2009

Ways to Change: A Reevaluation of Article V Campaigns and Legislative Consitutionalism

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I. INTRODUCTION

Recent scholarship has convincingly shown that social movements shape constitutional law, and vice versa.[1] To date, most theories study alternatives to formal constitutional amendments or consider the proper role for the courts in influencing the development of social movements.[2] In this Article, however, I approach the question of constitutional change from the standpoint of social movements that oppose a constitutional decision. What tools are available to a movement seeking to change the meaning of a decision? What are the advantages or disadvantages of pursuing an Article V amendment, of codifying a favorable constitutional interpretation by statute, or beginning a litigation campaign?

Often, current constitutional change scholarship has neglected these questions and has instead focused on the identification, study,

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1. *See, e.g.*, Reva Siegel & Robert Post, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) [hereinafter Siegel & Post, Roe *Rage*]. *See generally* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004) (arguing that popular constitutionalism and judicial supremacy are not mutually exclusive systems of legal ordering, but instead represent understandings and practices that dialectically structure our current system); Reva Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1336–40 (2006) [hereinafter Siegel, *Constitutional Culture*].

2. *See, e.g.*, William Eskridge, *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 422, 460–98 (2001); William Eskridge, *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1281–83, 1297–300 (2005); Siegel & Post, Roe *Rage*, *supra* note 1, at 384–85 (exploring how, through democratic constitutionalism, "[t]he Court must navigate a complex field of intense disagreement in order to produce an account of constitutional law that is democratically legitimate and faithful to norms of professional craft"); *see also supra* text accompanying note 1.

and defense of alternatives to formal constitutional amendments.[3] Consequently, theory to date has inadequately studied why and how social movements should use different methods of constitutional change-making in practice.[4] In telling stories about a proposed Human Life Amendment,[5] right-to-die lawyering,[6] the Freedom of Choice Act,[7] and the litigation of *Planned Parenthood of Southeastern*

3. *See, e.g.*, Siegel & Post, Roe *Rage*, *supra* note 1, at 430 (explaining the virtues of democratic constitutionalism and the ways in which "judges can use flexible constitutional standards to channel and mediate conflict, guiding public dialogue about hotly controverted social practices and endeavoring to shape the social meaning of competing claims"); William Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215–17, 1272–76 (2001) (explaining the nature of super-statutes and comparing them favorably to judicially-driven changes or the "constitutional moments" that produced the New Deal or the Fourteenth and Fifteenth Amendments); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS, Vol. II, 2–31 (1998) (arguing that constitutional moments offer the best chance for scholars to identify the "conditions under which future movements may *legitimately* claim that the People have given them a mandate for fundamental constitutional change").

4. Several scholars have raised intriguing questions about the value of litigation as a tool for constitutional change. *See, e.g.*, MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 463–68 (2004) (explaining how and why the courts are institutionally incapable of generating social change); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1439 (2005) (arguing that social movements should not define themselves through litigation, since by doing so, movements will lose their ability to radicalize and set political agendas).

5. Beginning in 1974, pro-life legislators and activists proposed a variety of federal constitutional amendments that would overrule *Roe v. Wade*. In the early 1970s, legislators or activists proposed amendments that would extend due process and equal protection guarantees "from the moment of conception," to permit the states to ban abortion, or require them to do so. *See* Human Life Amendments: Major Texts, 1973–2003, The National Campaign for a Human Life Amendment, *available at* http://www.nchla.org/datasource/idocuments/HLAmajortexts.pdf (last visited Oct. 17, 2009). For ease of reading, I refer to this struggle to amend the Constitution as the Human Life Amendment Campaign.

6. I refer in particular to the litigation of *Cruzan by Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990). In *Cruzan*, the parents of Nancy Cruzan, a woman in a vegetative state, requested that life-saving medical treatment be removed. *Id.* at 267–68. Medical care providers refused, citing a Missouri law that required clear and convincing evidence of a person's desire to terminate medical treatment. *Id.* at 267–69. Cruzan's parents challenged the Missouri statute on constitutional grounds, claiming that the law violated Nancy Cruzan's right to refuse unwanted medical treatment. *Id.* The Court upheld the constitutionality of the statute, holding that any right to refuse treatment extended only to competent, voluntary decisions. *Id.* at 279–80.

7. First proposed in 1988, the ultimately unsuccessful Freedom of Choice Act promised to "codify" *Roe v. Wade*. *See, e.g.*, Adam Clymer, *Bill that Would Lower Abortion Hurdles Has Lost Speed*, SEATTLE POST-INTELLIGENCER, Sept. 16, 1993, at A8. Early versions of the Act prohibited all or most abortion restrictions before viability and gave women the right to have an abortion after viability when doing so was necessary for the woman's life or health. *See, e.g.*, Scott Maben, *House Panel Oks Bill to Guard Abortion Rights*, HOUS. CHRON., Oct. 5, 1990, at 3.

Pennsylvania v. Casey,[8] I give a preliminary account of the advantages of two underemphasized change-making tools—Article V campaigns and efforts to change the meaning of judicial decisions by statute. [9]

In showing that the Article V amendment process is slow and cumbersome, current scholarship has described alternatives to the formal amendment process that are argued to be more dynamic and more easily manipulated by popular movements.[10] Similarly, since the Supreme Court's 1997 decision in *City of Boerne v. Flores*[11] placed stringent limits on Congress's fourteenth-amendment authority to define constitutional rights or remedies differently than the Court, scholars have questioned the continuing value of using legislative campaigns to change the Constitution's meaning.[12]

By illustrating the shortcomings of the formal amendment process or legislative struggles, however, we risk losing sight of the ways in which movements can productively use these campaigns to change the meaning of constitutional precedents. Using the Human

8. 505 U.S. 833 (1992). *Casey* reaffirmed the continuing validity of *Roe*, but rejected its trimester framework, explaining that abortion restrictions should be held unconstitutional only if they were an undue burden on women's decision to have an abortion. *Id*. at 869–76.

9. A point of clarification is in order. My argument involves what Mark Tushnet has called the "thin Constitution," the equality and liberty principles expressed in the Declaration of Independence, the Fourteenth Amendment, and the Bill of Rights. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 9–12 (1999). I do not explore how, if at all, social movements make claims about the parts of the Constitution that address the organization of government.

10. *See* ACKERMAN, *supra* note 3, at 15–17 (illustrating the shortcomings of a "hypertextualist" reading of Article V and the benefits of "constitutional moments" as an alternative to the Article V process); William Eskridge, *America's Statutory "Constitution,"* 41 U.C. DAVIS L. REV. 1, 23–24, 30 (2007) (arguing that constitutional amendments have been "too hard to achieve under the super-majority requirements of Article V" and proposing "super-statutes" as an alternative avenue for change); *see also* Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 473 (2007) (attributing the rarity of new Article V amendments to "the supermajority rules in Article V," which "make it so easy for a minority to block an amendment").

11. 521 U.S. 507 (1997).

12. *See, e.g.*, Reva Siegel & Robert Post, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 445 (2000) ("However interpreted, the Court's decisions in *Kimel* and *Morrison* [applying the *Boerne* framework] impose new and substantial restrictions on Congress's power to enact antidiscrimination laws under Section 5. This is because both decisions conceive of the legitimacy of Section 5 power as ancillary to judicial authority to enforce Section 1 of the Fourteenth Amendment."); David Strauss, Miranda*, the Constitution, and Congress*, 99 MICH. L. REV. 958, 973 (2001) (arguing that the *Boerne* Court's "'congruence and proportionality'" test "reflects . . . new distrust of congressional judgments" about "what is needed to protect constitutional rights").

Life Amendment as a model, I argue instead that Article V campaigns provide movements with the time and freedom to explore and refine new constitutional ideas. Because Article V amendment proposals produce struggles that stretch over years or decades, a social movement has time to develop unified arguments that address countermovement challenges. And because Article V campaigns are not governed by the rules limiting congressional authority and do not require deference to Supreme Court precedent, social movements pursuing formal amendments have more freedom to offer new understandings of the meaning of the Constitution.

In evaluating the Freedom of Choice Act, I contend that the limits imposed in legislative struggles on movements' freedom to explore different constitutional arguments—the political pressures to win votes and the legal pressure not to raise questions about congressional authority—force movements rapidly to develop precise, conflict-tested claims. In turn, these claims may prove beneficial in subsequent litigation.

What do we learn from viewing constitutional change in the way I propose? If we consider constitutional change from the point of view of a social movement member displeased with the outcome of a judicial decision, we can begin to understand which social, political, or legal factors make a particular method of constitutional change productive. Instead of regarding modes of constitutional change in isolation or arguing about which method of change is most effective, I contend that social movements should use Article V campaigns and legislative proposals as part of their arsenal of tools to change the meaning of a constitutional decision.

In Part II of this Article, I situate my argument in the context of current literature on constitutional change. In Part IIIA, by studying the Human Life Amendment of the 1970s and 1980s, I consider the benefits and costs of Article V campaigns. In Part IIIB, I study the constitutional arguments that emerged from the Human Life campaign and their influence on the litigation of *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*.[13]

Based on an examination of the Freedom of Choice Act of the early 1990s and the litigation of *Casey*,[14] Part IV considers an alternative model for campaigns to use to change the meaning of a

13. 497 U.S. 261 (1990).

14. 505 U.S. 833 (1992).

judicial decision. In Part IVA, I apply this model to analyze the costs of using legislative campaigns to change the meaning of a constitutional decision. In Part IVB, by exploring the influence of movement-countermovement conflict on *Casey*, I examine the benefits that may outweigh those costs. Part V offers a brief conclusion.

II. PRACTICING CHANGE

How would we view constitutional change differently if we took the point of view of a social movement member? Recent scholarship has given a provocative account of the ways that social movements and constitutional law influence one another.[15] For the most part, as I argue below, current theory offers alternatives to formal constitutional amendments or focuses on the role that courts should play in influencing the development of social movements.

Scholars like Reva Siegel and Robert Post carefully studied the ways that movement-countermovement contests produce constitutional arguments likely to be adopted by the courts.[16] Siegel and Post proposed a model they call "democratic constitutionalism," whereby the courts balance the need for a politically neutral, independent rule of law with the call for democratic legitimacy.[17] They argue that social movement attorneys should not shy away from conflict, explaining that the "question is *which* constitutional vision will influence the Court; it is not *whether* the Court will express a constitutional vision."[18]

I agree with Siegel and Post about the importance of movement-countermovement conflict in reshaping constitutional law. However, my focus is not on judges' obligation to balance democratic responsiveness and political independence, but rather on the concrete strategies social movements can use to achieve constitutional change.

My focus leads to a different portrayal of the dialogic contests between movements and counter-movements that contribute to changes in constitutional meaning. Siegel and Post are sensitive to

15. *See, e.g.*, *supra* note 1 and accompanying text.

16. *See, e.g.*, *supra* note 1 and accompanying text. In a related but distinctive vein, William Eskridge's work focuses on the role played by the courts in shaping identity-based social movements themselves. *See supra* note 3 and accompanying text.

17. *See, e.g.*, Siegel & Post, Roe *Rage*, *supra* note 1, at 433.

18. *Id.*

the exchanges between competing movements and those between movements and officials.[19] The stories they tell, however, often stress the judicial decisions that make new constitutional understandings enforceable.[20] By concentrating less exclusively on these decisions, I hope to show the extent to which movements can and should move between different constitutional arenas and strategies, including those often thought to have little value.

My second purpose is to shift the focus of constitutional change scholarship away from emphasis on why one method of change is more effective, significant, or normatively desirable than others. Current constitutional theorists propose a number of alternatives to the formal amendment process and explain the relative virtues of the models they propose. For example, Bruce Ackerman's study of "constitutional moments" identifies an alternative to formal amendments and highlights the particular virtues of that approach.[21] Ackerman describes constitutional moments as times at which "Americans have translated the heady rhetoric of constitutional politics into enduring judgments of higher law."[22] Like Siegel and Post, Ackerman proposes a model of constitutional change that does not require compliance with the rigid, formal Article V amendment process.[23] However, constitutional moments, as Ackerman envisions them, occur only rarely, when the people as a whole are fully engaged in considering a proposed constitutional change.[24] In Ackerman's view, the rarity of constitutional moments helps to explain their significance: it is only at these times that "a broad movement of transformative opinion [earns] the authority to set major aspects of the political agenda."[25]

By contrast, William Eskridge and John Ferejohn describe the unique virtues of a category of statutes that are more "normatively powerful" than ordinary statutes—laws that emerge from long

19. *See, e.g.*, Siegel & Post, Roe *Rage*, *supra* note 1, at 373–87.

20. *See* Siegel, *Constitutional Culture*, *supra* note 1, at 1323 (focusing on how "constitutional culture channels social movement conflict to produce enforceable constitutional understandings"); Siegel & Post, Roe *Rage*, *supra* note 1, at 406–30 (emphasizing how "a constitutional decision can be politically responsive at the same time it affirms a commitment to the law/politics distinction").

21. *See* ACKERMAN, *supra* note 3, at 6, 15–17.

22. *Id*. at 6.

23. *See id*. at 16–17.

24. *See id*. at 409.

25. *Id*.

periods of deliberation and democratic exchange and reflect important, foundational principles.[26] They argue that these "super-statutes" are normatively appealing and perhaps more appealing than the alternatives offered by other scholars.[27] To reach this conclusion, Eskridge and Ferejohn compare super-statutes to "constitutional moments"—"defined historical moment[s] involving a normative showdown."[28] A regime characterized by super-statutes would better prevent unelected judges from abusing their power.[29] Eskridge and Ferejohn also criticize the "updating" of constitutional meaning by unelected judges, referring to the criticisms of jurocracy often leveled against a system of judicial review.[30]

Scholars like Eskridge, Ferejohn, and Ackerman set out to identify sometimes radically different alternatives to formal constitutional amendments and to illustrate the unique benefits associated with each alternative. However, because these theorists focus on what makes a proposed amendment analogue appealing or distinctive, their scholarship does not address how different constitutional methods of change can and should be used together. My project here is to consider the complex ways that social movements shift between different constitutional arenas and strategies in order to accomplish one kind of constitutional change—revisions in the meaning of politically engaging constitutional precedents.

Unlike these authors, I am not identifying a new mode of constitutional change so much as considering the concrete, context-specific benefits or costs of using different tools to change the meaning of a judicial decision. Consequently, I am interested not only in novel modes of change or in what makes any one superior, but also in if and when movements can productively combine different methods. As a part of this analysis, I argue that movements should reconsider the concrete benefits of using underemphasized, widely criticized methods of constitutional change: legislative and formal amendment campaigns.

Those who have studied alternatives to the formal amendment process have joined a chorus of scholars criticizing the structure of

26. *See* Eskridge & Ferejohn, *supra* note 3, at 1217.

27. *See id.* at 1264–75.

28. *Id.* at 1273.

29. *See id.* at 1272–73.

30. *Id.* at 1267–68.

Article V.[31] Various scholars contend that Article V guarantees that the Constitution's meaning will change rarely,[32] that minorities can obstruct otherwise popular or necessary changes,[33] or that the structure of Article V was "not the product of a process meeting contemporary standards of equality and democracy."[34]

Scholars give different reasons for concern about legislative efforts to change the meaning of constitutional precedents. In 1997, the *City of Boerne v. Flores*[35] Court struck down the Religious Freedom and Restoration Act (RFRA),[36] concluding that the Act exceeded the scope of congressional authority under the Fourteenth Amendment.[37] The Court explained that Congress's power "to enforce" the Fourteenth Amendment did not include the power "to determine what constitutes a constitutional violation."[38] Rather, Section Five allows Congress only to remedy what the Court would determine to be violations of the Constitution.[39] Concluding that RFRA exceeded the scope of Congress's remedial power, the Court emphasized that there was a lack of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[40]

In the wake of *Boerne*, scholars claim the Court has "forcefully repudiated" the premise "that there [is] a dialectical relationship between constitutional law and constitutional culture."[41] Commentators have also argued that, after *Boerne*, Congress no longer has the freedom to endorse interpretations of constitutional rights offered by social movements that are different than the Court's.[42]

31. *See infra* notes 32, 34 and accompanying text.

32. *See* Eskridge, *supra* note 10, at 23–24, 30.

33. *See, e.g.*, Balkin, *supra* note 10, at 473.

34. Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, and Engagement*, 119 HARV. L. REV. 109, 121 n.60 (2005).

35. 521 U.S. 507 (1997).

36. Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb (1994)).

37. *City of Boerne*, 521 U.S. at 532.

38. *Id.* at 519.

39. *See id.*

40. *Id.* at 520.

41. Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 29 (2003); *see also supra* note 12 and accompanying text.

42. *See supra* note 12 and accompanying text.

In illustrating the downsides of these methods of constitutional change and the alternatives to them, however, theory to date has underemphasized the continuing benefits to be gained through them. By analyzing different models of constitutional change, I hope to open a discussion about when and how various strategies result in constitutional change. In reevaluating constitutional change scholarship from the standpoint of a social movement, I argue that social movements should be open to using Article V campaigns and legislative proposals as tools to change the meaning of a constitutional decision.

I will explore these issues by first considering the Human Life Amendment model for constitutional change, one initiated by a campaign for an Article V amendment and leading to an effective litigation struggle in *Cruzan*.

III. THE HUMAN LIFE AMENDMENT MODEL

The Human Life Amendment model offers insight into the ways that social movements can combine different strategies to alter the meaning of important judicial decisions. This model emerged from a struggle for a formal amendment that lasted more than a decade.

Current scholarship has called into question the continuing importance of such Article V campaigns in changing constitutional meaning. Bruce Ackerman warns that "[w]hatever the future may hold, don't expect big changes through formal amendments."[43] Others, like Reva Siegel, show how Article V amendment campaigns "mobilize[] groups of citizens, acting inside and outside the formal procedures of the legal system."[44]

Drawing on the Human Life model of constitutional change, I argue that amendment campaigns can and should be used by social movements not only because they mobilize support but also because

43. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742 (2007); *see also* Eskridge, *supra* note 10, at 23–24 ("Constitutional amendments were too hard to achieve under the super-majority requirements of Article V.").

44. *See* Reva Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299 (2001). For examples of this effect, see, e.g., Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1520 (1997) (explaining how the campaign for the Nineteenth Amendment "mobilize[d] millions of women, and also men"); Dan Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 161 (2006) (using an example showing how in "announcing its support for a federal constitutional amendment . . ., the Bush campaign sought to mobilize its conservative base").

these campaigns give movements unique freedom and time to develop novel constitutional positions. My claim is that social movements should view these campaigns as one of several valuable tools to be used to change the meaning of constitutional precedents.

In Part IIIA, by studying the pro-life struggle for a Human Life Amendment between 1973 and 1985, I explore the advantages and disadvantages of Article V campaigns as tools for change. In Part IIIB, I examine how new constitutional arguments emerge from Article V campaigns. In studying the litigation of *Cruzan*, I analyze how these new claims impact subsequent litigation.

A. Time and Freedom in Article V Campaigns

The role of amendment campaigns most often acknowledged involves the provocation of constitutional conflict and the mobilization of movement support.[45] As Reva Siegel has explained, "[o]utside the courthouse, the Constitution's text plays a significant role in eliciting and focusing normative disputes among Americans about . . . the Constitution."[46]

The history of the Human Life model demonstrates the unique value of Article V campaigns in mobilizing movement members who disapprove of a constitutional decision. In 1973, when the National Right to Life Committee held its annual meeting, attendance had more than tripled since the previous year.[47] The meeting was committed to overruling *Roe v. Wade*, and as Nick Thimmesch, a contemporary political commentator, noted, "[t]he political thrust of the National Right to Life organization now center[ed] around a 'Human Life Amendment' . . . ."[48]

Beginning in the spring of 1973, the movement focused its efforts on passing the Buckley Amendment that would guarantee the right to life supposedly destroyed by *Roe*.[49] The Buckley Amendment

45. *See supra* note 44 and accompanying text.

46. Siegel, *supra* note 44, at 314. Siegel has also contended that constitutional text enables and encourages popular movements and citizens to make claims about the Constitution. *See id*. at 297–306.

47. Nick Thimmesch, *Right to Life Fights for Human Values*, CHI. TRIB., June 17, 1973, at A6.

48. *Id*.

49. *See, e.g.*, *Foes of Abortion Changing Focus*, N.Y. TIMES, Feb. 23, 1975, at 37 (explaining that New York state pro-life activists were focusing on the passage of a Federal Human Life Amendment); Janis Johnson, *Abortion Foes Vow Intensified Fight*, WASH. POST, July 2, 1976, at A9 (describing focus of national organizations).

called for overruling *Roe* and chastised the Court for failing to recognize a constitutional right to life.[50]

Between 1974 and 1985, the Amendment certainly mobilized pro-life activists and provoked constitutional debate about the meaning and propriety of *Roe*, as Siegel's theory would predict. By 1974, on the anniversary of *Roe*'s decision, pro-life activists presented a petition with three million signatures calling for ratification of the Buckley Amendment.[51] Although the pro-life movement struggled to keep national attention on a Human Life Amendment between 1976 and 1980,[52] the repeatedly revived Amendment still helped to motivate pro-life advocates and to organize their claims.[53] In January 1980, as many as 54,000 participants in the annual March for Life again focused their demands on formal constitutional change.[54] In that year, prominent politicians such as Orrin Hatch, Gordon Humphrey, Ron Paul, and Republican presidential candidate Ronald Reagan spoke or submitted statements in favor of an amendment.[55]

Over time, however, as it became clear that the Human Life Amendment would not be ratified,[56] alternative reasons for pursuing Article V campaigns emerged. My claim is that, because Article V campaigns do not require consideration of the scope of congressional authority to pass a law or demand analysis of the meaning of extant

50. *See, e.g.*, J.C. Willke, *What Did* Roe *and* Doe *Really Say?*, THE NAT'L RIGHT TO LIFE NEWS, Apr. 27, 1989, at 8.

51. *See* Marjorie Hyer, *Abortion, Congress, Churches, Convictions*, WASH. POST, Jan. 22, 1974, at 56.

52. Neither candidate in the 1976 election endorsed a Human Life Amendment. *See, e.g.*, Nick Thimmesch, *No Sidestepping on Abortion Issue*, CHI. TRIB., Sep. 2, 1976, at A4 (explaining that Jimmy Carter opposed any constitutional amendment, while Gerald Ford supported an amendment giving states the ability to decide the issue of abortion).

53. *Abortion is Issue for Constitution, GOP Chief Says*, WASH. POST, Dec. 3, 1977, at A7 (reporting that there were at least fifteen resolutions before the House Judiciary Committee concerning abortion); Martin Waldron, *ERA and Abortion Face Senate Tests*, N.Y. TIMES, Dec. 5, 1976, at 394 (reporting that no vote on an amendment had been set on the New Jersey senate calendar).

54. *See, e.g.*, *infra* note 56 and accompanying text.

55. *See* Leslie Bennetts, *Thousands March in Capital Seeking Abortion Ban*, N.Y. TIMES, Jan. 23, 1980, at A12.

56. By September 1981, Orrin Hatch, one of the sponsors of a constitutional amendment to overrule *Roe*, noted that the prospects for passing a Human Life Amendment appeared dim, because pro-life activists "just [did not] have the votes to do it." Leslie Bennetts, *Antiabortion Forces in Disarray Less than a Year After Victory in Election*, N.Y. TIMES, Sept. 22, 1981, at B5.

precedent, those struggles offer movements unique freedom to imagine constitutional rights or interpretations of judicial decisions differently from the way the Court does. When given this independence, movements have room to explore different articulations of a right. At the same time, they may find freedom to disagree and may have to confront conflicts between members with radically different constitutional proposals. Protracted, even ultimately unsuccessful Article V struggles allow movements time to confront and explore the strengths and weaknesses of competing interpretations of a judicial decision.

Such was the case with the Human Life Amendment. During the campaign for its passage, the pro-life movement had time to consider different arguments about what it would mean to overrule *Roe*. Of course, there were drawbacks to pursuing change through the Article V process: the pro-life movement could not overcome the procedural obstacles presented by the Article V process.[57] However, in the years between 1974 and 1981, the movement was also able to explore different constitutional interpretations of the right to life "ignored" by *Roe* and to settle strong disagreements within the movement about the shape that right should take.

The first major disagreement to emerge within the pro-life movement involved the effect that a constitutional right to life would have on the legality of contraception. This division became apparent at a spring 1974 Senate hearing on the Buckley Amendment, as different pro-life leaders attacked *Roe*'s holding as to when life began.[58] All the witnesses were united in calling for an amendment to overrule *Roe* and to recognize a right to life "from fertilization to natural death . . . ."[59] Randy Engel of the U.S. Coalition for Life

57. Most often, critics note that amendments must normally be adopted by supermajorities in Congress and then ratified by three-quarters of the states. *See, e.g.*, Eskridge & Ferejohn, *supra* note 3, at 1271. For a comparative analysis of the Article V Amendment process, see Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 248–49, 254–67 (Sanford Levinson ed., 1995).

58. *See Abortion II: Hearing on S. 119 and S. 130 Before the S. Judiciary Comm.*, 93d Congress 527–28 (1974) (statement of Dr. Thomas Hilgers, chief resident in obstetrics/gynecology, Medical College of Toledo, Ohio) (explaining that IUDs would violate a constitutional right to life).

59. *See, e.g.*, *Abortion III: Hearing on S. 119 and S. 130 Before the S. Judiciary Subcomm. on Constitutional Amendments*, 93d Congress 103 (1974) (statement of Pat Golz, International President Feminists for Life); *Abortion III: Hearing on S. 119 and S. 130 Before the S. Judiciary Subcomm. on Constitutional Amendments*, 93d Congress 93 (1974)

explained that an amendment would ban "surgical abortion" as well as intra-uterine devices and contraceptive pills, because "[a]bortion by any other name [was] still" abortion.[60] Warren Schaller of American Citizens Concerned for Life asserted that overruling *Roe* would not affect any method of contraception that did not "destroy a newly conceived life or deny that new life its proper environment."[61]

This rift deepened in the next five years. In October 1981, the Senate began hearing testimony on the so-called Hatch Amendment to the Constitution.[62] It stated that "'a right to abortion [was] not secured by this Constitution'" and gave the Congress and the states "'the concurrent power to restrict and prohibit abortion.'"[63] However, when discussion of the amendment began again, different members of the pro-life coalition advanced conflicting versions.[64] Leaders of the National Right to Life Committee, one of the largest and best-established pro-life organizations, explained that a constitutional right to life would limit birth control methods "where there [was] positive proof of pregnancy" and would permit use of those methods for only "non-abortive or life-saving purposes."[65]

As debate about the Hatch Amendment continued, discussion about what a constitutional right to life should mean became

[hereinafter Statement of Randy Engel] (statement of Randy Engel, National Director, U.S. Coalition for Life).

60. *See* Statement of Randy Engel, *supra* note 59, at 58–59 (referencing an earlier publication of the Pro-Life Reporter).

61. *See Abortion III: Hearing on S. 119 and S. 130 Before the S. Judiciary Subcomm. on Constitutional Amendments*, 93d Congress 164 (1974) (statement of Warren Schaller, Jr., Executive Director, American Citizens Concerned for Life).

62. *See infra* note 64 and accompanying text.

63. *See Senate Panel OKs Antiabortion Amendment*, CHI. TRIB., Dec. 17, 1981, at 5. Senator Jesse Helms sponsored an alternative amendment creating a paramount right to life that would apply from the moment of conception and ban all abortions. *Id.*

64. *See, e.g.*, *Constitutional Amendments Related to Abortion: Hearing on S.110 Before the S. Judiciary Subcomm. on the Constitution*, 97th Congress 1076–79 (1981) [hereinafter Statement of James Bopp, Jr.] (statement of James Bopp, Jr., General Counsel, National Right to Life Committee) (describing the organization's proposed constitutional amendment); *Constitutional Amendments Related to Abortion: Hearing on S. 110 Before the S. Judiciary Subcomm. on the Constitution*, 97th Congress 1181–86 (1981) [hereinafter Statement of Nellie Gray] (statement of Nellie Gray, President, March for Life) (describing a different proposal); *Constitutional Amendments Related to Abortion: Hearing on S. 110 Before the S. Judiciary Subcomm. on the Constitution*, 97th Congress 1242–43 (1981) [hereinafter Statement of David O'Steen] (statement of David O'Steen, Director, Committee for a Pro-Life Congress) (expressing support for a "states' rights" Human Life Amendment).

65. *See* Statement of James Bopp, Jr., *supra* note 64, at 1089–90.

increasingly complex. Movement members disagreed about whether the Human Life Amendment should establish a hierarchy of constitutional rights and should determine that a right to life was paramount.[66] An equally divisive discussion arose about whether overruling *Roe* should mean that abortion would be illegal even if the mother's life were at risk.[67] Yet another division involved whether, if *Roe* were overruled, states would be permitted or required to restrict abortion.[68]

In addition to the Hatch Amendment,[69] Nellie Gray, the leader of March for Life, submitted an amendment to overrule *Roe* by creating a right to life that superseded other constitutional rights and by requiring bans on abortion even when a mother's life was at risk.[70] The National Right to Life Committee also offered an amendment of its own.[71] When the Hatch Amendment was passed by a Senate Subcommittee, only a handful of pro-life organizations endorsed it, while others supported only amendments requiring states to ban abortion.[72]

Although pro-life leaders did not agree on a single version of the Amendment,[73] the Human Life campaign permitted the movement to confront and address a range of internal conflicts about what it ought to mean to overrule the Court's decision in *Roe*. At the same

66. *See* Statement of Nellie Gray, *supra* note 64, at 1182–87 (explaining pro-life divisions about whether a right to life should be: (1) mandatory/permissive; (2) paramount); *see also* Statement of James Bopp, Jr., *supra* note 64, at 1076–79 (describing position of National Right to Life Committee that a constitutional right to life would have to establish a hierarchy of constitutional rights).

67. March for Life took the position that overruling *Roe* would and should make abortion illegal in all cases, even when the mother's life was at risk. *See* Statement of Nellie Gray, *supra* note 64, at 1182–87. The National Right to Life Committee, by contrast, drafted a human life amendment overruling *Roe* and permitting abortion to save the life of the mother. *See* Statement of James Bopp, Jr., *supra* note 64, at 1076–79.

68. The Committee for a Pro-Life Congress was among the groups arguing that overruling *Roe* meant only that the issue of abortion regulation should be left to the states. Statement of David O'Steen, *supra* note 64, at 1242. By contrast, leaders of March for Life argued that overruling *Roe* would require states to ban abortion in all cases, even when a mother's life was at risk. *See* Statement of Nellie Gray, *supra* note 64, at 1182–87.

69. For discussion of the so-called Hatch Amendment, see Statement of David O'Steen, *supra* note 64, at 1242–43.

70. *See* Statement of Nellie Gray, *supra* note 64, at 1182–87.

71. *See* Statement of James Bopp, Jr., *supra* note 64, at 1074–89.

72. *See Anti-abortion Group Backs Hatch Proposal*, N.Y. TIMES, Dec. 13, 1981, at A39 (describing pro-life divisions about the Hatch Amendment).

73. For a summary of the different amendments proposed by politicians alone, see Human Life Amendments, *supra* note 5.

time, the Amendment offered the pro-life movement important freedom to develop constitutional arguments unrelated to the Court's reasoning in *Roe*.

And as the history considered here suggests, Article V campaigns also offer a relatively low-cost opportunity for movements to explore novel ways to change the meaning of judicial decisions and to settle bitter internal disputes. By contrast, litigation or legislation campaigns may produce enforceable constitutional understandings that may not be in a movement's long-term interest or may seem undesirable to a movement in retrospect.[74] Because Article V campaigns are unlikely to produce immediate constitutional change or lead to the ratification of a new constitutional principle, movements risk less by experimenting with new constitutional arguments. And the freedom for constitutional exploration offered by Article V campaigns is unparalleled, because movements in such struggles are not bound to consider the scope of congressional authority or the meaning of past precedent.

My claim here is not that Article V amendments are a better method of constitutional change-making. Rather, I suggest that movements should be aware, as the pro-life movement learned, that even unsuccessful Article V campaigns can be important tools in changing the meaning of constitutional decisions.

B. From Article V Campaign to Litigation

Article V campaigns not only permit movements to rally support but also allow them time to work out internal disagreements and to face down countermovement attacks. Through protracted Article V campaigns, movements can gradually resolve internal disputes on narrow constitutional issues and thereby develop precise claims on particular constitutional questions that play an important role in subsequent litigation campaigns.

In the case of the Human Life Amendment, the pro-life movement slowly and incrementally developed a litigation position on the meaning of overruling *Roe* and what effect that would have on statutes about euthanasia and the right to die. In debate about a

74. For an example, see generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004) (explaining how, after a political struggle, the anti-classification approach successfully proposed by movement attorneys in *Loving v. Virginia* and *McLaughlin v. Florida* was used against the civil rights movement in cases involving affirmative action and busing).

formal amendment, the movement had time and freedom to change its claims to address internal disagreements and explore new constitutional arguments.

This effort would prove vitally important in the litigation of *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*.[75] Following a car accident and resulting complications, Nancy Cruzan entered into a persistent vegetative state.[76] Believing that their daughter would not want to live in her present condition, Cruzan's parents requested that her medical treatment be terminated, arguing that Cruzan had a fundamental right to refuse unwanted medical treatment.[77] The actual *Cruzan* decision represented an important victory for pro-life advocates, as the Court adopted almost wholesale the movement's arguments about the limits of a potential constitutional right to die.[78]

In some way, it is possible to view *Cruzan* as the culmination of the Human Life campaign. Important constitutional arguments generated by dialogic movement-countermovement conflict about the Amendment gained formal constitutional recognition by way of the *Cruzan* Court. However, my claim is not that movements should view courts as the best or only endpoint of constitutional struggles. Emphasizing that constitutional campaigns are ongoing makes us attentive to the ways that movements can and should use different strategies to suit the political and social demands of a particular moment.

Consider the example of *Cruzan*. Arguments about informed consent, developed in the Human Life campaign and constitutionalized by *Cruzan*, were imported into pro-life, state-level campaigns to introduce "informed consent" laws designed to limit the reach of *Roe*.[79]

75. 497 U.S. 261 (1990).

76. *Id*. at 266.

77. *Id*. at 266–67.

78. *See id*. at 278, 280.

79. According to the conservative Heritage Foundation, many states passed new informed-consent laws in the 1990s. *See* MICHAEL J. NEW, USING NATURAL EXPERIMENTS TO ANALYZE THE IMPACT OF STATE LEGISLATION ON THE INCIDENCE OF ABORTION 2 (Jan. 23, 2006), http://www.heritage.org/Research/Family/upload/93160_1.pdf. In 1992, very few states had passed informed consent laws; by 2000, twenty-seven states had passed them. *Id*.

1. The emergence of informed consent

From 1974 to 1990, in facing internal and external conflict about the Human Life Amendment, the pro-life movement gradually clarified its position on the relationship between a potential right to life and issues like physician-assisted suicide. In 1974 Senate testimony about the Buckley Amendment, Dr. Mildred Jefferson of the National Right to Life Committee asserted that "the aftermath of the Supreme Court's decisions on abortion" witnessed "increased efforts to popularize or make acceptable the extermination procedures of radical social medicine," including efforts to introduce "passive euthanasia bills."[80] In Jefferson's view, a right to life would contravene any "right to die" legislation, since any related practice, including the authorization of living wills, would constitute euthanasia.[81] In questioning Jefferson, the Chairman of the Senate Judiciary Subcommittee on Constitutional Amendments, pro-choice Senator Birch Bayh, rejected this position by borrowing the decisional-autonomy reasoning of *Roe*.[82] Thus, Bayh opined that a right to life would not deny individuals the ability "to make [their] own determinations" about end-of-life issues "as long as [those individuals were in] command of their capacities."[83]

When hearings resumed about the Hatch Amendment in the fall of 1981, pro-choice witnesses continued to emphasize decisional autonomy not only when speaking about the right to die but also in defending *Roe*. For example, a position paper submitted by the Religious Coalition for Abortion Rights stated that "[e]very person . . . must have the freedom to make decisions regarding abortion" and called for the availability of abortion so that "competent, moral

80. *Abortion III: Hearing on S.J. Res. 119 and 130 Before the S. Judiciary Subcomm. on Constitutional Amendments*, 93d Cong. 7–13 (1974) [hereinafter *Abortion III Hearing*] (statement of Mildred Jefferson of the National Right to Life Committee).

81. *Id.*

82. *Id.* at 11 (statement of Sen. Birch Bayh); *see also* B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 310 (2007) (describing *Roe*'s rationale as one based on "decisional autonomy"); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1689 (2008) (explaining that *Roe* recognized women's decisional autonomy in choosing abortion).

83. *Abortion III Hearing*, *supra* note 80, at 11.

choices [could] be made."[84] Similarly, Dr. Allan Rosenfield of the American Public Health Association explained that overruling *Roe* would allow the government to "coerce women to undergo unwanted childbirth."[85]

In the 1981 hearings, pro-life witnesses responded by exploring how decisional autonomy could be the touchstone of their own arguments—not only about a right to life but also about the scope of a right to die. In his testimony, pro-life theorist Germain Grisez explained that a right to life would respect decisional autonomy and ban only "non-voluntary euthanasia."[86] Grisez recognized decisional autonomy arguments against the Human Life Amendment.[87] In the case of a right to die, however, he explained that decisional autonomy was irrelevant for "non-competent persons."[88] Through movement-countermovement dialogue, decisional autonomy had become a prominent feature of pro-life claims about the scope of rights to life and rights to die.

By pursuing an Article V campaign, the pro-life movement profited from an opportunity to develop its constitutional position over time. The Human Life campaign shows that social movements can benefit from the apparent disadvantages of Article V campaigns. It may be true that Article V amendment struggles are often protracted. However, over the course of these struggles, movements have time to resolve internal struggles and consider different constitutional interpretations. Article V amendments should not likely be expected to achieve immediate success. For this reason, however, social movements can explore different constitutional positions without immediately responding to political pressure. Finally, because Article V campaigns propose formal constitutional change, movement-countermovement conflict can emerge from the shadow cast by the Court. It is only during such campaigns that movements do not need to defer to judicial precedents or worry about Congress's Section Five authority. In its efforts to overrule

84. *Constitutional Amendments Relating to Abortion: Hearing on S.J. Res. 110 Before the S. Subcomm. on the Constitution*, 97th Cong. 1031, 1036 (1981) (statement of the Religious Coalition for Abortion Rights).

85. *Id.* at 1057 (statement of Dr. Allan Rosenfield of the American Public Health Association).

86. *Id.* at 801 (statement of Germain Grisez).

87. *See id.*

88. *Id.* at 809, 813.

Roe by amendment, the pro-life movement benefited from the freedom to create a unified, conflict-tested litigation position.

2. Litigation benefits

By the time its attorneys submitted briefs to the Supreme Court in *Cruzan*,[89] the movement had developed a unified, conflict-tested position that proved very effective at emphasizing that a right to die could not extend to incompetent decision-makers. A pro-life brief submitted on behalf of Focus on the Family and the Family Research Council explained that any right to die "assumes a competent person who has the cognitive capacity to make a decision."[90] An amicus brief joined by Concerned Women for America, another pro-life organization, explained: "*Amici* . . . do not argue against the right of the individual competent patient to participate in medical treatment decisions . . . . *Amici* believe, however, that the instant case does not address such issues."[91]

The *Cruzan* plurality adopted a virtually identical understanding.[92] The plurality identified a constitutional liberty at stake in the case, explaining that past decisions suggested that "a competent person ha[d] a constitutionally protected liberty interest in refusing unwanted medical treatment."[93] However, the plurality also reasoned that such a right depended on the decision-making capacity of the individual in question.[94] The liberty interest to refuse medical treatment did not apply in similar cases, the plurality reasoned, because "[a]n incompetent person [was] not able to make an informed, voluntary choice."[95]

Cruzan represented an important constitutional change in itself: the Court had adopted an enforceable new and limited understanding of the scope of a potential constitutional right to

89. 497 U.S. 261 (1990).

90. *See* Brief of Focus on the Family and Family Research Council as Amici Curiae Supporting Respondents at 3, Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (No. 88–1503), 1989 WL 1128132.

91. Brief of the International Anti-Euthanasia Task Force et al. as Amici Curiae Supporting Respondents at 3, Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (No. 88–1503), 1989 WL 1128127.

92. *See Cruzan*, 497 U.S. at 278–80.

93. *Id.* at 278.

94. *Id.* at 278–90.

95. *Id.* at 280.

die.[96] Scholarly accounts often focus on similar constitutional decisions that emerge from movement efforts to "contest and shape popular beliefs about the Constitution's original meaning."[97] For example, in studying the Supreme Court's recent decision in *District of Columbia v. Heller*,[98] Reva Siegel shows how movement conflict about the meaning of the Second Amendment culminated in the Court's decision.[99] In Siegel's view, *Heller* is a powerful example of an opinion that "respects claims and compromises forged in social movement conflict."[100] Similarly, in Siegel's study of constitutional sex-discrimination jurisprudence and the ERA, she focuses on the ways in which "constitutional culture can channel social movement conflict to produce enforceable new understandings of the Constitution's text."[101]

Siegel carefully studies the patterns of exchange between officials and citizens and the influence of popular conflict on the reasoning used by the Court.[102] However, in emphasizing the emergence of enforceable new understandings, Siegel's work focuses on how dialogic contests between movements result in the adoption of new constitutional understandings by the Court.[103]

If we place less emphasis on the Court's enforcement of new constitutional interpretations, we can better understand that campaigns for constitutional change are rarely linear and do not always end with a judicial decision. Instead, these campaigns require social movements to move comfortably between legislation, litigation, and amendment campaigns. In the Human Life campaign,

96. *Cf.* Siegel, *supra* note 1, at 1323 (explaining how the Court channels movement-countermovement conflict into enforceable new constitutional understandings).

97. Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 194 (2008). *Cf.* L.A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 866 (2005) ("Forcing the Court to change its mind . . . would seem to be the most likely mechanism through which the people could control constitutional law.").

98. 128 S. Ct. 2783 (2008). Striking down a District of Columbia ordinance prohibiting most residents from owning handguns, *Heller* held that the Second Amendment extended an individual right to bear arms. *Id.* at 2788–822.

99. Siegel emphasizes the history of movement-countermovement conflict to "illustrate[] how contest[s] over the Constitution's meaning can endow courts with authority to change the way they interpret its provisions." Siegel, *supra* note 97, at 193.

100. *Id.*

101. Siegel, *supra* note 1, at 1369.

102. *See, e.g.*, *supra* note 1 and accompanying text.

103. *See, e.g.*, *supra* notes 99, 101 and accompanying text.

for example, the pro-life movement alternated between Article V efforts, litigation struggles, and legislative proposals, carrying over its claims about informed consent and decisional autonomy into its legislative campaigns in the 1990s.[104]

After developing powerful informed-consent arguments in the Human Life campaign, the pro-life movement could effectively stress decisional autonomy in these statutory campaigns. In defending such statutes in the summer of 1992, Ann Philburn of the pro-life National Right to Life Committee drew on arguments forged in the Human Life struggle, explaining the movement's position that "a woman should have the right to know the risks of abortion and the alternatives to it before making a decision that can't be reversed."[105] Texas state legislator Warren Chism, the sponsor of a 1993 informed-consent measure in that state, also argued that his bill was intended to "protect women" and their ability to make independent decisions.[106]

The Human Life Amendment campaign afforded the pro-life movement a chance to experiment with claims about the scope of rights to life and rights to die. Over time, the movement worked to resolve internal disputes about the meaning of a new constitutional right to life. One dispute involved the relationship between rights to life and physician-assisted suicide. In dialogic exchanges with pro-life advocates about the scope of a right to die, pro-life activists gradually began focusing on the importance of voluntary, competent choices. The movement's new claims about decisional autonomy played a prominent role in the successful litigation of *Cruzan*. By allowing the movement important time and freedom to experiment with different arguments, the Human Life Amendment campaign played a crucial role in the emergence of these claims.

104. *See, e.g.*, *infra* notes 110–11 and accompanying text. Informed-consent abortion restrictions took a variety of forms, but most required physicians to provide women with information about the condition of a fetus, the dangers of abortion, or alternatives to it. For an example of such a provision, see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 904–06 (1992). These statutes were not new in the 1990s. Indeed, the Supreme Court addressed a challenge to one such informed-consent provision as early as 1976, in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 65–67 (1976). Nevertheless, many more states adopted these type of statutes in this period. *See supra* note 79 and accompanying text.

105. Martha Shirk, *How Pennsylvania's Law Affects Abortion Rights: Are Restrictions Just "Common Sense" or an "Undue Burden"?*, ST. LOUIS POST DISPATCH, July 5, 1992, at 1B.

106. Ross Ramsey, *Bid to Require Abortion Delay Fails in House*, HOUS. CHRON., May 18, 1993, at 9.

What can the Human Life model tell us about the way that movements change the meaning of constitutional precedents? First, the history considered here shows the value of being more attentive to different models of constitutional change. The transformation of legal doctrine may provide the clearest evidence of constitutional change, but we should not see those doctrinal transformations as the endpoints of constitutional campaigns. Instead, movements should use tools like legislative or amendment campaigns in complex, strategically sophisticated ways.

IV. FOCA AND CONSTITUTIONAL CHANGE BY LEGISLATION

If, as I have argued, social movements should use different constitutional strategies in varying combinations at different times, what are the advantages and disadvantages of using those tools in different ways? How do Article V campaigns compare to other strategies? In this Part, I approach these questions by studying an alternative model used by social movements, one that emerged from pro-choice legislative efforts in the early 1990s to codify *Roe* and guarantee strong protections for abortion.[107]

Movements can use legislation in a number of different ways to change the meaning of a judicial decision. Groups may sponsor legislation that purports to overrule all or part of a constitutional decision, as did a coalition of civil liberties and religious organizations calling for the overruling of the Supreme Court's 1990 decision in *Employment Division v. Smith*.[108] In other instances, movements offer legislation that supposedly resolves constitutional questions "intentionally" left open by the Court.[109] The pro-life movement used this technique in the early 1980s, when fighting for a bill ostensibly answering questions left open in *Roe* about when

107. For a contemporary version of FOCA, see *The Freedom of Choice Act of 1989: Hearing on H.R. 3700 Before the H. Judiciary Subcomm. on Civil and Constitutional Rights*, 101st Cong. 2–4 (1990) (text of FOCA as of October 1990).

108. For coverage of the legislative campaign to overrule *Smith*, see Darrell Turner, *Groups Attack the Decision Curtailing Religious Freedoms*, ST. PETERSBURG TIMES, July 6, 1991, at 3E. In rejecting a free-exercise challenge to a state policy barring the use of sacramental peyote, *Smith* held that the First Amendment does not require exceptions for religious objectors to neutral rules of general applicability. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 876–88 (1990).

109. *See, e.g.*, David Farrell, *Anti-Abortionists Pushing the Battle in Congress*, BOSTON GLOBE, Jan. 26, 1981, at 1.

human life began.[110] However, for many in the pro-choice movement, the codification of *Roe* meant a change from the constitutional status quo: a statutory overruling of the Court's recent decision in *Webster v. Reproductive Health Services*[111] and the creation of abortion rights broader than those spelled out in *Roe*.[112]

What are the consequences of using a statute like FOCA to change the meaning of a constitutional decision? Unlike a formal amendment, a statute proposed for this purpose has a chance of passing.[113] However, the chance of success may bring its own set of constraints. If a statute is reasonably likely to be signed into law, a movement and its political allies have to avoid any serious risk that the Supreme Court will find the law to be beyond the scope of Congress's power. When offering different interpretations of constitutional precedent, a movement has to operate in the shadow of the Court, careful not to raise questions about congressional authority.[114]

Moreover, there are pragmatic, political considerations that weigh equally heavily on movements. In order to win congressional allies and popular support, movement activists have to present their constitutional positions in politically attractive ways in order to secure the votes necessary to pass a particular bill.

However, a movement can benefit from the rapidly developing internal divisions and countermovement challenges that characterize legislative campaigns like the one for FOCA. These political pressures can help a movement by forcing it to test and develop convincing new constitutional claims. In the case of FOCA, the pro-choice movement created new constitutional arguments in the face of deep internal rifts about the best interpretation of *Roe*. The movement also had to structure its claims to address pro-life

110. *See, e.g.*, *id*.

111. 492 U.S. 490, 507, 511–13 (1989) (plurality decision).

112. *See Freedom of Choice Act of 1989: Hearings before the Comm. on Labor & Human Resources*, United States Senate, 101st Cong. (1990) [hereinafter *Hearings*]; NOW, Freedom of Choice Act of 1991, Draft (Feb. 1991), *in* THE NOW PAPERS (MC 496, Box 91, Folder 15, Schlesinger Library, Harvard Univ.) [hereinafter The Freedom of Choice Act Draft].

113. *See* Ackerman, *supra* note 43, at 1742 (arguing that future constitutional changes will not likely be accomplished by formal amendment).

114. For arguments about how judicial reasoning and rhetoric constrain congressional freedom to discuss constitutional rights, see generally GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES AND KILLS POLITICS (2008); *see also* Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 444–45 (2001) (arguing that Congress sees itself as subordinate to the Court.).

questions about the constitutionality of the legislation. These conflicts allowed the pro-choice movement quickly to create new claims that figured prominently in the successful litigation of *Casey*.

My exploration of the FOCA model unfolds in two steps. In Part IVA, I develop an account of the costs involved in legislative efforts to change the meaning of constitutional precedents. In Part IVB, by considering the constitutional arguments that emerged from movement conflict about FOCA and figured prominently in the litigation of *Casey*, I study the power of campaigns like FOCA to create constitutional change.

A. The Costs of Legislation

In changing the meaning of a judicial decision through legislation, a social movement attempts a series of complex balancing acts: weighing the need for freedom to create politically appealing arguments and concern about Supreme Court intervention, considering internal conflicts and external challenges, and dealing with a need for votes and a commitment to constitutional principles. What reasons would a movement have to change the meaning of a constitutional precedent through legislation? The history of FOCA offers several answers.

Interest in using legislation to change the meaning of *Roe* began in 1988, when the Supreme Court granted certiorari in *Webster v. Reproductive Health Services*.[115] *Webster* involved a constitutional challenge to a multi-restriction Missouri abortion statute,[116] but many—including the Bush Administration, which filed an amicus brief asking the Court to reject *Roe* once and for all[117]—viewed the case as an opportunity for the Court to overrule *Roe*.[118]

As the pro-choice movement demonstrated in 1988, movements can use similar legislative campaigns to show the Court that the people demand a particular constitutional outcome. As Molly Yard, Eleanor Smeal, and Patricia Ireland of NOW explained in April

115. 492 U.S. 490; *see* March for Women's Equality/Women's Lives (Dec. 9, 1988), *in* THE NOW PAPERS (MC 496, Box 91, Folder 25, Schlesinger Library, Harvard Univ.) [hereinafter March] (exploring alternative ways to protect *Roe*).

116. Webster v. Reprod. Health Servs., 492 U.S. 490, 500 (1989).

117. *See* March, *supra* note 115, at 1 (mentioning the Bush Administration's call for *Roe*'s reversal).

118. *See, e.g.*, James Kilpatrick, *The End May Be Near for* Roe v. Wade, S.F. CHRON., Jan. 31, 1989, at A20.

1989, popular protests and political shows of strength would demonstrate to the Court that "a cross section of America [was willing to come] to the nation's capital to stand up and be counted on abortion rights."[119] In pursuing measures like FOCA, Yard argued, the pro-choice movement showed that it would "speak with one voice to the Bush Administration, the Supreme Court, and the Congress" in asking that abortion be "ke[pt] legal."[120]

The Supreme Court's September 1989 decision in *Webster* pushed the movement to develop new ideas about how legislation could be used to change the meaning of *Webster* and *Roe*. On a superficial level, *Webster* was uncontroversial: the Court refused to rule on the constitutionality of a statutory preamble defining the beginning of human life[121] and held moot a question concerning the statute's prohibition on publicly-funded abortions.[122] The issue decided by the Court—that it was constitutional to prevent public employees or facilities from being used in the performance of abortions[123]—seemed to be a straightforward application of the Court's earlier precedents.[124] More controversially, however, in upholding the statute's definition of fetal viability, a plurality called for the overruling of *Roe*'s trimester framework.[125] Writing in dissent, Justice Blackmun claimed that the forecast for abortion rights was bleak:

> Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation, and casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children.[126]

After the 1989 decision of *Webster*, pro-choice leaders offered a different understanding of FOCA: as an alternative to the judicial protection of abortion rights. For example, Sharon Rodine of the

119. *See* NOW National Board to NOW Chapter Presidents (Dec. 5, 1988), *in* THE NOW PAPERS, (MC 496, Box 91, Folder 25, Schlesinger Library, Harvard Univ.).

120. *See id*.

121. *Webster*, 492 U.S. at 507.

122. *Id*. at 513.

123. *Id*. at 511.

124. Maher v. Roe, 432 U.S. 464, 474 (1977); Poelker v. Doe, 432 U.S. 519, 521 (1977); Harris v. McRae, 448 U.S. 297, 325 (1980).

125. *Webster*, 492 U.S. at 517–18.

126. *Id*. at 557 (Blackmun, J., dissenting).

National Women's Political Caucus claimed in September 1989 that *Webster* "proved . . . [that] the only real protection for women's reproductive rights [was] political power."[127] As Ira Glasser of the ACLU asserted in September 1989, "[w]hen the Supreme Court [failed] to guarantee . . . fundamental rights," "political struggle" was necessary to "restore those rights."[128]

When the Supreme Court has proven hostile to a movement's position, there is a clear reason for it to seek protection in another arena. As the history of FOCA shows, however, movements seeking legislative solutions are limited by the rules governing congressional authority.

B. Arguing About Constitutional Authority

When debate on FOCA began in the spring of 1990, constraints on congressional authority quickly became the center of discussion, when Representative Henry Hyde was testifying against the Act.[129] At first, Hyde focused on criticizing the constitutional justification for abortion rights.[130] Senator Orrin Hatch, another opponent, refocused discussion, noting that the bill "went further" than that decision.[131] Hyde agreed with Hatch that FOCA provided broader protections than had been available through *Roe*.[132]

In April 1990, the National Right to Life Committee elaborated on this argument in a memo submitted to Congress.[133] In it, James Bopp, Jr., and Douglas Johnson argued that the Act was illegitimate partly because it would invalidate restrictions upheld under *Roe*, including parental-consultation, informed-consent, conscience-

127. *See* Statement of Sharon Rodine, National Women's Political Caucus (Sept. 6, 1989), *in* THE NOW PAPERS (MC 496, Box 91, Folder 25, Schlesinger Library, Harvard Univ.).

128. *See* Statement of Ira Glasser, ACLU (Sept. 7, 1989), *in* THE NOW PAPERS (MC 496, Box 91, Folder 25, Schlesinger Library, Harvard Univ.).

129. *Hearings*, *supra* note 112, at 33–35 (statement of Rep. Henry Hyde).

130. *See id.* ("[N]obody has the right to choose when the choice involves the destruction of someone else's rights.").

131. *See id.* at 38–40.

132. *See id.*

133. *See* Douglas Johnson, *"Freedom of Choice Act" Would Mandate Legal Abortion Throughout Pregnancy, Say NRLC Legal Experts*, THE NATIONAL RIGHT TO LIFE NEWS, Apr. 19, 1990, at 1 (The National Right to Life News Collection, Schlesinger Library, Harvard Univ.).

clause, and waiting-period laws.[134] Johnson and Bopp claimed that FOCA would "exceed *Roe*" by "mandat[ing] abortion on demand throughout pregnancy."[135] By October 1990, pro-life senators had taken up the argument made by Bopp and Johnson.[136] For example, Wisconsin Representative James Sensenbrenner claimed that, in passing FOCA, Congress would "overrule the Supreme Court decisions . . . in the name of upholding *Roe v. Wade*."[137] Like Sensenbrenner, pro-life activists argued that Congress lacked the constitutional authority to pass FOCA under Section Five of the Fourteenth Amendment,[138] the scope of which had been most recently discussed in the Supreme Court's 1966 decision in *Katzenbach v. Morgan*.[139]

In responding to these pro-life attacks, the pro-choice movement had to change its interpretations of *Roe* to account for limits on congressional authority. In October 1990, Senator Robert Packwood, one of the original sponsors of the Act, responded to Hyde and Hatch's criticisms by stating that the Act would "guarantee nationwide the rights that a woman had under *Roe v. Wade*—no more, no less."[140] The following February, NOW began circulating promotional material explaining that the Act accurately interpreted *Roe*.[141] Indeed, NOW claimed that the Act only "codif[ied] the principles established in the 1973 *Roe v. Wade* decision."[142] By early 1992, pro-choice activists could not campaign for FOCA without claiming to be interpreting *Roe*. For example, Representative Don Edwards, one of the key House sponsors of the Act, wrote in *The New York Times* in April 1992 that the purpose of FOCA was only to codify *Roe*.[143]

134. *See id.*

135. *Id.*

136. *See, e.g.*, Maben, *supra* note 7, at 3.

137. *Id.*

138. *Freedom Choice Act of 1989: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary* 101st Cong. 65–86 (1990) [hereinafter *1990 Hearings*] (statement of James Bopp, Jr., prominent pro-life attorney).

139. 384 U.S. 641 (1966).

140. *See Hearings*, *supra* note 112, at 24 (statement of Sen. Robert Packwood).

141. *See* The Freedom of Choice Act Draft, *supra* note 112, at 1.

142. *Id.*

143. *See* Rep. Don Edwards, Letter to the Editor, *Freedom of Choice Bill Protects Women*, N.Y. TIMES, Apr. 14, 1993, at A20.

The history of FOCA illustrates the constraints that limit the value of similar legislative measures in changing the meaning of constitutional precedents. Bills like FOCA are attractive partly because they promise social movements the freedom to voice constitutional interpretations unlike those set out by the Court.[144] However, because legislation like FOCA may stand a chance of being signed into law, countermovements force their opponents to incorporate constraints on congressional authority into their arguments about the Constitution.

As the FOCA example shows, legislative campaigns to change the meaning of constitutional decisions take place in the shadow of the Court. Countermovement members can use the possibility of Supreme Court intervention not only to argue against the passage of a law but also to force their opponents to moderate their arguments and demands. Over time, a movement may lose its freedom to offer novel constitutional positions because its members have internalized constraints on congressional authority and put forth only arguments that take those constraints into account.

C. Practical Limitations

For social movements pursuing similar campaigns, there are political as well as legal constraints on the freedom to develop new understandings of the Constitution. Believing it possible to pass such legislation, some movement leaders and political allies demand that members avoid any argument that could reduce a bill's chance of success. By making a movement seem disorganized and politically weak, the appearance of internal divisions may itself discourage a bill's potential supporters. If rifts run deep enough, different political allies of a movement may offer alternative versions of a bill, dividing supporters so that no single version has the votes to pass. Finally, as movements and countermovements compete for the support of politicians, each side is pressured to modify its claim to suit undecided legislators.

Movement members may be forced to discard constitutional positions that would result in the loss of valuable votes. Even when some movement members remain willing to state controversial constitutional claims, pragmatists draw them into dialogic contests and reshape and moderate the arguments of absolutists within the

144. *See, e.g.*, *supra* notes 130–31 and accompanying text.

movement. In trying to use pragmatists' arguments against them, dissenters may try to show that their own arguments are practical and politically reasonable. The absolutists' new arguments may often be not only more responsive to their opponents' claims but also more similar to them.

The history of FOCA illustrates the extent to which political pressures limit a movement's ability to offer novel constitutional arguments. The force of these constraints can be better understood if one examines the strategic battles waged within the pro-choice movement.

D. The First Pro-Choice Rift

The outlines of one such strategic battle were already apparent in the summer of 1992, when *Casey* was still pending. Between 1989 and 1990, absolutists had wielded considerable power within the pro-choice coalition championing FOCA. At a January 1990 NARAL Congressional Briefing, for example, Representative Don Edwards, one of the most prominent supporters of FOCA, explained that the Act would allow "no exceptions" on a woman's right to choose abortion.[145] NOW also took an absolutist position on FOCA.[146] At a December 1989 meeting of the NOW National Board of Directors, the Board voted to designate members of Congress as pro-choice only if they supported FOCA and separate legislation guaranteeing public funding for abortion and prohibiting the introduction of parental-notification and consent laws.[147]

Senator George Mitchell's bill reflected a different strategy in protecting *Roe*. According to this view, a narrow abortion right could still be politically significant and personally meaningful to women. As Mitchell told the *Houston Chronicle* in June 1992: "[w]e do not allow states to broadly restrict other constitutional rights."[148] In Mitchell's view, FOCA sent an important message that abortion rights were "no less fundamental to women" and were consequently

145. *See 1990 Hearings*, *supra* note 138, at 66–68 (statement of James Bopp, Jr., quoting Rep. Edwards).

146. *See infra* note 152 and accompanying text.

147. *See* NOW Nat'l Board Meeting Minutes (Dec. 1989), *in* THE NOW PAPERS (MC 496, Box 6, Folder 41, Schlesinger Library, Harvard Univ.).

148. Nancy Mathis, *Court Limits Access to Abortion*, HOUS. CHRON., June 30, 1992, at 1.

"deserv[ing of] the same protection."[149] More concretely, in adopting an equal-protection rationale for Section Five authority, Congress would recognize what Reva Siegel has called a sex equality rationale for abortion rights, one that acknowledged that reproductive autonomy was central to women's political, economic, and social equality.[150] As Laurence Tribe explained in his March 1992 congressional testimony, even an amended FOCA would be valuable in recognizing that:

> [y]ou can be armed with all the ballots you want and all the franchise in the world [. . .in] a system that harasses you and takes control of your body[. . .but] you may not be much better off than somebody who is excluded from the polling booth when it comes to making full use of . . . opportunity . . . under the law.[151]

In addition to providing a guaranteed minimum level of protection for abortion rights, the statute would call attention to a particular justification for abortion rights. If such an act were passed, citizens debating abortion rights would be more likely to discuss this rationale and, perhaps, to accept it.[152]

As the history of FOCA shows, political pressures brought to bear in legislative change campaigns encourage movements to voice only those constitutional positions likely to win votes. A movement may push its allies to suppress constitutional interpretations that seem radical or outside the mainstream, since those interpretations may cost the movement the support of moderates. Even when movement dissenters continue to speak out, they will do so in a dialogue with the majority faction of the movement. In turn, that dialogue will reshape the positions taken by both sides. In this way, strategic pressures place meaningful limits on a movement's ability to explore and set out new constitutional claims.

149. *Id.*

150. *See* Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 817–19 (2007).

151. *The Freedom of Choice Act of 1991: Hearing on H.R. 25 Before the H. Judiciary Subcomm. on Civil and Constitutional Rights*, 102d Cong. 14 (1992) [hereinafter Statement of Laurence Tribe] (statement of Laurence Tribe).

152. This effect would be comparable to what political science literature calls a framing effect. Well-documented in political-science and sociology scholarship, framing effects occur when "public opinion . . . is shaped by . . . constructions or definitions of social problems and policy solutions." Thomas Nelson, *Policy Goals, Public Rhetoric, and Political Attitudes*, 66 J. POL. 581, 582 (2004).

1. The second pro-choice rift: funding and abortion

As an example of how forceful these political pressures can be, consider the 1993 debate within the pro-choice movement about the use of Medicaid funding for abortions.[153] In July 1993, the House Appropriations Committee again took up debate about the Hyde Amendment, which had restricted the use of Medicaid for abortions unless a woman had been a victim of rape or incest or unless her life was threatened.[154] Most FOCA supporters, even absolutists like those in NOW, had accepted that FOCA would permit states to prohibit the public funding of abortion, because they believed that the subject would be covered by separate legislation, such as the proposed Reproductive Health Equity Act.[155] On July 1, to the surprise of many pro-choice activists, the full House voted 255-178 in favor of a restrictive version of the Hyde Amendment, signaling that public funding for abortion would not be guaranteed by any legislation in that congressional session.[156] At a press conference after the vote, Senator Carol Moseley-Braun announced that she was withdrawing support for FOCA, because a true codification of *Roe* would require public funding for abortion and would not, like FOCA, sanction a two-tier system of abortion that penalized poor women.[157] Moseley-Braun claimed that support for abortion rights was not consistent with allowing the state to "discriminate[] against young and poor women."[158] In Moseley-Braun's opinion, *Roe* demanded both gender equality and equal treatment for poor or non-white women and did not permit politicians to "trade[] off the rights of some women for the promise of rights for others."[159]

Pragmatists fired back that passing FOCA would be a necessary and important symbolic victory for young and poor women. In July 1993, Kate Michelman of NARAL wrote in *The Washington Post* that passing FOCA was necessary to show "a real commitment to . . .

153. For discussion of this conflict, see *House Votes to Keep Ban on Abortion Aid*, SEATTLE POST-INTELLIGENCER, July 1, 1993, at A1.

154. *See, e.g.*, *id.*; *see also House Rejects Abortion Funds*, ST. LOUIS POST DISPATCH, July 1, 1993, at A3 [hereinafter *House Rejects*].

155. *See* The Freedom of Choice Act Draft, *supra* note 112.

156. *See House Rejects*, *supra* note 154, at A3.

157. *See, e.g.*, Kevin Merida, *Senator Drops Support for Abortion Rights Bill*, WASH. POST, July 10, 1993, at A3; *see also infra* note 163 and accompanying text.

158. Merida, *supra* note 157.

159. *Id.*

true reproductive choice for American women."[160] Representative Don Edwards argued that passing FOCA would send a necessary message to American women.[161] Edwards claimed that Congress should convey a view that "the reproductive rights that the freedom of choice bill [promised would not] be held hostage" until Congress was willing to fund abortions.[162]

After two weeks, when movement dissenters and other African-American congresswomen responded, they no longer emphasized concrete protections for poor women but, like their pragmatist opponents, stressed the message FOCA would send. Representatives Maxine Waters, Carrie Meek, and Cynthia McKinney told *The Washington Post* that they were reconsidering their support for FOCA because of the ideas FOCA would convey.[163] As McKinney explained, some congresswomen agreed with Moseley-Braun that FOCA should say that public funding for abortion was "an integral part of being pro-choice."[164] NOW joined the National Women's Health Project and the Campaign for Abortion Rights for Everyone in calling for the rejection of FOCA if it permitted funding or parental-consultation restrictions.[165] As Patricia Ireland of NOW explained to the *Chicago Tribune*, "[y]ou can argue that half a loaf is better than none, . . . but that's only true if you're in the half that is getting the loaf."[166]

What does the history of FOCA illustrate about the use of legislative measures like FOCA in campaigns to change the meaning of constitutional precedents? Certainly, there are political pressures at work in Article V campaigns, as well; movement leaders often press one another to present their claims in a politically favorable light.[167] But when a movement works for constitutional change through

160. Kate Michelman, *Unwarranted Interference: The Continuing Struggle for Abortion Rights*, WASH. POST, July 19, 1993, at A15.

161. *See* Edwards, *supra* note 143, at A20.

162. *Id*.

163. Kevin Merida, *Drive for Abortion Funding Opens*, WASH. POST, July 14, 1993, at A3.

164. *Id*.

165. *See* Clarence Page, *Freedom of Choice May Fall Victim to Divided Forces*, CHI. TRIB., Aug. 11, 1993, at 17; Edwards, *supra* note 143, at A20.

166. Page, *supra* note 165, at 17.

167. *See generally* Serena Mayeri, *A New ERA or a New Era?: Amendment Advocacy and the Reconstitution of Feminism*, NW. U. L. REV. (forthcoming 2009) (on file with author).

legislation, unique constraints shape its arguments and limit its freedom to offer constitutional arguments of its own.

As FOCA shows, strategic and legal pressures associated with legislative campaigns limit a movement's ability to explore and set forth innovative constitutional arguments. Countermovements force their opponents to explain how a given piece of legislation is within Congress's constitutional authority. In dialogue with their opponents, social movements change their arguments to reflect limits on congressional authority. In turn, these limits discourage movement members trying to voice constitutional interpretations different from those already set out by the Court.

The political pressures that limit movements' freedom to develop new constitutional claims appear not only in conflicts between movements but also in internal struggles. In order to pass legislation like FOCA, some movement leaders push compromises with moderates and try to silence those members who disagree. These political pressures apply with special force to those who propose a radical change to the meaning of a judicial decision, for these absolutists are the most likely to stand outside the constitutional mainstream.

E. Shaping Casey

If there are real costs to using legislation as a tool for change, there are concrete benefits, as well. I explore the nature of these benefits by studying the relationship between the FOCA campaign and the litigation of *Casey*. My claim is that the intense political pressures, serious movement-countermovement challenges, and the relatively brief time frame associated with campaigns like the one for FOCA allow movements to rapidly develop precise, conflict-tested claims. In turn, these claims may prove beneficial in subsequent litigation.

Casey involved a constitutional challenge to a multi-restriction Pennsylvania abortion statute.[168] However, movement attorneys on both sides described the case as a referendum on *Roe*'s continuing validity.[169] James Bopp, Jr. of the National Right to Life Committee

168. The challenged statute included spousal-consent, informed-consent, parental-consultation, and waiting-period restrictions. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

169. *See* David Savage, *Supreme Court Case Puts Right to Abortion on Trial*, L.A. TIMES, Apr. 21, 1992, at 1.

argued that if the Justices "agree[d] abortion [was] no longer a 'fundamental right,' . . . . *Roe vs. Wade* [would] be gone."[170] Kathryn Kolbert of the ACLU concurred that "[t]he court [was] likely to use [the] case to abolish the fundamental constitutional rights to abortion."[171]

When the *Casey* Court voted not to overrule *Roe*, arguments from the FOCA debates figured prominently in its decision. The movement-countermovement struggles that defined the FOCA debates proved to be an important test for the pro-choice movement's arguments in *Casey* about the role of *Roe* and the Supreme Court in American politics.

1. Reliance

The first argument that emerged from the FOCA debates involved women's reliance on *Roe*.[172] In the juridical arena, reliance-based arguments had long played an important role in the courts' stare decisis analysis.[173] However, in the early 1990s, the Supreme Court had recognized such reliance interests only in the context of commerce, and often when one party could point to a particular contractual guarantee on which she relied.[174]

In the political arena in the late 1980s, NOW led efforts to redefine which reliance interests were deserving of constitutional recognition. At first, reliance arguments were inextricably linked to claims about popular support for *Roe*. In the lead-up to the March for Women's Equality/Women's Lives, a pro-choice protest demonstration, NOW, NARAL, and Planned Parenthood elaborated on the argument that women's political power was itself an adequate reason for the Court not to overrule *Roe*.[175] In December 1988 materials promoting the March, NOW explained:

> We are determined . . . to send a message to the White House, the Congress, and yes, the U.S. Supreme Court that we won't go back . . . . Our government—all three branches—has to understand

170. *Id*.

171. *Id*.

172. *Casey*, 505 U.S. at 856–57.

173. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991).

174. *See id.*; *accord* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); The Genesee Chief v. Fitzhugh, 12 How. 443, 458 (1852).

175. *See, e.g.*, Model Letter (Dec. 5, 1988), *in* THE NOW PAPERS (MC 496, Box 91, Folder 25, Schlesinger Library, Harvard Univ.).

> that American women will not docilely return to an era of compulsory pregnancy.[176]

The message sent by the March was that the Supreme Court should not overrule *Roe* because popular opinion demanded that *Roe* stay the law. March organizers also emphasized why women would not "go back" to an era like the one before the decision of *Roe*. For example, Patricia Baker, Executive Director of Planned Parenthood, explained that women had extremely strong reliance interests in the availability of legalized abortion.[177] Indeed, Baker argued, *Roe* had been the central "women's issue" of the past several decades, because "the abortion guarantees of *Roe v. Wade* [had] been in existence since 1973."[178]

After the FOCA debates began in May 1990, supporters of the bill started describing women's reliance interests as an independent justification for preserving *Roe*. These proponents were motivated to do so partly because, as the rift in the pro-choice coalition appeared, it became more difficult for absolutist pro-choice activists to argue that a majority of Americans supported their interpretation of *Roe*.[179] By July 1993, Senator George Wise, a leading supporter of FOCA, acknowledged that "a number of people believe[d] in the right to choose with some reasonable limitations."[180] Representative Don Edwards had written in *The New York Times* that "[a] majority in Congress believe[d] states should be able to require parental involvement . . . ."[181] In defending their position, absolutists had to explain how women's reliance interests justified broad protections for abortion rights, irrespective of the popular or congressional support for those protections.[182]

In making this argument, absolutists explained how women had relied on *Roe* in making both their economic and educational choices

176. *Id.*; *see also* Mimi Hall, *NOW at 25*, USA TODAY, Jan. 8, 1992, at 1A (members of NOW arguing that women's economic gains and career stability depended on the availability of legalized abortion).

177. *See, e.g.*, Robert Tomasson, *U.S. Action May Renew Abortion Debate*, N.Y. TIMES, Apr. 19, 1992, at A13.

178. *Id.*

179. *See, e.g.*, Clymer, *supra* note 7, at A8.

180. Kevin Merida, *Abortion Foes Claim Momentum in Congress and in Public Opinion*, WASH. POST, July 15, 1993, at A17.

181. Edwards, *supra* note 143, at A20.

182. *See id.*

and their personal and intimate decisions.[183] As Molly Yard, then-President of NOW, explained in 1991: "Any goal [a woman] sets for herself can be completely disrupted by an unplanned pregnancy."[184] In 1992, Laurence Tribe called on Congress to recognize that women who were prevented from controlling their reproductive lives "[were] less able . . . to invoke . . . rights . . . to equal employment[,] housing[, and] political participation."[185]

As FOCA was generating divisions within the pro-choice coalition in Congress, parties and amici in *Casey* reworked the reliance interest arguments that had developed in the political arena. An amicus brief submitted by a group of pro-choice state governments explained that "[m]illions of women who ha[d] come of age in the last twenty years . . . structured their identities, their families, and their pursuits around the possession of [the] fundamental . . . right to decide."[186] The petitioners' brief and a brief submitted by a group of pro-choice members of Congress described women's reliance interests in similar terms.[187]

It was a related account of reliance interests that the *Casey* Court adopted. As the Court explained:

> [P]eople have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[188]

Casey described reliance interests in a way that reflected the struggle of pro-choice activists to define a justification for *Roe*, reliance interests not tied to contractual agreements or legal arrangements but related instead to women's choices, economic opportunities, and intimate relationships.

183. *See, e.g.*, *Testimony of Molly Yard, President of the National Organization for Women, on the Appointment of David Souter to the United States Supreme Court*, 7 (Sept. 18, 1990), *in* THE NOW PAPERS (MC 496, Box 201, Folder 4, Schlesinger Library, Harvard Univ.).

184. *Id.*

185. Statement of Laurence Tribe, *supra* note 151, at 26.

186. Brief of the State of New York et al. as Amicus Curiae in Support of Petitioners at *6, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

187. *See* Brief for the Petitioner, *supra* note 186, at *22; Brief for Representatives Don Edwards et al. as Amici Curiae in Support of Petitioners at *13–14, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

188. *Casey*, 505 U.S. at 856.

2. Institutional legitimacy

A second argument central to *Casey* that emerged from the FOCA debates focused on the institutional legitimacy of the Supreme Court. Some pro-choice attorneys and amici had hinted at a similar argument during the litigation of *Webster* in the late 1980s. For example, a brief submitted by NOW mentioned in passing that the Court should not overrule *Roe* in *Webster*, because "adherence to precedent can reassure society that constitutional questions are answered with reference to settled principles rather than in response to political considerations."[189]

NOW leader Molly Yard elaborated this argument between September 1990 and September 1991 in testifying in opposition to the appointments of David Souter and Clarence Thomas to the Supreme Court.[190] In September 1990, Yard argued against Souter's nomination, accusing the Supreme Court of paying attention not to the Constitution but to "the right-wing of [the] country, led by President [George H.W.] Bush."[191] One year later, Yard attributed the Court's recent abortion decisions to a "conservative tide" that had blinded the Court to its responsibilities to interpret the law neutrally.[192] NOW and other pro-choice organizations called on Congress to be non-partisan at a time when the Court appeared not to be.[193]

Beginning in 1991, the pro-life movement responded to NOW's call for neutrality by claiming that Congress could be neutral only by deferring to the Court, that is, Congress would act the least controversially in codifying rather than expanding the right defined by *Roe*.[194] Douglas Johnson of the National Right to Life Committee told *The Washington Post* in January 1990 that FOCA was illegitimate, because it called into question whether "some of the

189. Brief for the National Organization for Women as Amicus Curiae Supporting Appellees at *20–21, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605); *see also* Brief of Amici Curiae National Association of Women Lawyers et al. in Support of Appellees at *14–16, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

190. *See infra* notes 197–98 and accompanying text.

191. *See* Testimony of Molly Yard, *supra* note 183.

192. *See Testimony of Molly Yard, President of the National Organization for Women, Against the Nomination of Clarence Thomas to the Supreme Court* (Sep. 1991), *in* THE NOW PAPERS (MC 496, Box 201, Folder 4, Schlesinger Library, Harvard Univ.).

193. *See, e.g.*, *id.*

194. *See infra* notes 201–02 and accompanying text.

very minimal regulations that [had] survived *Roe v. Wade* would continue to survive."[195] In March 1992, the Bush Administration also criticized the Act for going "well beyond the requirements of *Roe v. Wade*."[196]

Over time, pro-choice activists accepted, to some extent, that FOCA would be more politically legitimate if Congress "codified" rather than "went beyond" *Roe*.[197] The movement-countermovement dialogue that shaped the FOCA debate repeatedly reinforced the idea that neutrality involved non-action. To go beyond *Roe* or undercut it was argued to be, by extension, illegitimate and partisan.

As hope for passing FOCA faded,[198] these arguments were channeled back into the juridical arena. An amicus brief submitted in *Casey* by a group of pro-choice members of Congress built on political arguments linking unjustifiable partisanship with "tampering" with *Roe*.[199] The brief stressed that any "departure from precedent after the membership of the Court has been dramatically altered" could only "raise doubts both as to the Court's impersonality and as to the principled foundations of its decisions."[200]

The *Casey* Court explicitly endorsed this reasoning. An entire section of the opinion was dedicated to explaining "why overruling *Roe*'s central holding would . . . seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[201] In particular, the *Casey* Court explained, the Court could not meddle with *Roe* without appearing to be political and partisan.[202] Although many outside observers thought the Court was being partisan in leaving *Roe* alone, the Court adopted the contrary argument that had been advanced in the FOCA debate. "[T]o overrule under fire

195. Dan Balz, *Abortion Rights Strategy: A Move to Thwart the States*, WASH. POST, Jan. 23, 1990, at A23.

196. William J. Eaton, *Debate Begins on Abortion Rights Bill*, L.A. TIMES, Mar. 5, 1992, at 12.

197. *See, e.g.*, Edwards, *supra* note 143, at A20.

198. *See* Clymer, *supra* note 7, at 27.

199. Brief for Representatives Don Edwards et al. as Amici Curiae in Support of Petitioners, *supra* note 187, at *11.

200. *Id.*

201. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992).

202. *See id.* at 867.

in the absence of the most compelling reason," the *Casey* Court explained, "would subvert the Court's legitimacy beyond any serious question."[203]

3. Roe*'s core holding*

A final claim adopted in *Casey*—that a sex-equality rationale was part of the core holding of *Roe*[204]—was drawn from arguments made by the pragmatist faction of the pro-choice coalition sponsoring FOCA. Of course, as Reva Siegel has shown, sex-equality arguments for a constitutional abortion right did not originate during the FOCA debate.[205] Nonetheless, a particular understanding of *Roe* as a sex-equality decision emerged during discussions of FOCA.

As divisions in the pro-choice movement became clear in the spring of 1992, both absolutists and pragmatists had to explain how their positions preserved *Roe*.[206] In accomplishing this task, pragmatists like Senator George Mitchell and Kate Michelman of NARAL faced serious obstacles. How could one say that *Roe* had been preserved when important restrictions on abortion access were permitted? In the FOCA debates, the pragmatists responded that there was value in setting forth the justification for abortion rights.[207] In part, this approach was explained as the only politically realistic one; while there was widespread popular support for the idea of a choice-based abortion right for women, a majority of Americans approved of restrictions like parental-consultation laws.[208] In June 1992, Mitchell explained that his interpretation of *Roe* was intended to enhance the chances that FOCA would be passed.[209] Don Edwards also supported a more restrictive interpretation of *Roe*,

203. *Id*.

204. *See id*. at 845, 852–54.

205. *See generally* Siegel, *supra* note 150.

206. Indeed, NOW activists routinely complained that the pragmatist, or Mitchell bill, was "more restrictive" than *Roe*. *See, e.g.*, NOW National Board Meeting (Apr. 2–4 1990), *in* The NOW Papers (MC 496, Box 91, Folder 53, Schlesinger Library, Harvard Univ.).

207. *See, e.g.*, Joan Biskupic, *America's Longest War; At 20,* Roe *Conflict Enters New Era*, WASH. POST, Jan. 22, 1993, at A1 (pro-choice congressmen explaining that FOCA could permit a variety of state restrictions on abortion rights while still "captur[ing] the essence of *Roe*").

208. *See, e.g.*, Uri Berliner & Jeanne Freeman, *For Most, Abortion Isn't Just Yes or No*, SAN DIEGO UNION-TRIB., July 7, 1992, at C1 (reporting Gallup poll data).

209. *See* Mathis, *supra* note 148, at 1.

because "[a] bill that codifies *Roe* [and] parental involvement [could] pass."[210]

However, other pragmatists suggested that FOCA could serve an important purpose simply by endorsing abortion rights and explaining their significance.[211] In July 1993, Kate Michelman argued that passing FOCA would show that pro-choice legislators had fulfilled their "promise [to] support a woman's freedom to choose."[212] Mitchell also claimed that FOCA sent a message that women's abortion rights were as valuable as other constitutional rights.[213] Although far from fully elaborated, the pragmatists' idea seemed to be that it was important to explain and support the rationale for *Roe*.[214]

The *Casey* Court adopted and expanded on the pragmatists' idea that *Roe*'s core holding could be preserved at the same time that a variety of serious restrictions on abortion rights were permitted.[215] *Casey* explained that the core holding of *Roe* was still viable in part because the concept of liberty endorsed in it outweighed remaining reservations about *Roe*'s validity.[216] A significant part of *Roe*, the *Casey* Court suggested, was not the actual protections for abortion rights set out in the decision but a recognition that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[217]

In the FOCA debates, some pro-choice activists had contended that it was possible to preserve *Roe* even while discarding its trimester framework and permitting restrictions that the *Roe* Court might not have allowed.[218] *Casey* took this argument one step further: even as the legal framework of *Roe* was changed substantially, the central holding of the decision could be retained so long as the Court still recognized that a woman's "suffering [was] too intimate and personal for the State to insist, without more, upon its own vision of the woman's role."[219]

210. Edwards, *supra* note 143, at A20.
211. *See, e.g.*, Biskupic, *supra* note 207, at A1.
212. Michelman, *supra* note 160, at A15.
213. *See* Mathis, *supra* note 148, at 1.
214. *See id.*
215. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992).
216. *See id.* at 853.
217. *Id.*
218. *See, e.g.*, Biskupic, *supra* note 207, at A1.
219. *Casey*, 505 U.S. at 852.

Like other key aspects of the *Casey* decision, the Court's understanding of *Roe* reflected arguments made and tested in the FOCA debates. What does *Casey*'s story reveal about the benefits of legislative change campaigns like FOCA? As was the case in *Casey*, using legislation to change the meaning of a judicial decision can be conducive to relatively quick constitutional changes. In working to achieve timely political success, social movements and countermovements engage in intense conflicts, and both sides are forced to adopt politically attractive and relatively moderate claims that are likely to win over supporters. These are the kinds of conflict-tested claims that the Court is likely to recognize.[220]

Claims emerging from similar legislative struggles may be more appealing to the Court, because such claims factor in concerns about congressional authority, the reach of past constitutional decisions, and the need for political moderation. As countermovements raise questions about whether legislation is within the scope of Congress's authority, a movement uses past Supreme Court precedent to structure their constitutional interpretations. And as pragmatists within movements pressure dissenters to modify their claims, these dialogic conflicts produce new but politically moderate constitutional claims.

Although it may have less freedom to explore new constitutional claims in a campaign like FOCA, a movement can benefit from the constraints it faces. In facing similar limitations, a movement may stand a better chance of testing its claims and may make them appealing to the Court.

V. CONCLUSION

Recent scholarship has offered important insight into the alternatives to formal constitutional amendments. While explaining how these alternatives work and why they may be attractive, theory to date has not paid adequate attention to the ways in which social movements can and should combine different strategies for constitutional change.

220. *See* Siegel, *supra* note 1, at 1327 (analyzing how movement "conflict that can discipline constitutional advocacy into understandings that officials can enforce . . . as the Constitution").

In the case studies considered here, I offer an account of the advantages and drawbacks of making Article V amendment proposals and initiating legislative campaigns. In analyzing the history of the Human Life Amendment, I suggest that Article V campaigns are unique in offering movements time and freedom to unite their forces and refine new constitutional ideas.

By contrast, in legislative campaigns like the one for FOCA, movement members must restructure their claims to account for limits on congressional authority. Political pressures create similar limits on a movement's ability to explore new constitutional positions. In the battle to win votes and forge a bill likely to succeed, pragmatists within a movement may encourage their allies to voice only mainstream or politically attractive positions. Even when dissenting members continue to make claims, those contentions have often been altered in response to the concerns expressed by pragmatists. When movements rework their arguments in response to varying pressures, however, their new claims are both moderate and conflict-tested. The pressures that limit a movement's freedom to explore new constitutional arguments may also make these arguments more persuasive in court.

My project in studying change campaigns like FOCA and the Human Life Amendment has been to begin a conversation about when and how various strategies, even underemphasized ones, result in constitutional change. If we are more attentive to the way that movements pass between social arenas and profit from different methods of change, we will have a better sense of the rich and complex ways that movements pursue their goals. Additionally, if current scholarship proceeds from the point of view of a social movement member or attorney, we will better understand ways to change.