal courts.

We have decided to organize the chapters in this volume in chronological order, rather than by subject matter. This format highlights the lived horizon in which women and men encounter—and struggle with—questions of reproductive rights and justice, and the ways American law has responded at different eras in the nation's history. But chronological order is just one way to make sense of the stories about rights, justice, and various forms of law-making inside and outside of the courts collected in these pages.

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The first chapter, Melissa Murray's exploration of *Griswold v. Connecticut* (1965), tells the story of a case that has long been viewed as a stalwart of the constitutional law and reproductive rights canon. *Griswold* held that a Connecticut law criminalizing the use of contraception violated the right to privacy protected by the due process clause of the Fourteenth Amendment. The contraceptive ban challenged in *Griswold* carried a criminal penalty; and, critically, Estelle Griswold and Lee Buxton were arraigned, charged, and tried before a court for violating it. The chapter argues that in overlooking *Griswold's* criminal law antecedents, we have overlooked many things. We have missed an

³ See generally Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728 (2017); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

opportunity to locate this decision within the broader context of the criminal law reform debate that was taking place in the 1950s and 1960s—one that sought to limit the state’s use of criminal law as a means of policing and enforcing compliance with majoritarian sexual mores. In doing so, we have failed to appreciate that the case was not simply about birth control, but also about designing limits on the state. Recuperating *Griswold’s* place in the criminal law reform debate brings these interests into focus—and makes it easier to discern the notion of privacy as a bulwark against the state’s efforts to compel moral conformity. But perhaps most importantly, focusing on the criminal law aspects of *Griswold’s* history allows us to glimpse the similarities between the present day and the period that preceded *Griswold*. Then, as now, access to contraception remains uneven, especially for those who lack the personal resources to fund their contraceptive use. As importantly, the stigma and disapproval that once attended contraceptive use can still be expressed—albeit in more muted ways—in the new forms of state regulation that have emerged to replace the criminal ban struck down in *Griswold*. These insights make clear the limitations of decriminalization as a means of law reform, and underscore the many vehicles, beyond the criminal law, that the state may deploy in its efforts to enforce a particular vision of sex and sexuality.

In the second chapter, Neil Siegel tells the story of *Struck v. Secretary of Defense* (1971), a little-known case that was litigated by Ruth Bader Ginsburg, but never decided by the Supreme Court because it was declared moot. Susan Struck was an Air Force Captain whose pregnancy and religious refusal to have an abortion subjected her to automatic discharge from the Air Force. As Siegel shows, Ginsburg’s brief in Struck’s case highlights a path not taken in the development of the Supreme Court’s equal protection doctrine on sex discrimination. In *Struck*, Ginsburg underscored the vital links between pregnancy discrimination and sex discrimination, and between sex discrimination and restrictions on access to contraception and abortion, at a time when the Justices did not understand the relationships among these practices. The brief came at a very early point in the development of equal protection law on sex discrimination—in 1972, just after the Court had held for the first time in American history that a sex classification violated the Equal Protection Clause, and before the Court’s decision in *Roe v. Wade*. Only by registering where constitutional law was and where it would imminently head when Ginsburg litigated *Struck* can one entirely grasp the significance of Ginsburg’s brief—and the implications of its subsequent neglect. In more recent decades, the Court has—to a significant, albeit incomplete, extent—gained an appreciation of the relationships among the practices that Ginsburg identified.

In the next chapter, Linda Greenhouse and Reva Siegel offer a fresh account of *Roe v. Wade* (1973). Greenhouse and Siegel do not begin

with a litigation history or even a drama featuring familiar characters (Sarah Weddington, Linda Coffee, and Norma McCorvey). Instead they start their story in the 1960s, showing how debate over abortion changed shape in politics in the years before courts played a prominent role. This early history provides resources for thinking about polarization of abortion and the logic of abortion's constitutionalization. The authors show how concerns about race and class helped drive the early efforts toward abortion reform; examine the late appearance of feminist claims for abortion's decriminalization and the fierce resistance they provoked; and explore opposition to abortion's decriminalization in the years before *Roe* when the movement was predominantly centered amongst Catholics in the Democratic party and large numbers of evangelical protestants and Republicans had yet to join the cause. Born in politics, with courts barely in view, the debate over abortion ultimately reached judicial dockets in the form of new claims on the Constitution's longstanding guarantees of liberty, equality, and life. Greenhouse and Siegel examine the claims on the Constitution that *Roe* acknowledged, as well as competing arguments that the Justices were, initially at least, unable to hear. Ultimately, the Court was moved by these arguments for and against the abortion right, and reasoned from them two decades later when the Court reaffirmed a significantly revised version of the *Roe* framework in *Planned Parenthood v. Casey*. As the first case in a long line to reach the Supreme Court, *Roe* did not initiate the abortion conflict, and just as clearly did not end it. One of the few Supreme Court decisions that ordinary Americans can name, for some it is a symbol of judicial overreach; for others, it represents the courts' ability to protect individual rights in the face of mobilized political opposition. And, as Greenhouse and Siegel show, the story of *Roe* continues, a conflict that the Court can structure, but not settle.

Deborah Dinner next offers a reading of the equal protection case *Geduldig v. Aiello* (1974), which held, the year after *Roe*, that laws regulating pregnancy do not classify on the basis of sex sufficiently to trigger heightened judicial scrutiny under the Equal Protection Clause. Dinner's chapter situates the case within the context—and conflicts—of the American welfare state. The chapter explains that this constitutional case concerned a question that continues to vex legal and political culture. Does sex equality require the public to assume responsibility for sharing the costs of reproduction, much as we pool other risks that threaten family support (e.g. unemployment or accidents)? In the late 1960s, working women and activists confronted the limits of the U.S. welfare regime that had developed over the course of the twentieth century. Both public social insurance schemes and private employer-sponsored benefits were designed to support male breadwinners. Childbearing workers were an anathema within these schemes' gendered logic, and they excluded maternity from coverage. After labor feminists failed in the 1940s and 1950s to secure new forms of social security, including paid maternity leave, feminist legal

reformers in the late civil rights era turned to a new legal tool: sex discrimination law. They analogized between pregnancy and temporary disability to force the inclusion of pregnancy within the public and private dimensions of the welfare regime. Prior to the realization of heightened scrutiny for sex-based classifications, feminist attorneys brought lawsuits challenging the gender stereotypes that underpinned both public and private employers' exclusion of pregnancy from temporary disability insurance. Yet the Supreme Court's 1974 decision in *Geduldig* held that pregnancy-based classifications did not necessarily constitute a violation of constitutional sex equality. Although the Pregnancy Discrimination Act of 1978 now makes clear that pregnancy discrimination constitutes sex discrimination in violation of Title VII, Dinner argues that this significant body of law is insufficient. The nation's failure to recognize that gender equality demands an expansion of the welfare state, in ways that would socialize responsibility for the costs of pregnancy and childbirth, continues to harm low-income families today.

The next chapter introduces a case that will be new to most readers—*Madrigal v. Quilligan* (1978), an unpublished decision from a California federal district court refusing to fully remedy sterilization abuse in the early 1970s. As Maya Manian describes in harrowing detail, *Madrigal* involved ten women (the Madrigal Ten) who filed a lawsuit alleging that medical personnel at the Los Angeles County USC Medical Center systematically coerced Mexican-American women into submitting to sterilization. Although the district court refused to award damages to the Madrigal Ten, the case dramatically altered public consciousness and public policy on coerced sterilization. Despite their loss in the damages phase of the litigation, the Madrigal Ten catalyzed efforts to strengthen California's regulations for ensuring voluntary consent to sterilization. In addition, the *Madrigal* litigation inspired the anti-sterilization abuse movement in California and helped to shape Chicana feminism in the 1970s. The case galvanized Chicana feminist activism in ways that highlighted tensions between mainstream white feminists focusing on reproductive rights and women of color focusing on reproductive justice. The Chicana activists brought the still nascent framework of reproductive justice to the forefront, incorporating concerns about discrimination along intersectional lines of gender, race, poverty, and immigration status—all issues at play in the *Madrigal* case, and all of which still resonate today.

Debates over sterilization also play an unexpectedly central role in Khiara M. Bridges' detailed story of *Harris v. McRae* (1980), in which the Supreme Court upheld the constitutionality of the Hyde Amendment, which prohibits the use of federal funds for abortions desired by Medicaid recipients. Although this funding restriction disproportionately burdens women of color, who are overrepresented among those living in poverty, the lawyers who challenged the Hyde Amendment failed to invoke race, class, or gender in their arguments

against the law. The chapter explains the reasons for this erasure, identifying the precedent laid down by the Burger Court as responsible for rendering illegible claims that sound in race, class, or gender. As importantly, Bridges draws connections between advocacy against the Hyde Amendment and the growing opposition to sterilization abuse, highlighting the ways in which activists argued that by refusing to fund indigent women's abortions but covering the cost of their sterilizations, the federal government made it more likely that low-income women of color would choose sterilization in order to avoid unwanted pregnancies. Both *McRae* and *Madrigal* thus highlight the ways in which state power has been wielded, not just in the familiar direction of preventing abortion and encouraging pregnancy, but by using coercion to limit or punish family formation by marginalized groups.

Serena Mayeri's treatment of *Planned Parenthood v. Casey* (1992) showcases the interplay of social movement activism, legal and political advocacy, and the evolution of constitutional doctrine. In the 1980s, abortion opponents chipped away at *Roe v. Wade* by passing carefully-crafted state-level restrictions, advocating for a more lenient constitutional standard of judicial review, and supporting presidential candidates who would appoint more conservative judges. By the time Pennsylvania's Abortion Control Act reached the Supreme Court in 1992, *Roe* seemed doomed. But in a surprise decision authored by three Republican appointees, the Court reaffirmed *Roe*'s core holding while upholding all but one of the Pennsylvania restrictions. Abortion rights advocates succeeded in vanquishing spousal notification requirements, arguing successfully that they reflected an archaic vision of marriage inconsistent with modern equal protection law and posed dangers to survivors of intimate partner violence. Feminist advocates and scholars persuaded the Court to see abortion rights as a matter of women's autonomy, dignity, and equal citizenship as well as privacy, and so helped place abortion rights on firmer constitutional footing. But opponents of abortion persuaded the Court to dilute the standard of review applicable to abortion restrictions from strict scrutiny to the "undue burden" standard, and to elevate the state interest in protecting potential life, allowing for many more restrictions that limit access to reproductive health care for poor women, rural women, and women of color. The lessons activists on both sides of the abortion debate learned from *Casey* continue to reverberate today, as an increasingly conservative Court appears poised to further erode abortion rights and access.

In *Pregnant While Black: The Story of Ferguson v. City of Charleston*, Priscilla Ocen tracks one of the most notorious efforts to criminalize the reproductive choices of poor black women and the ways in which law failed to adequately address the various reproductive harms these women experienced as a result. Beginning in 1989, at the height of the moral panic surrounding crack cocaine, staff at the Medical University of South Carolina drug tested poor black pregnant

women without their consent. The drug testing was part of a program developed in coordination with local law enforcement, ostensibly in an effort to promote fetal rights. Feminist lawyers, horrified by stories of black women being dragged from their hospital beds, sought to challenge the hospital's policy as a violation of the right to procreation, equal protection, and privacy, and in so doing, underscored the policy as part of a larger state effort to regulate the reproductive choices of black women. In 2001, the Supreme Court struck down the policy as a violation of the Fourth Amendment's right to be free of unreasonable searches. The Court's narrow framing of the legal question, however, left open the question of whether states may punish women for their behavior while pregnant. As a result, in the years since *Ferguson*, pregnant women, disproportionately those who are poor and black, continue to be prosecuted for crimes ranging from child neglect to murder.

In the next chapter, Samuel Bagenstos examines Chief Justice Rehnquist's surprising opinion for the Court in *Nevada Department of Human Resources v. Hibbs* (2003). In upholding the family-care provisions of the Family and Medical Leave Act (FMLA) as a proper exercise of Congress's authority to enforce the Fourteenth Amendment, the *Hibbs* Court endorsed key tenets of what the chapter calls feminist universalism—the notion that sex equality is best served by rules and policies that reject differentiation between women and men. The chapter traces the way that many American feminist legal advocates moved toward universalism in the 1970s and 1980s—a process that culminated in the enactment of the FMLA in 1993. The chapter then shows how Rehnquist—hardly known for his embrace of legal feminism up to that point—relied heavily on feminist universalist arguments in *Hibbs*. Rehnquist's embrace of universalism is perhaps ironic. Even at the time *Hibbs* was litigated, evidence was accumulating that the FMLA's universalist approach was insufficient to achieve the underlying goals of disestablishing gender-role stereotypes and promoting equal opportunities for women and men throughout society. In this regard, *Hibbs* at once reflects the triumph of the feminist universalist project and its limitations.

Pregnancy at work is front and center in Katherine Shaw's chapter on *Young v. UPS* (2015), the Supreme Court's most recent case on the meaning of the Pregnancy Discrimination Act of 1978. When UPS driver Peggy Young became pregnant, her doctor recommended that she not lift more than 20 pounds for the duration of her pregnancy. UPS refused to accommodate her limitation—although it accommodated many other employees with non-pregnancy-related limitations—forcing her to take unpaid leave and eventually to lose her health insurance. The lower courts in Young's case, like most lower courts across the country, analyzed her PDA claims in a comparative framework, concluding that the failure to accommodate *some* nonpregnant employees insulated UPS from liability for its refusal to accommodate pregnancy. In Young's case,

the Court corrected that distortion of the PDA, holding that a pregnant worker like Young *could* make out a claim of pregnancy discrimination where an employer provided accommodations to a sizable number of other employees. Peggy Young's win was an important victory for pregnant workers—a victory that suggests the appeal of pregnancy across political lines. As Shaw explains, the legal fight to protect women who become pregnant and wish to remain pregnant, while also continuing to work, has produced unlikely coalitions of individuals and organizations that take starkly different views on many other issues involving reproductive rights and justice. Young's litigation team and amicus supporters reflected both liberal and conservative voices; so did the 6–3 majority her case produced, recalling the PDA's enacting coalition nearly forty years earlier. In this regard, *Young* may point the way to the prospect of unexpected—yet durable—legal and political coalitions around issues like paid leave, subsidized childcare, and additional protection against pregnancy discrimination at the state and local level.

Cary Franklin tells the story of *Whole Woman's Health v. Hellerstedt*, the 2016 case in which the Court invalidated a Texas law (H.B. 2) that imposed onerous regulations on abortion providers—and not on providers of other medical procedures of equal risk—in the name of protecting women's health. The chapter focuses not only on the Court's decision, but on actors such as Americans United for Life (AUL), an influential advocacy group partly responsible both for H.B. 2 and for the broader constitutional strategy that produced it. As Franklin explains, AUL has been tremendously successful in restricting women's access to abortion in recent years by pursuing an incremental strategy that aims to “hollow[] out *Roe*,” not by challenging it directly but by promoting ever-stiffer abortion regulations and persuading courts to weaken constitutional protections for the abortion right. One of the chief ways AUL has pursued these goals is by casting abortion regulation as woman-protective, asserting that such regulation shields women and fetuses alike from a greedy and unscrupulous abortion industry. During the legislative debates over H.B. 2, legislators opposed to the law disputed its claims to protect women's health. They argued that there were no legitimate health justifications for the law, that it would actually hurt women by driving reproductive healthcare clinics out of business, and that the state's poor track record when it came to protecting women's health undermined its claim to be acting for that reason here. The central question in *Whole Woman's Health* was whether the Court would defer to the legislature's assertion that it was acting to protect women's health or whether it would probe whether the regulation actually yielded health benefits. The Court did the latter: It examined whether Texas's law actually served the state's interest in protecting women's health, and how the law affected women's ability to exercise the abortion right. By scrutinizing the law and finding that the balance of interests weighed heavily in favor of invalidation, the Court

handed AUL and other anti-abortion forces a defeat. But it did not take long for those forces to regroup, in preparation for the next round of battles over abortion rights.

In our final chapter, Douglas NeJaime maps the legal question of parental recognition onto evolving principles of sexual orientation equality. He does so through the lens of *Brooke S.B. v. Elizabeth A.C.C.*, a groundbreaking 2016 New York Court of Appeals decision. While LGBT advocates have long argued for more expansive approaches to parenthood that would protect parents and children in a range of families, in recent years they also have urged courts to protect the children of same-sex parents specifically and thereby vindicate principles of sexual orientation equality. This chapter shows how an emphasis on sexual orientation equality can shape approaches to parental recognition in ways that yield recognition for some families—namely, same-sex couples and others using assisted reproductive technologies (ART)—while leaving other families in an uncertain state—namely, families in which the nonbiological parent did not participate in the decision to have the child but nonetheless raised the child. This distinction illustrates differences in standards that distinguish between *intent* and *function*. Intentional parenthood focuses on the decision to have a child, while functional parenthood focuses on the act of raising the child. The *Brooke S.B.* court adopted an intentional standard, and connected its approach to respect for same-sex couples' families and to emergent constitutional and family-law principles of sexual orientation equality. Nonetheless, the court explicitly left open the possibility of a functional test that would reach beyond the same-sex parents before it. Accordingly, both *Brooke S.B.* and subsequent developments—including decisions relying on and extending *Brooke S.B.*—have made New York a state in which same-sex and other nonbiological parents have multiple routes to parental recognition. New York is not alone in this regard: about half of states now recognize an unmarried nonbiological parent as a legal parent through an intentional or functional standard. Other states have resisted these reforms and have continued to limit parentage, presenting a new frontier for reproductive rights and justice.

