

## The Unfinished Story of *Roe v. Wade*

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*Roe v. Wade*<sup>1</sup> is both a case and a symbol. It is the rare Supreme Court case that Americans recognize by name.<sup>2</sup> It holds a special place in constitutional law, remaining openly and intensely contested after nearly half a century, despite continuing popular support.<sup>3</sup>

To those who support abortion rights, *Roe* demonstrates the Court's crucial role in protecting individual rights in the face of determined political opposition. For its critics, *Roe* was the work of an "unelected" Court creating new constitutional rights; supposedly, by deciding matters properly left to democratic determination, the Court inflamed conflict over abortion and riled our politics.<sup>4</sup>

We explain the origins of the abortion right and conflicts over it differently. The story we tell is not simply a litigation history of a landmark case, but instead a story about the democratic foundations of our constitutional law. We start our account of the abortion conflict before litigation begins. Conflict enters the picture well before the courts do, as people argue over the Constitution's meaning in their everyday lives. We recount how citizens who lacked power in any conventional sense were able over time to change the way the nation and its courts understood longstanding guarantees of liberty, of equality, and of life.

*Roe* itself, filed in federal district court in Dallas in March 1970, was one of many cases in the late 1960s and early 1970s that invoked the Constitution to challenge the century-old

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> See *U.S. Supreme Court Key Findings*, PENN SCHOEN BERLAND 14 (July 14, 2015), [http://sites.c-span.org/camerasInTheCourt/pdf/July-SCOTUS-Agenda-071415\\_multiple-year-tracking.pdf](http://sites.c-span.org/camerasInTheCourt/pdf/July-SCOTUS-Agenda-071415_multiple-year-tracking.pdf).

<sup>3</sup> See Hannah Fingerhut, *About Seven-in-Ten Americans Oppose Overturning Roe v. Wade*, PEW RESEARCH CENTER FACT TANK (Jan. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/01/03/about-seven-in-ten-americans-oppose-overturning-roe-v-wade/> (noting that, in 2016, sixty-nine percent of Americans said *Roe* "should not be completely overturned").

<sup>4</sup> See Cary Franklin, *Roe as We Know It*, 114 MICH. L. REV. 867, 867-71 (2016) (book review); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2071-76 (2011), reprinted in LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* 263, 303-07 (2d ed. 2012), [http://documents.law.yale.edu/sites/default/files/BeforeRoe2ndEd\\_1.pdf](http://documents.law.yale.edu/sites/default/files/BeforeRoe2ndEd_1.pdf).

regime of criminal abortion statutes;<sup>5</sup> *Roe* just happened to be first in line on the Supreme Court's docket. These cases emerged from principled and heated dialogue among powerful social movements that initially did not even have courts in view. The story of *Roe v. Wade* is the story of conflict born in democratic politics that engendered the rights claims that the Court would ultimately recognize. The conflict continues to this day, even as advocates and their arguments have changed as few would have expected.

This framework offers a fresh context for reading *Roe*. Enlarging our perspective in this way allows us to recover claims for and against abortion rights to which the Court's opinion in *Roe* responded, as well as claims that the Court ignored—claims for women's equality and for protecting potential life that played an important role in reshaping the abortion right nearly twenty years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>6</sup>

The account of *Roe*'s history the chapter offers can inform both normative and predictive debate about *Roe*'s future.

## 1. Mobilization for Reform

Abortion, at least in early pregnancy, was not a crime at the nation's founding.<sup>7</sup> But by the late nineteenth century, to deliberately terminate a pregnancy was a crime in every state except when necessary to save a woman's life.<sup>8</sup> Women turned to abortion nonetheless. By the mid-twentieth century, by some estimates, there were 1.2 million abortions a year, meaning that perhaps more than one of every four pregnancies ended in abortion.<sup>9</sup> Women of means could often find their way to a safe abortion, whether by traveling to countries where the procedure was legal (Japan, England, and Sweden, by the 1960s)<sup>10</sup> or by referral to an underground network of doctors who provided safe abortions for a price.

But for women without the money or the network, terminating a pregnancy came at great risk, if the opportunity came at all.<sup>11</sup> In the 1930s, before the introduction of antibiotics, there were an estimated 10,000 abortion deaths a year, with thousands more women left permanently injured or rendered sterile from illegal and unsafe abortions.<sup>12</sup> The majority of

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<sup>5</sup> On *Roe*, see *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970). For other cases, see, for example, *Crossen v. Breckenridge*, 446 F.2d 833 (6th Cir. 1971); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973); *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972), *vacated*, 410 U.S. 951 (1973); *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973); *Doe v. Scott*, 10 F. Supp. 688 (N.D. Ill. 1970); *People v. Belous*, 458 P.2d 194 (Cal. 1969); *State v. Munson*, 201 N.W.2d 123 (S.D. 1972).

<sup>6</sup> 505 U.S. 833 (1992).

<sup>7</sup> JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY*, at vii, 3 (1978); LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973*, at 8 (1997).

<sup>8</sup> REAGAN, *supra* note 7, at 5.

<sup>9</sup> Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem* (1959), 50 AM. J. PUB. HEALTH 948, 950 (1960), *reprinted in* GREENHOUSE & SIEGEL, *supra* note 4, at 22, 23.

<sup>10</sup> GREENHOUSE & SIEGEL, *supra* note 4, at 3.

<sup>11</sup> REAGAN, *supra* note 7, at 193.

<sup>12</sup> FREDERICK J. TAUSSIG, *ABORTION SPONTANEOUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS* 28 (1936).

these deaths occurred among women of color, even though they comprised a minority of the population.<sup>13</sup> As the years went by, there was little change in the racially disparate burden of illegal abortion. Only six percent of those who died from illegal abortions in New York City in the mid-1960s were white.<sup>14</sup> During this same period, black women were fourteen times more likely than white women to die from illegal abortion in Georgia.<sup>15</sup>

Alarmed public health doctors were among the first to call for reform. At a public health conference in 1959, Dr. Mary Steichen Calderone, the medical director of Planned Parenthood, delivered a paper entitled *Illegal Abortion as a Public Health Problem*.<sup>16</sup> The “frightening hush-hush” surrounding the subject, she argued, was “a symptom of a disease of our whole social body.”<sup>17</sup> Calderone emphasized the inequities inflicted on poor women who could not find doctors to authorize the procedure.<sup>18</sup>

In 1962, the American Law Institute (ALI), a prestigious group of lawyers, judges, and legal academics, proposed a modest but still pathbreaking reform as part of an ongoing project to modernize criminal law. Its proposal called for committees of doctors to authorize “therapeutic” abortions for women whose situations met certain approved indications. These included a pregnancy that resulted from rape or incest; that “would gravely impair the physical or mental health” of the woman; or would lead to a child born with a “grave physical or mental defect.”<sup>19</sup>

Notably, the ALI reform proposal, which a dozen states adopted from the late 1960s through 1970,<sup>20</sup> granted authority to doctors, not to women; the version Georgia enacted required a pregnant woman to persuade three doctors plus a three-member hospital committee that her pregnancy qualified for a legal abortion.<sup>21</sup> The American Medical Association, which had helped drive the nineteenth-century effort to criminalize abortion,

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<sup>13</sup> See ABORTION IN THE UNITED STATES: A CONFERENCE SPONSORED BY THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AT ARDEN HOUSE AND THE NEW YORK ACADEMY OF MEDICINE 67-68 (Mary Steichen Calderone ed., 1958).

<sup>14</sup> Harriet F. Pilpel, *The Abortion Crisis*, in THE CASE FOR LEGALIZED ABORTION NOW 97, 100-01 (Alan F. Guttmacher ed., 1967).

<sup>15</sup> Loretta J. Ross, *African-American Women and Abortion: A Neglected History*, 3 J. HEALTH CARE FOR POOR & UNDERSERVED 274, 281 (1992).

<sup>16</sup> Calderone, *supra* note 9, at 22-24.

<sup>17</sup> *Id.* at 24.

<sup>18</sup> *Id.* at 23.

<sup>19</sup> MODEL PENAL CODE § 230.3 (AM. LAW INST., Proposed Official Draft 1962), reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 24, 25.

<sup>20</sup> GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES 185-86 (2005).

<sup>21</sup> MODEL PENAL CODE § 230.3, *supra* note 19, at 25; see also KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 55-57 (1984) (arguing that one of the primary goals of therapeutic abortion boards was to restrict access to abortions). For Georgia’s multidoctor requirement, see *Doe v. Bolton*, 410 U.S. 179, 184 (1973).

adopted a new rule in 1970 that authorized its members to perform therapeutic abortions, but also instructed them not to engage in “mere acquiescence to the patient’s demand.”<sup>22</sup>

Other streams fed into a growing movement for reform. A 1968 best-selling book, *The Population Bomb*, warned that the earth was running out of resources.<sup>23</sup> While eugenicists once focused on controlling the birthrate among the nation’s poor, the mid-century environmentalists preached the virtues of separating sex and procreation and of limiting family size for the rich and poor alike.<sup>24</sup>

It was not until feminists joined the movement for decriminalization that woman-centered arguments for abortion reform emerged. Betty Friedan, the founder of the National Organization for Women, made such an argument in a fiery speech to an abortion-rights conference in Chicago in February 1969. The conference was sponsored by the Illinois Citizens for the Medical Control of Abortion,<sup>25</sup> a “staid” and “cautious” group whose founders were primarily concerned with “population and family-planning work.”<sup>26</sup> Friedan presented the audience with a completely different account of the reasons for reform: “[T]here is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process.”<sup>27</sup> Laws criminalizing abortion denied women the authority to shape their lives, Friedan argued. The repeal of criminal abortion laws would endow women with that practical and symbolic capacity: “Women are denigrated in this country, because women are not deciding the conditions of their own society and their own lives. Women are not taken seriously as people . . . . So this is the new name of the game on the question of abortion: that women’s voices are heard.”<sup>28</sup>

Feminists innovated forms of abortion protest designed to assert women’s authority in domains where traditionally it had been denied. To challenge the conventions that consigned women to secrecy and shame about abortion, women shared their own abortion stories during public “speak-outs.”<sup>29</sup> The Abortion Counseling Service of the Women’s Liberation Movement,

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<sup>22</sup> *Resolution No. 44: Therapeutic Abortion*, 1970 AM. MED. ASS’N PROCEEDINGS OF HOUSE OF DELEGATES 221, 221, reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 25, 28-29.

<sup>23</sup> PAUL R. EHRLICH, *THE POPULATION BOMB* 24-25 (1968).

<sup>24</sup> See, e.g., ZERO POPULATION GROWTH, INC., *PROGRESS?*, reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 55, 56-57.

<sup>25</sup> GREENHOUSE & SIEGEL, *supra* note 4, at 3.

<sup>26</sup> SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 16, 45, 53 (1991).

<sup>27</sup> Betty Friedan, President, Nat’l Organization for Women, *Abortion: A Woman’s Civil Right* (Feb. 1969), reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 38, 39.

<sup>28</sup> *Id.*

<sup>29</sup> For what may be the first abortion speak-out protesting the New York Legislature’s failure to include women in its hearing on abortion reform, see Susan Brownmiller, *Everywoman’s Abortions: “The Oppressor is Man,”* VILL. VOICE, Mar. 27, 1969, at 1, reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 127, 128-130. On the hearing, which featured 14 men and 1 nun on the list of speakers, see Edith Evans Asbury, *Women Break Up Abortion Hearing*, N.Y. Times, Feb. 14, 1969. [p.42]. On the aims of the feminist “Redstockings” in developing the speak-out technique, and its transatlantic spread, see ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA, 1967-1975* (1989). Critically, the speak-out technique was shared among movements. See William N. Eskridge, Jr., *Challenging*

better known as Jane, organized to provide access to safe abortion—initially by identifying trustworthy physicians and then by teaching women to perform the procedure themselves.<sup>30</sup> By taking charge in this very practical—and civilly disobedient way—activists sought to shift the locus of authority from government and doctors to women. The informational brochure Jane distributed asserted: “Only a woman who is pregnant can determine whether she has enough resources—economic, physical and emotional—at a given time to bear and rear a child. Yet at present the decision to bear the child or have an abortion is taken out of her hands by governmental bodies which can have only the slightest notion of the problems involved.”<sup>31</sup>

Friedan was hardly the only voice that linked the right to abortion to women’s empowerment. Frances Beal, a prominent African-American feminist, described the intersectional harms that abortion’s criminalization inflicted on women of color.<sup>32</sup> Women in black and Puerto Rican communities lived in a kind of “double jeopardy”: on the one hand pressured to accept sterilization in exchange for welfare benefits, on the other exposed to unsafe abortion when unready or unable to bear children. Beal emphasized that in 1969, “[n]early half of the child-bearing deaths in New York City were attributed to abortion alone and out of these, 79% are among non-whites and Puerto Rican women.”<sup>33</sup>

## 2. Countermobilization: Conflict Before *Roe*

As calls for reform spread from the medical and legal professions to popular movements, those who were committed to keeping abortion illegal began urgently to organize. The clergy of the Catholic Church played a leading role. In 1967, while an ALI-style reform bill was pending in the New York Legislature that would have allowed a panel of doctors to determine whether a woman could have an abortion in cases of rape, incest, threat to her physical or mental health, or in cases of fetal abnormality, priests in most of the state’s 1700 churches read a pastoral letter warning that the “right of innocent human beings to life is sacred.”<sup>34</sup>

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*the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 824, 880 (1997) (discussing the use of speak-outs in the post-Stonewall gay rights movement).

<sup>30</sup> GREENHOUSE & SIEGEL, *supra* note 4, at 7.

<sup>31</sup> *Abortion, a Woman’s Decision, a Woman’s Right*, CWLU HERSTORY PROJECT, <https://www.cwluherstory.org/jane-documents-articles/abortion-a-womans-decision-a-womans-right> (reprinting “Jane’s original informational pamphlet”).

<sup>32</sup> Interview by Loretta J. Ross with Frances Beal, in Oakland, CA, 28-29, 35-37 (Mar. 18, 2005), in VOICES OF FEMINISM ORAL HISTORY PROJECT, <https://www.smith.edu/libraries/libs/ssc/vof/transcripts/Beal.pdf>.

<sup>33</sup> FRANCES BEAL, *BLACK WOMEN’S MANIFESTO: DOUBLE JEOPARDY: TO BE BLACK AND FEMALE* (1969), *reprinted in* GREENHOUSE & SIEGEL, *supra* note 4, at 49, 52. For an account exploring the conflicting political pressures on women of color who faced population control measures as well as criminal abortion laws, see JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* (2003).

<sup>34</sup> George Dugan, *State’s 8 Catholic Bishops Ask Fight on Abortion Bill: Pastoral Letter Read*, N.Y. TIMES (Feb. 13, 1967), <http://query.nytimes.com/mem/archive/pdf?res=9902E1DD103BE63ABC4B52DFB466838C679EDE>.

In 1967, recognizing that reform was moving swiftly and that “more than half of all Catholics disagreed” with the official Church position, the National Conference of Catholic Bishops (NCCB) funded a “national educational campaign to provide institutional support for the right-to-life cause”; a year later, a young priest named Bishop James McHugh established the National Right to Life Committee (NRLC) to provide resources to oppose state-level legislative reform.<sup>35</sup>

During this period, the Catholic Church reaffirmed its view that the purpose of sex was to create new life within marriage, reiterating its prohibition on birth control.<sup>36</sup> But in the midst of a revolution in sexual mores and with American Catholics bitterly divided over whether to preserve the Church’s ban on contraception,<sup>37</sup> the NRLC built the case for maintaining the criminalization of abortion in terms that made no reference to sex. Instead, the NRLC placed the fetus at the center of the argument, emphasizing its right to life within a constitutional and human rights framework.<sup>38</sup>

Catholic opposition to abortion acquired new momentum under the leadership of Dr. John C. Willke. Willke, a family doctor, spent the 1960s traveling the country with his wife Barbara as Catholic sex and marriage counselors, opposing birth control and celebrating the virtues of saving sex for marriage and childbearing. In 1970, they enlisted in the antiabortion cause.<sup>39</sup> The next year, the Willkes self-published a pocket-sized book, *Handbook on Abortion*,<sup>40</sup> which sold 1.5 million copies in eighteen months.<sup>41</sup> The book was notable for two features. One was a graphic display of color photographs of fetuses.<sup>42</sup> The other, subtler but equally powerful, was its explicit appeal to “our pluralistic society,”<sup>43</sup> rooting opposition to abortion not in religious doctrine about the purposes of sex or the nature of life but instead in logic and

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<sup>35</sup> DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 88-89, 92, 94 (2016); see also Greenhouse & Siegel, *supra* note 4, at 295-97, 295 n.132.

<sup>36</sup> See, e.g., PAUL VI, HUMANAE VITAE, ENCYCLICAL LETTER OF THE SUPREME PONTIFF PAUL VI (July 29, 1968), reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 73, 76.

<sup>37</sup> See GREENHOUSE & SIEGEL, *supra* note 4, at 74-75.

<sup>38</sup> See WILLIAMS, *supra* note 35, at 89-90. Emphasis on the fetus and its right to life may have obscured but did not eliminate Catholic views about the wrongs of nonprocreative sex, which finds continuing expression in opposition to contraception, gay rights, and same-sex marriage. See, e.g., *Ministry to Persons with a Homosexual Inclination: Guidelines for Pastoral Care*, U.S. CONF. CATHOLIC BISHOPS 3-4 (Nov. 14, 2006), <http://www.usccb.org/issues-and-action/human-life-and-dignity/homosexuality/upload/ministry-persons-homosexual-inclination-2006.pdf> (“By its very nature, the sexual act finds its proper fulfillment in the marital bond . . . . There are a variety of acts, such as adultery, fornication, masturbation, and contraception, that violate the proper ends of human sexuality. Homosexual acts also violate the true purpose of sexuality.”).

<sup>39</sup> See JOHN C. WILLKE, ET AL., ABORTION AND THE PRO-LIFE MOVEMENT: AN INSIDE VIEW 32-33 (2014); Cynthia Gorney, *The Dispassion of John C. Willke*, WASH. POST (Apr. 22, 1990), [https://www.washingtonpost.com/archive/lifestyle/magazine/1990/04/22/the-dispassion-of-john-c-willke/5d8be81a-7521-4986-b7c4-b052765349ac/?utm\\_term=.8374ef4d472c](https://www.washingtonpost.com/archive/lifestyle/magazine/1990/04/22/the-dispassion-of-john-c-willke/5d8be81a-7521-4986-b7c4-b052765349ac/?utm_term=.8374ef4d472c).

<sup>40</sup> J.C. WILLKE & BARBARA WILLKE, HANDBOOK ON ABORTION 145 (1971).

<sup>41</sup> GREENHOUSE & SIEGEL, *supra* note 4, at 99.

<sup>42</sup> Photographs of fetuses, in WILLKE & WILLKE, *supra* note 40, following p. 27.

<sup>43</sup> *Id.* at v.

medical science. *Handbook on Abortion* went through two dozen printings and was translated into many languages.<sup>44</sup>

To be sure, not all Catholics opposed decriminalization<sup>45</sup> and not everyone who opposed decriminalization was Catholic. But it was the leadership of the Church that led opposition to abortion reform, identifying that position so closely with Catholicism that Protestant churches—historically unwilling to join forces with the Catholic Church—largely stayed away.<sup>46</sup> (Surprisingly from today’s perspective, in 1971 the National Association of Evangelicals and the Southern Baptist Convention adopted positions that accepted abortion in certain health-related circumstances.<sup>47</sup> In this period, evangelicals had little political engagement with abortion. Opposition to abortion was regarded as Catholic in origin and energy.<sup>48</sup>)

The Catholic face of antiabortion activism had political implications that would grow exponentially in importance over the decade to come, offering new incentives for antiabortion advocacy. During the 1972 presidential campaign, leaders of the Republican Party—which to this point had supported liberalization of contraception and abortion—began to experiment with antiabortion advocacy in an effort to recruit Catholic voters away from their traditional allegiance to the Democratic Party.<sup>49</sup> An important figure was Kevin Phillips, a political strategist for the Nixon White House who made his name forecasting that the Republican Party could recruit white Southern Democrats to the GOP by appealing to race (the so-called “Southern Strategy”).<sup>50</sup> Phillips was quick to recognize another source of new Republican voters: by adopting an antiabortion stance, Republicans might attract culturally conservative Catholic Democrats.<sup>51</sup>

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<sup>44</sup> GREENHOUSE & SIEGEL, *supra* note 4, at 99.

<sup>45</sup> See, e.g., George Gallup, *Abortion Seen Up to Woman, Doctor*, WASH. POST, Aug. 25, 1972, at A2, reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 208 (“Fifty-six per cent of Catholics believe[d] that abortion should be decided by a woman and her doctor . . . .”); see also note 35 and accompanying text (discussing the division of opinion among American Catholics in the early 1970s).

<sup>46</sup> See Greenhouse & Siegel, *supra* note 4, at 295-96 & n.132.

<sup>47</sup> Nat’l Ass’n of Evangelicals, *Statement on Abortion* (1971), reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 72, 73 (stating that abortion should be to available to safeguard the health or life of the woman, and after counseling, in cases of rape or incest); S. BAPTIST CONVENTION, RESOLUTION ON ABORTION (1971), reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 71, 72 (calling for legislation that would allow the possibility of abortion in cases of rape, incest, severe fetal deformity, and “carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother”).

<sup>48</sup> Greenhouse & Siegel, *supra* note 4, at 263, 295-97 & 295 n.132.

<sup>49</sup> See WILLIAMS, *supra* note 35, at 188-89; Greenhouse & Siegel, *supra* note 4, at 286-87. Gallup polls of the era show that more Republicans than Democrats supported the decriminalization of abortion. See *infra* note 58 and accompanying text.

<sup>50</sup> James Boyd, *Nixon’s Southern Strategy: ‘It’s All in the Charts,’* N.Y. TIMES (May 17, 1970), <http://www.nytimes.com/packages/html/books/phillips-southern.pdf>.

<sup>51</sup> Kevin Phillips, *How Nixon Will Win*, N.Y. TIMES (Aug. 6, 1972), <http://www.nytimes.com/1972/08/06/archives/how-nixon-will-win-a-republican-takes-to-the-soapbox-in-answer-to.html>. See generally Greenhouse & Siegel, *supra* note 4, at 290.

Patrick Buchanan, another key Republican strategist, saw in the abortion conflict a chance to capture Catholic votes and much more. Working with Richard Nixon’s presidential campaign, Buchanan identified new ways of attacking abortion that would tap into voters’ unease with those who *supported* abortion—among them, the youth movements calling for liberalization of abortion laws as part of a broader progressive agenda for fundamental social transformation; movements then tying abortion to sexual revolution, civil rights, social justice, and an end to war; and, prominently, feminists emphasizing abortion’s role in achieving women’s equality in the home and workplace.<sup>52</sup> Buchanan was quick to appreciate that the growing conflict over abortion was not only about when life began but also involved wide-ranging questions of religion, sex, and sexuality—the topics at the heart of what he would later famously call the “cultural wars.”<sup>53</sup> Americans were deeply divided about how to live together, and, as Buchanan understood, abortion was becoming a symbol of those deep divisions.

### 3. Legislative Change and Legislative Lock-Up

As public attention to the abortion issue escalated, so did public support for reforming old criminal laws.<sup>54</sup> Between 1967 and 1970, a dozen states enacted laws that followed the ALI’s model, permitting abortion—with multiple doctors’ approval—for women whose situations met the stated criteria.<sup>55</sup> In 1970, Alaska, Hawaii, Washington, and New York went further to repeal their existing abortion prohibitions to permit women to terminate a pregnancy without restriction until a certain gestational age.<sup>56</sup>

By mid-1972, polls showed startlingly broad-based public appetite for reform of the nation’s abortion laws. A Gallup poll published in August of that year showed that sixty-four percent of Americans—nearly two out of three—agreed that “abortion should be a matter for decision solely between a woman and her physician.”<sup>57</sup> The responses showed little difference between men and women. Notably, a majority of Catholics (fifty-six percent) agreed with the

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<sup>52</sup> Greenhouse & Siegel, *supra* note 4, at 286-92 (discussing strategies for Republicans to court Democratic voters devised by Kevin Phillips and Patrick Buchanan during the Nixon presidency; documenting how Buchanan urged President Nixon to attack abortion as a way of persuading Catholics and cultural conservatives long affiliated with the Democratic Party to vote for Republicans).

<sup>53</sup> At the 1992 Republican National Convention, Buchanan warned that America was in the grips of a “cultural war” and denounced the “radical feminis[t] . . . agenda [that] Clinton & Clinton would impose on America: abortion on demand, a litmus test for the Supreme Court, homosexual rights, discrimination against religious schools, women in combat units. That’s change, all right. But that’s not the kind of change America needs.” Patrick J. Buchanan, *Address to the Republican National Convention in Houston* (Aug. 17, 1992), in AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=78575>.

<sup>54</sup> See Judith Blake, *Abortion and Public Opinion: The 1960-1970 Decade*, 171 *Sci.* 540, 541 & tbl.1 (1971).

<sup>55</sup> BURNS, *supra* note 20, at 177 tbl.5.1.

<sup>56</sup> *Id.* at 178 tbl.5.3.

<sup>57</sup> Gallup, *supra* note 45, at 208. This poll was in Justice Blackmun’s files. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 91 (2005).



statement. While a majority of both Republicans and Democrats also agreed, Republican support was notably higher (sixty-eight percent compared with fifty-nine percent).<sup>58</sup>

The momentum for reform seemed unstoppable, with state after state enacting legislation and poll numbers rising. But it all came to a halt after 1970. During the following two years, liberalization efforts failed across the country and no additional reform bills were enacted.<sup>59</sup> The New York Legislature, its members under intense pressure from the clergy of the Catholic Church, repealed the reform measure it had adopted two years earlier.<sup>60</sup> Only Governor Rockefeller's veto kept the reform law on the books.<sup>61</sup> In 1972, a closely watched Michigan referendum to liberalize abortion law failed.<sup>62</sup> This development was widely seen as a bellwether for the fate of the state-by-state legislative strategy.<sup>63</sup>

The shutdown of legislative reform in the face of overwhelming popular support illustrates the ability of a mobilized minority, committed to a single issue and institutionally funded and organized, to thwart reforms that have broad popular support.<sup>64</sup> In New York, for example, public support for the new abortion law stood at over sixty percent when the legislature repealed it, and support for liberalization in Michigan was fifty-nine percent when voters sent the reform referendum to defeat.<sup>65</sup> In frustration, and with reason to hope for a better outcome, advocates turned to the courts.

#### 4. New Claims on the Constitution

As the effort to secure legislative reform stalled, those in favor of abortion rights turned to other approaches and audiences. Might an appeal to the courts and to the Constitution succeed in changing the law governing abortion—and if so, on what grounds? Young lawyers—recent law school graduates, many of them women—began to make new claims, based in part on the Supreme Court's recent decision recognizing a right to privacy in reproductive decision-making, about the meaning of the longstanding constitutional guarantees of liberty and equality.<sup>66</sup>

These early cases filed before *Roe* are striking as they express the constitutional injury of laws criminalizing abortion in a variety of ways—some that judges would take decades to recognize and others that judges do not recognize to this day. The cases illustrate popular

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<sup>58</sup> Gallup, *supra* note 45, at 208. For an analysis of polling at the time of the decision showing somewhat weaker support for reform, see Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 948 (2016).

<sup>59</sup> Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 139 (2012).

<sup>60</sup> Greenhouse & Siegel, *supra* note 4, at 281 n.69.

<sup>61</sup> *Id.*

<sup>62</sup> Robert N. Karrer, *The Formation of Michigan's Anti-Abortion Movement, 1967-1974*, 22 MICH. HIST. REV. 67, 95-98 (1996).

<sup>63</sup> *Id.*

<sup>64</sup> See Lain, *supra* note 59, at 139-42.

<sup>65</sup> *Id.* at 140-41.

<sup>66</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

dialogue about the meaning of the Constitution’s guarantees, as citizens try to educate those in power about harms not shared equally across lines of sex, race, and class. Their voices likely played a role in leading judges to appreciate that laws criminalizing abortion inflicted constitutional injuries on women without necessarily persuading the judges of the precise constitutional character of those harms.

In fact, constitutional challenges to abortion statutes were already making their way through the courts, raised by doctors facing criminal prosecution for performing abortions.<sup>67</sup> In 1971, the U.S. Supreme Court reviewed the conviction of a doctor who argued that the health exception in the District of Columbia’s abortion law was unconstitutionally vague because it left doctors uncertain whether an abortion would be legal or criminal. To avoid the constitutional question, the Court interpreted the law to give doctors latitude to use their ordinary professional judgment.<sup>68</sup> Two years earlier, in *People v. Belous*,<sup>69</sup> the California Supreme Court reversed a doctor’s conviction on vagueness grounds. *Belous* drew national attention because the court went beyond vagueness to invoke, as a separate ground for reversing the doctor’s conviction, the right to privacy first recognized by the U.S. Supreme Court four years earlier when it struck down a law criminalizing contraception in *Griswold v. Connecticut*.<sup>70</sup>

In invoking the right to privacy, the *Belous* court drew on a widely cited article by a recent law school graduate named Roy Lucas.<sup>71</sup> Lucas advocated directly challenging the constitutionality of criminal abortion statutes under the Fourteenth Amendment’s rights of privacy and autonomy recognized in *Griswold*.<sup>72</sup>

Lucas had embarked on a quest that many others were soon to join: how to express intuitions about the injustice of abortion restrictions in constitutional law.<sup>73</sup> Spurred by the recent failure of a reform bill in the New York Legislature, reformers in October 1969 filed four separate lawsuits challenging the state’s abortion ban.<sup>74</sup> Each lawsuit drew upon a model brief that Lucas had prepared, taking its arguments in different directions that reflected the interests of plaintiffs with distinct stakes in the abortion issue—doctors, ministers, an antipoverty

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<sup>67</sup> Risa L. Goluboff, *Dispatch from the Supreme Court’s Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1379 (2010).

<sup>68</sup> *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971).

<sup>69</sup> 458 P.2d 194 (Cal. 1969).

<sup>70</sup> *Id.* at 199 (citing *Griswold*, 381 U.S. at 485-86, 500).

<sup>71</sup> *Id.* at 201 n.10 (citing Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730 (1968)).

<sup>72</sup> Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730, 755-56 (1968).

<sup>73</sup> Lucas worked with, among others, Melvin Wulf, the legal director of the American Civil Liberties Union (ACLU), and Harriet Pilpel, an ACLU cooperating attorney and longtime advocate for the right to contraception and abortion. See LEIGH ANN WHEELER, *HOW SEX BECAME A CIVIL LIBERTY* 128-31 (2013).

<sup>74</sup> GREENHOUSE & SIEGEL, *supra* note 4, at 140.

organization, and a class of women arguing that the law violated their rights to privacy and equal protection.<sup>75</sup>

In this last case, *Abramowicz v. Lefkowitz*, Nancy Stearns of the Center for Constitutional Rights, along with other feminist lawyers, built upon the Lucas brief's emphasis on the right to privacy, offering new ways of expressing the constitutional injuries wrought by New York's criminal abortion law.<sup>76</sup> The Stearns brief appealed to equal protection and to the Eighth Amendment's prohibition of cruel and unusual punishment, as well as to a "right to life" that belonged to the *woman*.<sup>77</sup> These arguments all gave voice to feminist claims about the harms abortion bans inflicted on women that were not well expressed by the language of privacy in *Griswold*.

Stearns invited the courts to consider intersectional claims of class, race, and sex. At this time, the Supreme Court had not yet rejected class-based claims under the Equal Protection Clause, claims that at the time were being pressed in litigation across a variety of fronts.<sup>78</sup> Stearns was thus free to argue that abortion's criminalization violated equal protection by limiting safe abortion to women of means<sup>79</sup> and by inflicting disparate harms on poor women of color.<sup>80</sup>

Stearns also argued that criminal abortion laws discriminated on the basis of sex. She advanced this claim before the Court had held that sex discrimination violated equal protection—and on terms that the case law resists to this very day.<sup>81</sup> In the *Abramowicz* brief, Stearns and her colleagues argued that in forcing women to continue a pregnancy, criminal abortion laws violated equal protection by: (1) punishing the woman, but not the man, who engaged in sexual relations; and (2) relegating women to a society that expelled pregnant students, fired pregnant employees, and denied employment to women with children.<sup>82</sup> The brief further asserted that the abortion laws "are both a result and symbol of the unequal treatment of women" and reasoned that so long as "such a broad range of disabilities are

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<sup>75</sup> See Linda Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, N.Y. TIMES, Jan. 25, 1970, reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 130, 134-36.

<sup>76</sup> See, e.g., Plaintiffs' Brief at 66, *Abramowicz v. Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969) (69 Civ. 4469).

<sup>77</sup> *Id.* at 12, 35, 46.

<sup>78</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>79</sup> See, e.g., Plaintiffs' Brief at 3, *Abramowicz*, 305 F. Supp. 1030 (69 Civ. 4469).

<sup>80</sup> Reva B. Siegel, *Roe's Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875, 1889 (2010) (citing equal protection wealth and race inequality claims in feminist challenges to criminal abortion laws in several states).

<sup>81</sup> In *Geduldig v. Aiello*, the Court famously rejected a claim that a California insurance program's refusal to include pregnancy as a disability subject to coverage constituted unconstitutional discrimination on the basis of sex. 417 U.S. 484 (1974). For a discussion of *Geduldig* and the Court's evolving analysis of the relationship between sex discrimination and pregnancy discrimination, see generally Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 OHIO ST. L. J. 1095 (2009).

<sup>82</sup> Plaintiffs' Brief at 35-36, 37, *Abramowicz*, 305 F. Supp. 1030 (69 Civ. 4469).

permitted to attach to the status of pregnancy and motherhood, that status must be one of choice.”<sup>83</sup>

Without case law to cite in support of these equal protection claims—and at a time when only one percent of Article III judges were women<sup>84</sup>—the feminist lawyers in *Abramowicz* invoked actual women as authority. The brief quoted plaintiffs’ depositions and testimonies in ways that mirrored women’s abortion speak-outs of the day.<sup>85</sup> The brief brought women’s voices into the courtroom to show how laws criminalizing abortion inflicted injuries that reflected and enforced inequalities of sex, race, and class.<sup>86</sup>

Nancy Stearns worked with movement lawyers to file similar suits with large, named groups of plaintiffs in Connecticut, New Jersey, Rhode Island, Massachusetts, and Pennsylvania.<sup>87</sup> The Connecticut case shows the same concern with the intersecting forms of inequality. The pamphlet written to recruit plaintiffs challenged the ways criminal abortion laws and cultural forces together pressured women into bearing children they were not ready to have, while at the same time stigmatizing unwed motherhood and threatening sterilization and the loss of public benefits to poor women who bore children. “We are tired of being pressured to have children or not to have children. It’s our decision,” the pamphlet declared.<sup>88</sup>

Catherine Roraback, who had helped litigate *Griswold v. Connecticut*, and Nancy Stearns translated these movement claims into a life, liberty, and equality challenge to Connecticut’s nineteenth-century abortion statute.<sup>89</sup> Ultimately, 1700 women signed up as plaintiffs in the case that became known as *Women v. Connecticut*, or more formally, *Abele v. Markle*.<sup>90</sup> Litigation in the *Abele* case ultimately led to the invalidation of Connecticut’s nineteenth-century abortion ban. The district court invoked principles of due process on which the Court in *Roe* would rely and principles of sex equality that would not inform the Court’s abortion jurisprudence for decades. In its opinion, the district judge observed that in the century since Connecticut’s ban on abortion had been enacted, there had been a transformation in the roles

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<sup>83</sup> *Id.* at 40, 87.

<sup>84</sup> *Demography of Article III Judges, 1789-2015*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/gender> (reporting that in 1970, seven of the 619 Article III judges—1.14%—were women).

<sup>85</sup> See, e.g., Plaintiffs’ Brief at 19, 21, *Abramowicz*, 305 F. Supp. 1030 (69 Civ. 4469).

<sup>86</sup> The New York lawsuits did not produce a court decision. They became moot early in 1970 when the New York Legislature, by a “dramatic last-minute switching of a single vote,” repealed New York’s criminal abortion law. See Bill Kovach, *Abortion Reform Is Voted by the Assembly, 76 to 73; Final Approval Expected*, N.Y. TIMES (Apr. 10, 1970), <http://www.nytimes.com/1970/04/10/archives/abortion-reform-is-voted-by-the-assembly-76-to-73-final-approval.html>.

<sup>87</sup> See Siegel, *supra* note 80, at 1886-87.

<sup>88</sup> GREENHOUSE & SIEGEL, *supra* note 4, at 169.

<sup>89</sup> Complaint for Declaratory Judgment, Injunction, and Other Appropriate Relief, *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972) (No. 14291).

<sup>90</sup> *Abele*, 342 F. Supp. 800; *Hearing on Abortion Before the J. Comm. on Pub. Health & Safety*, 1972 Leg., Spec. Sess., 18-23 (Conn. 1972) (statement of Catherine Roraback), reprinted in GREENHOUSE & SIEGEL, *supra* note 4, at 184, 186.

<sup>90</sup> *Abele*, 342 F. Supp. 800.

of women, citing due process precedent and the Nineteenth Amendment, Title VII of the 1964 Civil Rights Act, and *Reed v. Reed* (the first equal-protection sex discrimination case).<sup>91</sup>

## 5. *Roe v. Wade*

“We never thought we were filing what would become *the* Supreme Court case,” Sarah Weddington would write two decades later.<sup>92</sup> Only recently graduated from the University of Texas Law School when she helped launch the case that became *Roe v. Wade*, Weddington lacked the experience and movement connections of Nancy Stearns and Catherine Roraback.<sup>93</sup> In 1969, she was living in Austin when members of a local women’s group approached her for help in providing birth control counseling for unmarried University of Texas students.<sup>94</sup> Abortion was not on the group’s original agenda, but the issue soon arose as the women considered their potential legal liability for referring students to abortion providers.<sup>95</sup> The group asked Weddington to bring a federal lawsuit challenging the constitutionality of the Texas statute, which dated to 1854 and prohibited all abortions except those necessary to save a pregnant woman’s life.<sup>96</sup>

Weddington agreed. Several years earlier, as a “scared” law student, Weddington and her boyfriend had traveled “to a dirty, dusty Mexican border town to have an abortion, fleeing the law that made abortion illegal in Texas” and spending all her money in the process.<sup>97</sup> Weddington accepted the invitation to challenge the law, in order to “help[] others avoid what we had gone through.”<sup>98</sup>

Two years out of law school, Weddington had a legal research job but no experience practicing law.<sup>99</sup> Looking for help, she turned to her law school classmate, Linda Coffee, who had clerked for a federal district judge in Dallas, Judge Sarah T. Hughes, one of the first women appointed to the federal bench.<sup>100</sup> The plaintiffs the two women recruited included a married

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<sup>91</sup> See *Abele*, 342 F. Supp. at 802 & nn.8-9. The legislature reenacted the law, which was again struck down in an opinion that made the concept of fetal viability central to a balance between women’s rights and the state’s regulatory interests in abortion. See GREENHOUSE & SIEGEL, *supra* note 4, at 163-196 (collecting sources).

<sup>92</sup> SARAH WEDDINGTON, *A QUESTION OF CHOICE* 50 (40th anniversary ed. 2013).

<sup>93</sup> For profiles of Nancy Stearns and Catherine Roraback, see Amy Kesselman, *Women Versus Connecticut: Conducting a Statewide Hearing on Abortion*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000*, at 42, 43-44, 46-47 (Rickie Solinger ed., 1998).

<sup>94</sup> DAVID J. GARROW, *LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 390-93 (1994).

<sup>95</sup> *Id.* at 391-93.

<sup>96</sup> TEX. PENAL CODE ANN. §§ 1191-1196 (West 1972), *declared unconstitutional by Roe v. Wade*, 410 U.S. 113, 153 (1973); see also GARROW, *supra* note 94, at 395.

<sup>97</sup> WEDDINGTON, *supra* note 92, at 13, 16.

<sup>98</sup> *Id.* at 50-51.

<sup>99</sup> *Id.* at 26, 51.

<sup>100</sup> *Id.* at 53-54. Judge Hughes was the third woman appointed to an Article III court. See *Women as ‘Way Pavers’ in the Federal Judiciary*, U.S. COURTS (Feb. 26, 2015), <http://www.uscourts.gov/news/2015/02/26/women-way-pavers-federal-judiciary>.

couple with medical reasons for avoiding pregnancy and an unmarried pregnant woman who for the purposes of the case was given the name Jane Roe. A doctor who was under indictment for performing an abortion later entered the case as an intervenor.<sup>101</sup>

In March 1970, Weddington and Coffee filed their three-page complaint in the United States District Court for the Northern District of Texas, in Dallas.<sup>102</sup> As a federal court challenge to the constitutionality of a state law, the case was referred to a special three-judge court, with direct appeal to the U.S. Supreme Court. The brief that Weddington and Coffee filed included a photocopy of portions of Roy Lucas's brief in the doctors' challenge to New York's criminal abortion statute.<sup>103</sup> The Weddington-Coffee brief questioned the state's interest in criminalizing abortion.<sup>104</sup> It argued that the Texas law was void for vagueness,<sup>105</sup> violated the right to privacy recognized in the Supreme Court's due process cases,<sup>106</sup> and discriminated against poor women.<sup>107</sup> The Weddington-Coffee brief incorporated the doctrinal privacy arguments that Roy Lucas had advanced in the New York litigation, but did not mention the movement equality concerns about sex and motherhood that Nancy Stearns and her colleagues were pressing as the reason for recognizing women's right to control their reproductive lives.

On June 17, 1970, the District Court, which included Judge Sarah Hughes, issued a per curiam opinion reasoning that the right to privacy announced in *Griswold* extended to decisions about abortion.<sup>108</sup> The court issued a declaratory judgment that the statute was unconstitutional but refused to enjoin its enforcement on the assumption that the state would conform its criminal prosecution to constitutional requirements.<sup>109</sup>

In the spring of 1971, the Supreme Court agreed to hear the appeals in both *Roe v. Wade* and *Doe v. Bolton*,<sup>110</sup> which declared unconstitutional Georgia's recent ALI-style reform statute. In the Texas case, Jane Roe's lawyers, with the assistance of Roy Lucas and Norman Dorsen, a prominent law professor and civil libertarian, focused their brief largely on the

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<sup>101</sup> GARROW, *supra* note 94, at 405, 433-34; WEDDINGTON, *supra* note 92, at 56-61. Weddington and Coffee soon thereafter amended both complaints to convert the cases into class actions on behalf of all others similarly situated. See *Roe v. Wade*, 314 F. Supp. 1217, 1219 n.1 (N.D. Tex. 1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973). A quarter of a century later, Norma McCorvey was converted to the antiabortion cause by the national director of Operation Rescue. See Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1644-45 nn.12-14 (2008).

<sup>102</sup> Plaintiff's Original Complaint, *Roe*, 314 F. Supp. 1217 (Nos. 3-3690-B, 3-3691-C). See generally WEDDINGTON, *supra* note 92, at 64-65.

<sup>103</sup> Brief of Plaintiffs Jane Roe, John Doe, and Mary Doe at app., *Roe*, 314 F. Supp. 1217 (Nos. CA-3-3690, CA-3-3691); see also GARROW, *supra* note 94, at 438-39.

<sup>104</sup> Brief of Plaintiffs Jane Roe, John Doe, and Mary Doe at 7-9, *Roe*, 314 F. Supp. 1217 (Nos. CA-3-3690, CA-3-3691).

<sup>105</sup> *Id.* at 9-10.

<sup>106</sup> *Id.* at 13.

<sup>107</sup> *Id.* at 11-12.

<sup>108</sup> *Roe*, 314 F. Supp. at 1217, 1222.

<sup>109</sup> *Id.* at 1224 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 484-85 (1965)).

<sup>110</sup> 319 F. Supp. 1048, 1050, 1056-57 (N.D. Ga. 1970) (declaring unconstitutional Ga. Code Ann. §26-1201 et seq. (1961)).

*Griswold*-anchored privacy objection to the state’s abortion ban.<sup>111</sup> They raised a vagueness claim focusing on the law’s harm to doctors and argued that by criminalizing abortions, Texas was putting its female citizens at risk.<sup>112</sup>

In an amicus brief, Nancy Stearns voiced a variety of movement-informed equality arguments for the abortion right that were not included in the party brief. She maintained that denying women control over childbearing impoverished families. Her emphasis was on the gender bias of the law that deprived women of a choice over whether and when to become mothers.<sup>113</sup>

Texas incorporated into its brief a medical account of fetal development that the state asserted “establishes the humanity of the unborn child.”<sup>114</sup> “We submit that the data not only shows [sic] the constitutionality of the Texas legislature’s effort to save the unborn from indiscriminate extermination, *but in fact suggests a duty to do so.*”<sup>115</sup> The state defended its law on the ground that the fetus has a right to life protected by the Due Process and Equal Protection Clauses of the Constitution.<sup>116</sup> The brief cited to numerous scientific sources<sup>117</sup> and, on the model of Jack Willke, included photographs of prenatal development.<sup>118</sup>

Justices Black and Harlan having unexpectedly retired at the beginning of the 1971 Term, only seven Justices sat for the arguments. Justice Blackmun, assigned by Chief Justice Burger to write the majority opinions striking down both the Texas and Georgia laws, focused his initial draft on the objections that the medical profession had been raising about criminal abortion laws: the laws were unconstitutionally vague and so exposed doctors to the risk of prosecution without notice.<sup>119</sup>

After Justices Lewis F. Powell Jr. and William H. Rehnquist joined the Court in January 1972, the Justices decided to rehear the cases before a full bench. The new argument took place in October 1972—a fateful two years after the cases were filed. In the interim, as we have seen, popular support for decriminalization had surged and was still rising, while counter-mobilization was also mounting. In developments that would prove highly significant, Congress

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<sup>111</sup> Brief for Appellants at 91-94, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

<sup>112</sup> *Id.* at 125.

<sup>113</sup> Brief Amicus Curiae on Behalf of New Women Lawyers, Women’s Health and Abortion Project, Inc., National Abortion Action Coalition at 14, 26, 31, *Roe*, 410 U.S. 113 (No. 70-18).

<sup>114</sup> Brief for Appellee at 31, *Roe*, 410 U.S. 113 (No. 70-18).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 56.

<sup>117</sup> *See, e.g., id.* at 32.

<sup>118</sup> *See, e.g., id.* at 35, 37, 39-40.

<sup>119</sup> Goluboff, *supra* note 67, at 1379.

had voted to send an Equal Rights Amendment (ERA) to the states for ratification<sup>120</sup> and a presidential campaign was underway.

Perhaps moved by the growing tide of lower court opinions striking down abortion prohibitions, as well as by poll results showing public support for abortion's decriminalization that crossed party lines and religious groups,<sup>121</sup> Justice Blackmun now approached his assignment with the confidence to base a new draft opinion not on the ground of vagueness but on a constitutional right, the right to privacy that the Court in *Griswold* had derived from the Ninth and Fourteenth Amendments.<sup>122</sup> Neither the state's arguments on behalf of the unborn nor concern about the welfare of pregnant women, he concluded, could outweigh a woman's fundamental right to terminate a pregnancy, at least in the early stages.<sup>123</sup>

In his opinion, Justice Blackmun identified the right to privacy as "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."<sup>124</sup> It was, he said, "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>125</sup> The majority reviewed the Court's due process precedents, going back to the early twentieth century, that protected intimate decision-making within and about family relations. These included *Meyer v. Nebraska*,<sup>126</sup> *Pierce v. Society of Sisters*,<sup>127</sup> *Griswold v. Connecticut*,<sup>128</sup> and *Loving v. Virginia*.<sup>129</sup>

Yet even as the Court recognized a woman's privacy interests in deciding whether to bear a child, it also recognized that the state had an interest in regulating abortion. The Court rejected Texas's claim that the unborn had a constitutionally protected right to life from conception,<sup>130</sup> concluding that a wide body of law demonstrated that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."<sup>131</sup> Even so, Justice Blackmun reasoned, "[t]he pregnant woman cannot be isolated in her privacy."<sup>132</sup> The state had "separate and distinct" regulatory interests in protecting pregnant women's health and in

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<sup>120</sup> MARJORIE J. SPRULL, *DIVIDED WE STAND: THE BATTLE OVER WOMEN'S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS* 31 (2017) (reporting votes in the House in 1971 and the Senate in 1972).

<sup>121</sup> See *GREENHOUSE*, *supra* note 57, at 91 (noting that Justice Blackmun had filed away a Gallup poll showing public opinion on abortion reform). For the Gallup poll results in Justice Blackmun's papers, see *supra* text accompanying notes 57-58.

<sup>122</sup> For Justice Blackmun's own outline of his reasons for his emergent view that the Texas law was unconstitutional, see *GREENHOUSE*, *supra* note 57, at 91-92.

<sup>123</sup> *Id.* at 95.

<sup>124</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>125</sup> *Id.*

<sup>126</sup> 262 U.S. 390 (1923).

<sup>127</sup> *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

<sup>128</sup> 381 U.S. 479 (1965).

<sup>129</sup> 388 U.S. 1 (1967).

<sup>130</sup> *Roe*, 410 U.S. at 156-58. For an overview of Texas's argument, see Brief for Appellee at 31-32, *Roe*, 410 U.S. 113 (No. 70-18).

<sup>131</sup> *Roe*, 410 U.S. at 157-58.

<sup>132</sup> *Id.* at 159.



protecting potential life, interests that grew as a pregnancy progressed and eventually became “compelling.”<sup>133</sup>

In creating this “trimester” framework, the *Roe* Court recognized a new state interest in regulating a pregnant woman to “protect[] the potentiality of human life.”<sup>134</sup> The Court reasoned that this interest was outweighed by the woman’s constitutionally protected right to decide whether to carry a pregnancy to term. Only at viability, when the fetus “presumably has the capability of meaningful life outside the mother’s womb,” did the state’s interest in unborn life become compelling; “after viability,” the state could “go so far as to proscribe abortion . . . except when it is necessary to preserve the life or health of the mother.”<sup>135</sup>

The vote was 7-2. Justice Rehnquist dissented, focusing not on ethical questions about abortion but instead on jurisprudential questions about the appropriate role of courts in a constitutional democracy. He objected to the majority treating the right to privacy as a right worthy of judicial protection, arguing that the Court should have employed deferential rational basis review and that the trimester framework the Court adopted in its stead was “far more appropriate to a legislative judgment than to a judicial one.”<sup>136</sup> He complained that “judicial legislation” of this kind repeated the errors of the Court’s discredited decision in *Lochner*.<sup>137</sup>

Justice White, joined by Justice Rehnquist, made the point in harsher terms, emphasizing that under the Constitution the states retained authority to decide how to regulate abortion.<sup>138</sup> He was openly dismissive of the decision’s solicitude for women’s interests in controlling decisions about whether to become a mother and characterized the Court’s framework in scathing terms: “During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the pregnant woman more than the life or potential life of the fetus.”<sup>139</sup>

Justice White’s contemptuous account of women seeking abortion for “convenience, whim, or caprice” was largely un rebutted by the majority, which appealed to medical science for authority and often spoke as if doctors rather than women were the rights holders whom the Court was empowering to make decisions on behalf of their female patients.<sup>140</sup> The majority did, for the first time, and perhaps in response to new rights claims, recognize reasons

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<sup>133</sup> *Id.* at 162-63.

<sup>134</sup> *Id.* at 162.

<sup>135</sup> *Id.* at 163-64.

<sup>136</sup> *Id.* at 173-74 (Rehnquist, J., dissenting).

<sup>137</sup> *Id.* at 174 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>138</sup> *Id.* at 221 (White, J., dissenting).

<sup>139</sup> *Id.*

<sup>140</sup> See Siegel, *supra* note 80, at 1897-1900; see also Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 BROOK. L. REV. 147, 184-85 (2006).

why a woman might seek to end a pregnancy.<sup>141</sup> But this passing discussion barely acknowledged the life-altering health harms or economic stakes of depriving women of control over the timing of motherhood, much less the assault on a woman’s dignity of having others empowered to decide her life’s course.

It is not surprising that the Court did not tie its analysis of the abortion right more closely to these considerations or, in recognizing the state’s interest in protecting potential life, scrutinize more closely the state’s reasons for compelling a woman to become a mother. *Roe* reached the Court at a moment of profound transition. After all, the Court was only on the verge of constructing a jurisprudence of women’s rights—just days before handing down *Roe*, the Justices heard a young lawyer named Ruth Bader Ginsburg argue the landmark equal protection case *Frontiero v. Richardson*.<sup>142</sup>

## 6. From *Roe* to *Casey*: Conflict and Constitutional Change

The Court’s decision consolidated strong public support for the abortion right. Two months after the Court decided *Roe*, a National Opinion Research Center survey “showed a remarkable liberalization of abortion attitudes on the part of all groups and subgroups of American society.”<sup>143</sup> In February 1976, sixty-seven percent of those responding to a nationwide survey agreed with the statement: “[T]he right of a woman to have an abortion should be left entirely up to the woman and her doctor.”<sup>144</sup>

*Roe* was greeted by criticism, though not the firestorm often imagined today.<sup>145</sup> (Strikingly, during the 1975 Senate confirmation hearing for John Paul Stevens, the first Supreme Court nominee since *Roe*, there was not a single question about abortion.<sup>146</sup>) Abortion opponents continued their efforts, now seeking to amend the Constitution either by prohibiting abortion or by returning the abortion question to the states.<sup>147</sup> While those efforts failed,

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<sup>141</sup> See *Roe*, 410 U.S. at 153 (citing the prospect of a “distressful life,” physical or psychological harm, and mental health, among other reasons); cf. Siegel, *supra* note 80, at 1895-96 (discussing Stearns’s view of the advocates’ influence on the Court).

<sup>142</sup> 411 U.S. 677 (1973).

<sup>143</sup> William Ray Arney & William H. Trescher, *Trends in Attitudes Toward Abortion, 1972-1975*, 8 FAM. PLAN. PERSP. 117, 124 (1976). Arney and Trescher review post-*Roe* polling data and observe: “It is notable that the 1973 NORC [National Opinion Research Center] survey, fielded just two months after the 1973 Supreme Court abortion decisions, showed a remarkable liberalization of abortion attitudes on the part of all groups and subgroups of American society . . . . Very little change occurred in the years following the decisions . . . .” *Id.* at 124. The authors further suggest that the Court’s action may have had “an immediately legitimating effect on public opinion.” *Id.*

<sup>144</sup> Sandra Stencel, *Abortion Politics*, in EDITORIAL RESEARCH REPORTS ON NATIONAL HEALTH ISSUES: TIMELY REPORTS TO KEEP JOURNALISTS, SCHOLARS AND THE PUBLIC ABREAST OF DEVELOPING ISSUES, EVENTS AND TRENDS 21, 36 (1977) (reporting on a CBS News/New York Times survey).

<sup>145</sup> Cf. Franklin, *supra* note 4, at 867-71.

<sup>146</sup> *Nomination of John Paul Stevens To Be a Justice of the Supreme Court: Hearing Before S. Comm. on the Judiciary*, 94th Cong. (1975), <https://www.loc.gov/law/find/nominations/stevens/hearing.pdf>; see also Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749, 751 (2010).

<sup>147</sup> H.R.J. Res. 261, 93d Cong. (1973). For an extensive compilation, see *Human Life Amendment*, HUMAN LIFE ACTION, <http://www.humanlifeactioncenter.org/issues/human-life-amendment>.

opponents were successful in cutting off state and federal funding for most abortions for poor women under the Medicaid program, restrictions that a series of Supreme Court decisions upheld.<sup>148</sup> The Court acquiesced in these funding decisions as consistent with the right recognized in *Roe*. It endorsed the government’s “objective of protecting potential life” through “incentives that make childbirth a more attractive alternative than abortion”<sup>149</sup> for women who relied on government assistance for their medical care. Critics pointed out that the Court had interpreted *Roe* to expose poor women of color to the same health and reproductive inequalities they endured before *Roe*.<sup>150</sup>

In the decades after *Roe*, the abortion debate continued to change shape. In January of 1973, few could have foreseen that the abortion right would become inextricably identified with the cause of women’s equality, that the Republican Party would court voters by targeting for reversal a decision originally supported by five of six Republican-appointed Justices,<sup>151</sup> or that the party’s strategists would find in abortion an issue that would prove capable of uniting Catholics and evangelicals, who had long mistrusted each other, in political coalition as Christians.<sup>152</sup>

The national ratification campaign for the ERA, which began just before the Court’s decision in *Roe*,<sup>153</sup> helped widen debate from biology to the very structure and integrity of the American family. By 1977, Phyllis Schlafly was warning that the ERA would provide a new constitutional basis for abortion (and same-sex marriage).<sup>154</sup> A new “pro-family” politics emerged that tied debates over abortion and family roles.<sup>155</sup> Defending the family and the unborn provided religious leaders an opportunity to reclaim a role for religion in the public square.<sup>156</sup>

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<sup>148</sup> *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>149</sup> *Harris*, 448 U.S. at 325. [cross-reference Bridges chapter]

<sup>150</sup> See, e.g., Kristin Booth Glen, *Abortion in the Courts: A Laywoman’s Historical Guide to the New Disaster Area*, 4 FEMINIST STUD. 1, 17-19 (1978); Linda Greenhouse, *Abortion Goes Before the Supreme Court Again*, N.Y. TIMES (Apr. 20, 1980), <http://query.nytimes.com/mem/archive/pdf?res=9805E6D71339E232A25753C2A9629C94619FD6CF>.

<sup>151</sup> Greenhouse & Siegel, *supra* note 4, at 292-303; see also *Republican Party Platform of 1980* (1980), in AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25844>.

<sup>152</sup> Greenhouse & Siegel, *supra* note 4, at 294-99. On the debate over *Roe*’s role in polarization around abortion, see Greenhouse & Siegel, *supra* note 4.

<sup>153</sup> See *supra* note 120 and accompanying text.

<sup>154</sup> SPRUILL, *supra* note 120, at 101-12; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1389-93 (2006); see also ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S, at 296 (2012).

<sup>155</sup> MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 14-15, 178-183 (2015).

<sup>156</sup> Sandra Salmans, *Christian Fundamentalists Press Own Campaign Within the G.O.P. Drive*, N.Y. TIMES (Aug. 17, 1984), <http://www.nytimes.com/1984/08/17/us/christian-fundamentalists-press-own-campaign-within-the-gop-drive.html> (“Fundamentalist Christians . . . emerged in 1980 as a new electoral force . . . [T]heir agenda is uniformly family-oriented and conservative. It is against abortion [and] the proposed Federal equal rights amendment . . .”); see also, e.g., James M. Penning, *Pat Robertson and the GOP: 1988 and Beyond*, 55 SOC. RELIGION 327, 337 (1994).

Repeatedly the conflict over abortion converged on the Court, most fatefully in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>157</sup> a case involving a statute restricting abortion in conflict with the Court's post-*Roe* decisions.<sup>158</sup> When the case reached the Supreme Court, only Justice Blackmun remained of *Roe*'s seven-member majority—and a majority of Justices had been appointed by Presidents who openly sought *Roe*'s reversal.<sup>159</sup>

The Court that handed down *Casey* startled the nation by reaffirming—yet at the same time changing—*Roe*'s central holding. In writing *Casey*, no longer did the Court look outward, toward the authority of doctors or the science of pregnancy. It reached for a settlement between the contending forces within the Constitution itself.

Reasoning that the trimester framework, which only permitted the government to restrict abortion to protect potential life at the point of fetal viability, had “undervalue[d] the State’s interest in [protecting] potential life,”<sup>160</sup> the Court abandoned the framework. It adopted instead an “undue burden” standard that permitted the state to regulate abortion to protect unborn life from the beginning of pregnancy,<sup>161</sup> so long as the state protected life by means that respected women’s authority to decide whether to give birth.<sup>162</sup> In so holding the Court created opportunities for opponents of abortion to enact restrictions on abortion that *Roe* itself never sanctioned, restrictions that were designed to transform the public’s understandings of the morality and the constitutionality of the practice.

Although *Casey* allowed states to enact abortion restrictions throughout pregnancy as *Roe* did not, it built upon *Roe*'s concerns with autonomy, speaking in the language of liberty, dignity, and equality.<sup>163</sup> Government could “persuade” a woman to carry her pregnancy to term,<sup>164</sup> but the “means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.”<sup>165</sup> The state could not prevent a woman from exercising a right the Court deemed essential to her ability “to participate equally in the economic and social life of the Nation.”<sup>166</sup> Respect for the equal citizenship of women

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<sup>157</sup> 505 U.S. 833 (1992).

<sup>158</sup> See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

<sup>159</sup> Cf. Linda Greenhouse, *Changed Path for Court?; New Balance Is Held by 3 Cautious Justices*, N.Y. TIMES (June 26, 1992), <http://www.nytimes.com/1992/06/26/us/changed-path-for-court-new-balance-is-held-by-3-cautious-justices.html> (“In addition to Justice Powell, Justices William J. Brennan Jr. and Thurgood Marshall . . . have retired, as has Chief Justice Warren E. Burger. Justices Scalia, Kennedy, Souter and Thomas have all arrived . . .”).

<sup>160</sup> *Casey*, 505 U.S. at 873.

<sup>161</sup> *Id.* at 874, 878.

<sup>162</sup> See Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice*, 125 YALE L.J. 1428, 1431 (2016).

<sup>163</sup> See, e.g., *Casey*, 505 U.S. at 846-48, 851, 856.

<sup>164</sup> *Id.* at 878 (emphasis added).

<sup>165</sup> *Id.* at 877.

<sup>166</sup> *Id.* at 856.

appears centrally in the opinion.<sup>167</sup> Nearly a generation later, voices barely acknowledged in *Roe* acquired primacy of place.

As a matter of law, it is now *Casey* more than *Roe* that defines the reach of the abortion right.<sup>168</sup> Yet *Roe* continues to exert a powerful pull on the nation's politics—and its understanding of courts, rights, and constitutional law—conveying wildly different meanings to different audiences. At one and the same time, *Roe* is the site of practical political struggle and of profound questions of principle. To some, it is the ultimate symbol of a court's usurpation of democratic prerogatives. To others, it sanctions the taking of unborn life. To still others, it stands for the dignity and the empowerment of women—"a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."<sup>169</sup>

These are conflicts that law can shape—but cannot settle.

The debate continues to rage. As the Supreme Court's membership evolves, a Court that questioned the basis for the abortion right could decide cases along many paths -- with implications for *Roe*, *Casey* and more. But as we have seen, the Supreme Court is not the only actor and almost never has the final word on the questions that most deeply engage and define us. The debate over how the American public best understands the constitutional guarantees of liberty, equality, and life<sup>170</sup> will continue where our story began -- in state legislatures and in state courts, in Congress, in social movements -- and among the people themselves.

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<sup>167</sup> The joint opinion's account of a woman's constitutionally protected liberty to make decisions about bearing children is deeply informed by the understandings of the Court's sex equality jurisprudence. *See id.* at 852 (observing 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. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society"). Sex equality reasoning dominates the portions of the opinion striking down the spousal notice requirement—the only requirement in the Pennsylvania law the Court invalidated. *See id.* at 895-98; *id.* at 898 ("A State may not give to a man the kind of dominion over his wife that parents exercise over their children."). For an account of equality arguments concerning fetal-protective and woman-protective restrictions on abortion discussed in *Casey* and in subsequent opinions of the Court, see Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 U.C.L.A. REV. DISC. 160 (2013). [cross reference. Mayeri chapter]

<sup>168</sup> *See Whole Woman's Health v. Hellersted*, 136 S. Ct. 2292 (2016).

<sup>169</sup> *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

<sup>170</sup> *See Reva B. Siegel, ProChoiceLife: Asking Who Protects Life and How--and Why It Matters in Law and Politics*, 93 Ind. L. J. 207 (2018).