

Spring 2014

Beyond Backlash: Legal History, Polarization, and Roe v. Wade

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Recommended Citation

Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, 71 *WASH. & LEE L. REV.* 969 (2014),

Available at: <https://ir.law.fsu.edu/articles/326>

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Beyond Backlash: Legal History, Polarization, and *Roe v. Wade*

Mary Ziegler*

Abstract

On its fortieth anniversary, Roe v. Wade serves as the most prominent example of the damage judicial review can do to the larger society. Scholars from across the ideological spectrum have related how Roe helped to entrench the ideological positions held by those on either side of the abortion issue, precluding any form of productive compromise. This criticism, which the Article calls the “beyond backlash” argument, has profound legal consequences, serving as both a justification for overruling Roe and as a case study of the benefits of varying interpretive methods.

This Article reevaluates the beyond backlash claim through a careful historical study of the world of abortion politics in the decade after Roe. It unearths a surprising set of negotiations between activists who believed in shared solutions. Roe certainly intensified conflict, prompting a nationalization of pro-life activities and sparking an academic debate about judicial review. Nonetheless, as the Article argues, the ideological entrenchment we associate with Roe came later than we have thought and emerged for reasons beyond the Court’s decision.

This Article uses this history as an entry point for rethinking the uses to which post-Roe history is put in contemporary debate about judicial review. The beyond backlash argument uses Roe as shorthand for a wide array of strategic decisions and political events. Disentangling the decision from the events following it will allow scholars to have a more principled debate about what responses to Roe actually teach us about the role of the courts. At a minimum, the Article suggests that scholars have overstated the degree to which Roe immediately polarized discussion. Until we

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better understand the causes for the radicalization of abortion politics, we should not rely so heavily on Roe in reasoning about the consequences of judicial review.

As importantly, reexamining the beyond backlash narrative makes apparent that polarization is neither inevitable nor beyond the control of nonjudicial actors. If we wish to create a more reasoned abortion debate, Roe cannot stop us from doing so.

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I. Introduction

In May 2013, Justice Ruth Bader Ginsburg, perhaps the strongest defender of abortion rights on the Supreme Court, suggested that *Roe v. Wade*¹ “stopped the momentum that was on

1. 410 U.S. 113 (1973).

the side of change.”² As marriage-equality litigation continues to move into the Supreme Court, Ginsburg’s comments have revived discussion of *Roe*’s damaging effects. Most often, scholars focus on the ways in which *Roe* set back the abortion cause, undercutting the progress that the pro-choice movement had made.³ Conventionally, however, we believe that *Roe*’s impact went much further. Scholars from Robin West to Jeffrey Rosen argue that *Roe* helped to entrench the ideological positions held by those on either side of the issue, precluding any form of productive compromise.⁴ The polarization produced by *Roe* spilled over into other legal conflicts about gender, helping to doom the Equal Rights Amendment (ERA), to energize the New Right and the Religious Right, and to put off potentially promising alliances in support of caretaking.⁵ Beyond backlash, *Roe* bequeathed to the

2. Emily Bazelon, *Backlash Whiplash: Is Justice Ginsburg Right that Roe v. Wade Should Make the Court Cautious About Gay Marriage?*, SLATE (May 14, 2013, 3:08 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/justice_ginsburg_and_roe_v_wade_caution_for_gay_marriage.html (last visited Apr. 15, 2014) (on file with the Washington and Lee Law Review).

3. See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 468 (2004) (suggesting that litigation alone “cannot fundamentally transform a nation”); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 520 (2001) (contending that *Roe* “undermine[d] [abortion] right[s] by stimulating extra opposition to them”).

4. See, e.g., RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 79, 124–27 (2003) (discussing *Roe* as a pragmatic decision that had the effect of stifling “potentially worthwhile social experimentation”); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 96 (2006) (“[W]hen the Supreme Court struck some of these abortion restrictions down in the late 1970s and ’80s, it finally energized abortion opponents who otherwise would have had to make their case in the political arena.”); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 381, 381–82 (1985) (“*Roe v. Wade* sparked public opposition and academic criticism, in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action.” (footnote omitted)); Cass Sunstein, *Civil Rights Legislation in the 1990s: Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991) (using *Roe* as an example to show that courts are not always the proper institution to bring about social change); Robin West, *From Free Choice to Reproductive Justice: De-constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1394–1404 (2009) (describing the fact that *Roe* hangs by a thread, is subject to the political tides of the president, and lacks criticisms from the pro-choice movement).

5. *Infra* Part II.

American people what Emily Bazelon has called “the intractable, depressing national divide over abortion.”⁶

Whereas backlash arguments address the harm judicial decisions do to social-change movements, *Roe*’s critics focus on the damage done by judicial intervention to the larger society.⁷ This criticism, which the Article calls the “beyond backlash” argument, has profound legal consequences. Justice Antonin Scalia has woven this argument into a demand for the overruling of *Roe*.⁸ In the broader legal academy, scholars believe that post-*Roe* polarization provides a powerful warning about the consequences of particular interpretive methods—particularly, when the Court decides too much too soon.⁹ Forty years after *Roe*, the decision serves as a central example of the dangers of judicial review.¹⁰

This Article reevaluates the beyond backlash claim through a careful historical study of abortion politics in the decade after *Roe*. It unearths a surprising set of negotiations between activists who believed it possible to find common legal ground.¹¹ *Roe* certainly intensified conflict, prompting a nationalization of pro-life activities and sparking an academic debate about judicial review.¹² Nonetheless, as the Article argues, the ideological

6. Bazelon, *supra* note 2.

7. See Sunstein, *supra* note 4, at 766 (“*Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus.” (footnote omitted)).

8. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998–1002 (1992) (Scalia, J., dissenting) (discussing the political pressure on the Court caused by *Roe* and arguing that if the Court did what it is supposed to do—read the Constitution and discern our society’s understanding of that text—then the people would leave the Court alone).

9. See *infra* Part II (exploring this scholarship at greater length).

10. See Eskridge, *supra* note 3, at 519 (citing *Roe* as an example of the Court meddling too much in the political process).

11. *Infra* Part IV.

12. On the federalization of the abortion issue after *Roe*, see, for example, Scott Idleman, *Liberty in the Balance: Religion, Politics, and American Constitutionalism*, 71 NOTRE DAME L. REV. 991, 1021 (1996) (reviewing ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1996)) (“*Roe* . . . more or less ensured that abortion would become a national issue and that abortion-related activism, whether for or against, would become nationalized . . .”). On the academic debate sparked by *Roe*, see, for example, BARRY FRIEDMAN, *THE WILL OF THE*

entrenchment we associate with *Roe* came later than we thought and emerged for reasons beyond the Court's decision.

The Article chronicles a complex effort on the part of opposing activists to find consensus—if not on abortion, then on the gender issues associated with it.¹³ Moderate pro-life activists worked to redefine the legal right to choose, requiring government support for a range of reproductive choices.¹⁴ Some in the pro-choice movement supported some form of fetal rights, considering them in the larger context of debate about medical ethics, human experimentation, and human dignity.¹⁵ These stories show that judicial review did not intensify abortion conflict in the way we have often believed.

Furthermore, the Article provides compelling new evidence that the polarization of the struggle increased at least partly “without the intermediation of judicial review.”¹⁶ The dynamics of gradual political party realignment in the 1970s, the mobilization of the New Right and the Religious Right, the setbacks confronted by the pro-choice movement, the emergence of effective new pro-life litigation strategies, and the declining popularity of the welfare state all helped to undermine preexisting efforts to find common ground.¹⁷

The Article uses this history as an entry point for rethinking the uses to which post-*Roe* history is put in contemporary debate about judicial review. The beyond backlash argument uses *Roe* as

PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 299–313 (2009) (discussing the intellectual debate *Roe* sparked over how the Constitution should be interpreted and the political backlash with the rise of the New Right).

13. See *infra* Part VI (discussing ways that activists on both sides of the abortion debate could come together for certain causes such as contraceptives).

14. See Thomas W. Hilgers, Marjory Mecklenburg & Gayle Riordan, *Is Abortion the Best We Have to Offer?: A Challenge to the Aborting Society*, in *ABORTION AND SOCIAL JUSTICE* 177, 180 (Thomas W. Hilgers & Dennis J. Horan eds., 1972) (“Both those who favor and oppose abortion can agree that a woman with a problem pregnancy needs help. The suggestions which follow represent new ideas and an extension of the old.”).

15. See *infra* Part IV (discussing the pro-choice movement's views of fetal rights outside of the abortion context).

16. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *YALE L.J.* 2028, 2033 (2011).

17. See *infra* Part V (explaining the various political changes occurring in the 1970s that contributed to the political backlash of *Roe*).

shorthand for a wide array of strategic decisions and political events.¹⁸ Disentangling the decision from the events following it will allow scholars to have a more principled debate about what *Roe* actually teaches us about the role of the courts. At a minimum, the Article suggests that scholars have overstated the degree to which *Roe* immediately polarized discussion.¹⁹ Until we better understand the causes of the radicalization of abortion politics, we should not rely so heavily on *Roe* in reasoning about the consequences of judicial review.

As importantly, reexamining the beyond backlash narrative makes apparent that polarization is neither inevitable nor beyond the control of nonjudicial actors. If we want to create a less dysfunctional abortion politics, we have it in our power to do so.

The Article proceeds as follows. Part II briefly sets out the beyond backlash narrative, examining the evidence offered for *Roe*'s disastrous impact on national politics. Part III begins to complicate this narrative. This Part recovers the lost history of antiabortion efforts to define and protect some form of reproductive choice for women. Tracing these efforts across legal debates about healthcare, child care, family planning, and pregnancy discrimination, the Article uncovers a new antiabortion argument used in the years immediately after the Supreme Court decided *Roe*. Abortion opponents argued that the state could ban abortion only if it conferred rights on women after pregnancy.²⁰ For this reason, activists campaigned for reforms that created new protections for caretakers, arguing that reproductive choice lost meaning if the state did not support women raising children.²¹

18. See Greenhouse & Siegel, *supra* note 16, at 2086 (“We suggest . . . that the dominance of the ‘Court-caused-it’ backlash narrative has shortchanged both legal scholars and the general public of a more complete understanding of an important chapter in America’s social, political, and legal history.”).

19. See *id.* at 2086–87 (discussing the fact that *Roe* was only one factor among many in the polarization of abortion as a political issue in America); *infra* Part VII (making conclusions based on the various historical, legal, and political facts offered in the Article).

20. See Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1656 (2008) (“In the years after *Roe*, it was not the antiabortion movement that was making claims about protecting women’s choices and women’s health; *these were the claims and frames of the movement’s abortion-rights adversaries.*”).

21. *Id.*

Part IV examines pro-choice conversations about medical experimentation, fetal life, and informed consent. In the midst of scandals concerning medical exploitation and sterilization abuse, some in the pro-choice movement worked to carve out a space for fetal rights that did not conflict with *Roe*.²²

Part V studies the reasons a world of possible compromise gave way to one of greater ideological entrenchment. This Part spotlights the role played by ongoing political party realignment, the emergence of the New Right and the Religious Right in American politics, and the ascendancy of incrementalist litigators in the pro-life movement.

Part VI asks what this history teaches us about *Roe*'s last forty years and its future ramifications, and Part VII briefly concludes.

II. Beyond Backlash: Roe and American Politics

Conventional backlash arguments examine the impact of a judicial decision on the cause it advances.²³ As Michael Klarman explains, a court “venturing too far in advance of public opinion” might “undermine the cause” advanced by social movement members.²⁴ Klarman and Gerald Rosenberg focus primarily on the utility of litigation as a source of social change.²⁵ While

22. See AMERICAN CIVIL LIBERTIES UNION PRIVACY COMMITTEE MEETING MINUTES, June 16, 1976, 1–2 [hereinafter ACLU MEETING MINUTES, June 1976] (discussing protections for fetal rights that were consistent with *Roe*'s holdings regarding fetus viability and the importance of the life of the mother) (on file with Mudd Library, Princeton University, Box 112, The ACLU Papers, Folder 8 “Rare Books and Manuscripts Division”).

23. See Greenhouse & Siegel, *supra* note 16, at 2032 (“The backlash narrative conventionally identifies the Supreme Court’s decision as the cause of polarizing conflict and imagines backlash as arising in response to the Court repressing politics.” (footnote omitted)).

24. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 203 (2013).

25. See *id.* at 166

Not only do court decisions make people aware of previously unnoticed social change and force politicians to take positions on issues that they previously have ducked, but they also impose substantive resolutions of policy issues that may be very different from those supported by most voters. It is this aspect of judicial decisions that is the most important cause of backlash.

Rosenberg contends that the courts are largely ineffective in reshaping social, moral, or political norms, Klarman suggests that litigation can make things worse for the social movements that the Court tried to help.²⁶

However, criticisms of *Roe* go beyond the conventional backlash narrative.²⁷ Scholars, Supreme Court Justices, and grassroots activists argue that the 1973 decision did broader political damage.²⁸ Richard Posner suggests that *Roe* cut off a promising, state-by-state negotiation about the scope and rationale of abortion rights.²⁹ If the Court had not imposed a single, national result on a divided polity, Posner reasons, lawmakers might have arrived at an approach that commended itself to those on both sides of the issue.³⁰

Cass Sunstein and Jeffrey Rosen further contend that *Roe* helped to radicalize broader American gender politics.³¹ In Rosen's view, *Roe* empowered extremists on either side who

See also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 422 (2d ed. 2008) ("U.S. courts can almost never be significant producers of effective social reform.").

26. Compare KLARMAN, *supra* note 3, at 422 (discussing the violent outbursts across the country in reaction to *Brown's* school desegregation), with ROSENBERG, *supra* note 25, at 420–24 (concluding as to when and under what conditions courts can produce significant social reform and using *Brown* and *Roe* as examples).

27. See Sunstein, *supra* note 4, at 766 ("[T]he decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents." (footnote omitted)).

28. See Ginsburg, *supra* note 4, at 381–83 (discussing how *Roe* went too far in taking a "medical approach" and the implications of this medical approach); Sunstein, *supra* note 4, at 766 (discussing the implications of *Roe*); Mary Ziegler, *The Possibility of Compromise: Anti-Abortion Moderates After Roe v. Wade*, 87 CHI.-KENT L. REV. 571, 572 (2012) [hereinafter Ziegler, *Possibility of Compromise*] (discussing STOP ERA's belief that *Roe* affected its efforts).

29. See, e.g., POSNER, *supra* note 4, at 125 ("[B]ut the Court ignored an important consequence—the stifling effect on democratic experimentation of establishing a constitutional right to abortion.").

30. See, e.g., *id.* at 254 (discussing the potential outcomes of different decisions by the Court in *Roe*).

31. See ROSEN, *supra* note 4, at 90–97 (discussing the effect of the *Roe* decision on American politics, particularly with judicial nominations); Sunstein, *supra* note 4, at 766 ("[*Roe*] may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents." (citation omitted)).

rejected the idea of compromise out of hand.³² Sunstein asserts that *Roe* helped to mobilize religious conservatives who successfully defeated the ERA and undercut the women's movement.³³ William Eskridge elaborates on the way in which *Roe* empowered traditionalists in the pro-life movement who resisted any change to women's roles.³⁴ In the view of Eskridge and his colleague John Ferejohn, *Roe*'s reasoning moved pro-life traditionalists to more extreme positions and embittered the abortion battle.³⁵

Beyond backlash arguments have influence outside the legal academy. Beginning in the 1980s, leading pro-lifers have used these arguments as a reason for overruling *Roe*.³⁶ For example, in 1981, Dr. John Willke, a leading abortion opponent since the pre-*Roe* period, argued that *Roe* should be overruled because of its impact on American politics: "[W]e live in a Nation that is totally polarized on this issue," he asserted.³⁷ "Unlike other issues in the body politic, there is no middle ground, there is no compromise."³⁸

Justice Antonin Scalia has made beyond backlash arguments a part of American constitutional law. In *Planned Parenthood of*

32. See, e.g., ROSEN, *supra* note 4, at 100 ("The result is a polarizing gap between the moderation of the country as a whole on abortion and the radical opposition it continues to inspire among conservative legal elites.").

33. See, e.g., Sunstein, *supra* note 4, at 766 ("[T]he decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents." (citation omitted)).

34. See, e.g., Eskridge, *supra* note 3, at 520 ("[A]ny substantial success on the part of the pro-choice movement would have triggered a strong countermovement, for it would have altered important status entitlements and gender roles.").

35. See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 242 (2010) ("Pro-life traditionalists mobilized as a normative social movement seeking to preserve not only human life but also a traditionalist ethic of family values and women's domestic role. . . . [T]he movement sought to amend the Constitution to overrule *Roe*.").

36. See *Confirmation of Sandra Day O'Connor to the Supreme Court: Hearing Before the S. Judiciary Comm.*, 97th Cong. 282 (Sept. 10, 1981) (statement of Dr. John Willke, President, National Right to Life Committee) (analogizing *Roe* to *Dred Scott* as an example of another case that exists as a "blot upon our Nation").

37. *Id.*

38. *Id.*

Southeastern Pennsylvania v. Casey,³⁹ the majority used post-*Roe* backlash in explaining the need to hold fast to *Roe*'s "essential" holding.⁴⁰ Were the Court to hold otherwise, the *Casey* majority suggested, the Justices would signal their vulnerability to political pressure.⁴¹

Scalia responded that maintaining *Roe*, just like deciding it, would make the abortion battle more dysfunctional.⁴² Scalia explained:

Roe's mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption [. . .] that the Court's new majority decrees.⁴³

In Scalia's view, *Roe* created a politics of violence, radicalization, and hostility to the Court.⁴⁴ The opinion's unconvincing, result-oriented reasoning angered a public that demanded principled decision making.⁴⁵ Furthermore, the Court's imposition of a single, national solution precluded any meaningful effort to find consensus on the abortion issue.⁴⁶ Only overruling *Roe*, Scalia

39. 505 U.S. 833 (1992).

40. *See id.* at 867 ("So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.")

41. *See id.* ("[T]o reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question . . . [and] [t]he country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure.")

42. *See id.* at 997–1001 (Scalia, J., dissenting) (discussing how the plurality opinion's "maintaining" of *Roe* is actually inconsistent with the principals of *Roe* and arguing that the Supreme Court must get out of the debate because it has no right to be there in the first place).

43. *Id.* at 996–97.

44. *See id.* (discussing the public and political reactions and effects of *Roe*).

45. *See id.* at 995–97 (discussing the problem with standing by *Roe* because of the public opinion against it and noting that this Nietzschean vision of the Court is not what the Founders envisioned).

46. *See id.* at 995 ("*Roe*'s mandate for abortion on demand destroyed the

tells us, would offer any opportunity to create a more productive dialogue about abortion.⁴⁷

Beyond backlash arguments speak to courts as much as to social movement members. These contentions ask courts to consider the impact their decisions will have not just on a particular cause but also on the larger geography of American politics. *Roe* serves as a warning about the harm that courts can do in exercising judicial review.⁴⁸

As importantly, beyond backlash arguments offer a compelling narrative about the world *Roe* produced. In this account, opposing movements responded to *Roe* by taking more extreme positions and became less flexible in their gender politics.⁴⁹ Possible partnerships on related issues, including family planning, sex discrimination, and maternal rights, became impossible.⁵⁰

What features of *Roe* supposedly produced this stalemate? Some scholars point to the decision's timing. Michael McConnell has described *Roe* as a decision "that cuts off deliberation and debate, that makes compromise impossible, and that eliminates political solutions."⁵¹ William Eskridge and John Ferejohn similarly describe *Roe* as an effort "to close off active democratic

compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level.").

47. See *id.* at 1002 ("[B]y banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.").

48. See William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1293–94 (2009) (using *Roe* as an example of why judicial review should be limited).

49. See Eskridge, *supra* note 3, at 472–73 (discussing the countermovements from *Roe* and the success of the pro-life and anti-ERA movements); Ziegler, *Possibility of Compromise*, *supra* note 28, at 572 (discussing the "polarization narrative").

50. See Ziegler, *Possibility of Compromise*, *supra* note 28, at 589 (discussing the conventional "polarization narrative" of scholars, which suggests that after *Roe* compromise on issues was impossible).

51. Michael McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1540 (1989) (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988)).

deliberation through activist judicial review.”⁵² In 1985, Justice Ginsburg pioneered such an argument about *Roe*’s timing.⁵³ Before the opinion came down, Ginsburg asserts, the pro-choice movement had made impressive progress in the states.⁵⁴ Because the Court decided too much too soon, the pro-life movement was able to reverse this trend and introduce new abortion restrictions.⁵⁵ Because the public did not yet support the expansive abortion rights *Roe* announced, the opinion unnecessarily angered abortion opponents and radicalized discussion of the issue.⁵⁶

Others emphasize the sweeping holding and rationale *Roe* offered. Cass Sunstein, whose minimalist theory urges an incremental approach to judicial decision making, describes *Roe* as “a large mistake.”⁵⁷ Richard Posner’s judicial pragmatism also appears incompatible with *Roe*’s far-reaching holding.⁵⁸

Arguments about *Roe*’s consequences figure centrally in conversations about the role played by the courts in American democracy. Scholars use *Roe* as a case study of the unexpected harms produced by judicial review.⁵⁹ Some, like Sunstein and

52. Eskridge & Ferejohn, *supra* note 48, at 1302.

53. See Ginsburg, *supra* note 4, at 381–84 (discussing the legislative movements prior to the *Roe* decision and how *Roe* effected the change that was occurring before the decision).

54. See *id.* at 379–80 (describing the movement towards liberalization of abortion statutes across states and the Texas law at issue in *Roe* as “the most extreme prohibition extant”).

55. See *id.* at 381 (“*Roe* ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures.”).

56. See Sunstein, *supra* note 4, at 766 (“[T]he decision . . . spur[red] opposition and demobilize[d] potential adherents. . . . At the same time, *Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly . . .”).

57. See, e.g., Cass R. Sunstein, *The Minimalist Constitution*, in *THE CONSTITUTION IN 2020*, at 37–38 (Jack M. Balkin & Reva B. Siegel eds., 2009) (“Minimalists want to avoid broad, ambitious judicial rulings.”).

58. See, e.g., POSNER, *supra* note 4, at 257 (“But *Roe v. Wade* was not [an easy interpretive case] and the decision is more realistically understood as a reflection of the relative weight that seven Justices of the U.S. Supreme Court placed on fetal life and women’s reproductive autonomy than as a consequence of reading the Constitution carefully . . .”).

59. See, e.g., Eskridge, *supra* note 3, at 520 (“*Roe* illustrates the central problem with a philosophy that rejects pragmatic considerations in

Posner, rely on *Roe* as an illustration of the relative disadvantages of particular modes of constitutional interpretation.⁶⁰ Even within the Court, Justices Scalia and Ginsburg turn to *Roe*'s effects in reasoning about the best path forward in American abortion law.⁶¹ In stories about the power of the courts, *Roe* serves as a cautionary tale.⁶² Scholars urge judges to consider this history before issuing decisions with damaging consequences.⁶³

Parts III and IV use original archival evidence to test the beyond backlash hypothesis. A number of scholars have argued that conflict over abortion began well before *Roe*, as activists mobilized to change state laws. This Article breaks new ground by showing that opportunities for compromise remained after the decision. Part III examines one effort of this kind—an antiabortion effort to create a new right of reproductive choice.

III. The Pro-Life Movement and Reproductive Freedom

In the mid-1970s, both pro-choice and pro-life activists offered a capacious new understanding of reproductive freedom.⁶⁴

constitutional jurisprudence . . .”).

60. See, e.g., Sunstein, *supra* note 4, at 766 (discussing *Roe* as an illustration of the Court's limited efficacy in bringing about social change).

61. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 982–85 (1992) (Scalia, J., dissenting) (discussing *Roe*, the public reactions to *Roe*, and how the Court should deal with those reactions in making decisions regarding abortion law); Ginsburg, *supra* note 4, at 386 (“I understand the view that for political reasons the reproductive autonomy controversy should be isolated from the general debate on equal rights, responsibilities, and opportunities for women and men. I expect . . . that organized and determined opposing efforts to inform and persuade the public on the abortion issue will continue . . .”).

62. See *Casey*, 505 U.S. at 995–96 (Scalia, J., dissenting) (describing the *Casey* opinion as an example that “[t]he Imperial Judiciary lives” and questioning whether the Court was following its Constitutional duties by continuing to stick with *Roe*).

63. See Greenhouse & Siegel, *supra* note 16, at 2086

[T]he history of conflict before and after *Roe* suggests that in thinking about the possibilities and limits of adjudication, we need to be attentive to the motives for conflict that emerge from sources outside as well as inside the courtroom, from directions and actors that may shift over time.

64. See SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 61–62 (1991) (describing the post-*Roe*

Although they disagreed profoundly about abortion and the nature of motherhood, opposing activists believed that reproductive choice lost meaning if women did not have the financial means to raise children without sacrificing their careers, educations, or health.⁶⁵ Many feminists argued that reproductive choice required access to and funding for abortion,⁶⁶ whereas most abortion opponents favored an amendment that would ban abortions performed by private as well as state actors.⁶⁷ While pro-lifers often saw motherhood as women's natural role, feminists wished to separate women's reproductive capacities and social obligations.⁶⁸ Nonetheless, those on opposing sides of the abortion issue collaborated successfully in campaigning for protections for adolescent mothers and bans on

emergence of “multi-issue organizations” that fought for a broad variety women's issues); Ziegler, *Possibility of Compromise*, *supra* note 28, at 582 (discussing the new position of American Citizens Concerned for Life (ACCL) that protection and economic equality of pregnant women was important to prevent abortion).

65. See STAGGENBORG, *supra* note 64, at 113 (“The Reproductive Rights National Network . . . demand[ed] not only the right to legal abortion, but also the right to child care, health care, an adequate income, and other conditions that would allow women a real choice as to whether or not to have children . . .”); Ziegler, *Possibility of Compromise*, *supra* note 28, at 575 (“[T]he Mecklenburg faction supported or at least accepted broad access to family planning services, as well as publicly funded daycare.”).

66. For discussion of feminist interest in abortion funding, see, for example, SERENE MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 191 (2011) (discussing the “battle over abortion funding” and its linking of feminists and civil rights advocates because “[w]hen poor women did seek abortion, lack of funds more than legal restrictions stood in their way”); JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* 82 (2003) (“Mary Treadwell echoed Gray’s notion of reproductive freedom when she insisted that feminists needed to take into account the economic needs of poor women of color when they spoke of abortion rights.”).

67. See, e.g., LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 209–10 (1992) (“[Pro-life groups] also, at least initially, concurred on the single best vehicle for achieving that goal—an amendment to the U.S. Constitution.”). On the campaign for fetal-rights amendment in the early 1970s, see, for example, STAGGENBORG, *supra* note 64, at 69, 71, 106–07.

68. See, e.g., Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 450–55 (2011) (discussing the Citizen’s Advisory Council on the Status of Women and feminists’ attempt to seek temporary disability for pregnant women by arguing that while child gestation can only be done by women, both men and women can perform childrearing).

pregnancy discrimination.⁶⁹ These activists agreed that true choice would require state assistance.⁷⁰

A. Trauma, Abortion, and Unintended Pregnancy

Pro-life arguments about reproductive choice emerged from earlier dialogue about the impact of abortion on women's mental health.⁷¹ Beginning in the mid-1960s, a handful of states reformed their abortion laws to make the procedure legal on the basis of mental health, among other reasons.⁷² Looking to the model statute adopted by the American Law Institute (ALI), these reform states also permitted abortion on a variety of grounds.⁷³ Nonetheless, as the number of abortions performed annually increased, psychiatric abortions became the most accessible.⁷⁴ Women infrequently reported cases of rape, incest,

69. See *id.* at 471 n.346 (“The specter of abortion, however, led some social conservatives to support the [Pregnancy Discrimination Act (PDA)] as a new form of state protection for motherhood.”); Ziegler, *Possibility of Compromise*, *supra* note 28, at 582 (“[T]he [ACCL] positioned itself as a reasonable antiabortion organization with which a variety of abortion advocacy groups could work.”).

70. See Ziegler, *Possibility of Compromise*, *supra* note 28, at 582 (discussing the ACCL's efforts against *Gilbert* that aligned with those of a feminist, pro-choice coalition).

71. See Thomas W. Hilgers, *The Medical Hazards of Legally Induced Abortion*, in *ABORTION AND SOCIAL JUSTICE*, *supra* note 14, at 57, 75–77 (discussing the psychiatric problems women encounter after an abortion); Fred E. Mecklenburg, *The Indications for Induced Abortion: A Physician's Perspective*, in *ABORTION AND SOCIAL JUSTICE*, *supra* note 14, at 37, 39–41 (discussing the impact of abortion versus birth on the mother).

72. See, e.g., KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 65 (1984) (“In 1959, the American Law Institute had proposed a Model Penal Code that would have written into the abortion law the considerations some doctors were already using: the mental health of the mother, rape or incest, and fetal deformity.”); LESLIE REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973*, at 220–21 (1997) (“[The model law] allowed licensed physicians to perform abortions for physical and mental health reasons, fetal defects, or when pregnancy was the result of rape or incest.” (footnote omitted)).

73. See Greenhouse & Siegel, *supra* note 16, at 2037–38 (discussing the model statute and the effect that it had on state laws).

74. See Christopher Tietze, *United States: Therapeutic Abortions, 1963 to 1968*, *STUDIES IN FAM. PLAN.*, Nov. 1970, at 5, 5 (showing that between 1963 and 1968, total abortions increased from 390 to 4,626 and psychiatric abortions

and fetal abnormality, and with improvements to obstetric and gynecological care, fewer physicians could fit abortions within physical-health exceptions.⁷⁵ Between 1963 and 1968, a published study reported a seven-fold increase in the number of psychiatric abortions performed.⁷⁶

To avoid legal liability, physicians had to fit a variety of social and economic decisions into the category of psychiatric abortions.⁷⁷ In 1970, *Studies in Family Planning* found that a majority of psychiatric abortions were not “strictly psychiatric” but rather justified on the basis of “impulsive behavior, misjudgment, [and] environmental factors like alcoholism, drug use, and some types of adolescent behavior.”⁷⁸ In diagnosing a woman as depressed or suicidal, as other studies reported, physicians took into account a woman’s socioeconomic or marital status.⁷⁹

Providers justified a wide variety of abortions—including those chosen for social or economic reasons—on psychiatric grounds.⁸⁰ By extension, the emerging pro-choice movement suggested that legal abortion would prevent a great deal of psychological trauma.⁸¹ In a strategy memorandum to pro-choice

increased from 44.6% of abortions to 69.6%).

75. See, e.g., LUKER, *supra* note 72, at 54 (“Between the two world wars, medical science made large strides in eliminating or discovering new treatments for conditions that had previously threatened maternal health.”).

76. See Tietze, *supra* note 74, at 5 (showing that in 1963, 174 psychiatric abortions were performed compared to 3,219 in 1968).

77. See Sidney H. Norman et al., *Abortion: Obtained and Denied*, *STUD. IN FAM. PLAN.*, May 1970, at 1, 4 (discussing the fact that women would enter a psychiatric evaluation with the goal of obtaining an abortion and “[t]he most important consideration in the psychiatrist’s mind . . . is the total effect on the woman and her family of carrying the pregnancy to term”).

78. *Id.*

79. See, e.g., John A. Ewing & Beatrice A. Rouse, *Therapeutic Abortion and a Prior Psychiatric History*, 130 *AM. J. PSYCHIATRY* 37, 38 (1973) (“The study group consisted of black and white women from all socioeconomic levels.”); John R. Partridge et al., *A Study of Psychiatric Applicants at North Carolina Medical Hospital*, 32 *N.C. MED. J.* 131, 132–36 (1971) (discussing the demographic information that the study collected).

80. See Norman, *supra* note 77, at 4 (“The majority of abortions performed on psychiatric recommendation . . . do not appear to be ‘strictly psychiatric’ The symptoms presented by patients usually consist of a variety of personality disorders . . . interacting with environmental problems . . .”).

81. See Siegel, *supra* note 20, at 1653 n.44 (discussing “a substantial body

activists, leading advocate Larry Lader wrote: “Cite cases of how women’s lives were ruined by being forced to bear an unwanted child . . . [and] the tragedy of the unwanted child, possibly leading to the battered child and infanticide.”⁸² Similarly, the official debate manual of the National Association for the Repeal of Abortion Laws (NARAL, later known as the National Abortion Rights Action League) described the psychological harms averted by legal abortion.⁸³ Liberalizing archaic laws would “decrease the number of unwanted children, battered children, child abuse cases, and possibly subsequent delinquency, drug addiction, and a host of social ills associated with neglectful parenthood.”⁸⁴ The manual also counseled activists on how to respond to allegations that abortion would psychologically damage women.⁸⁵ The response was: “While many women are known to be hospitalized with mental illness following childbirth, such severe psychosis following abortion is virtually unknown.”⁸⁶

Beginning in the 1960s, scholars opposed to abortion responded by arguing that abortion caused psychiatric distress. Legal scholar Dennis Mahoney explained: “[T]herapeutic abortion . . . carries with it a degree of emotional trauma far exceeding that which would have been sustained by continuation of the pregnancy.”⁸⁷ Another scholar went further in outlining the damage done by abortion: “Social reasons can never be held sufficient to warrant the dangers of emotional trauma that . . . [women] will subsequently experience. [Abortion] cannot be to

of scholarship that repudiates claims of post-abortion syndrome”).

82. Memorandum from Larry Lader, Chairman of the Bd. Nat’l Ass’n for Repeal of Abortion Laws (NARAL), to NARAL Bd. Members et al. 2 (Fall 1972) (on file with the Schlesinger Library, Harvard University, The NARAL Papers, MC 313, Carton 8, Folder “Debating the Opposition”).

83. *See id.* at 5 (“Women undergoing the degradation, danger, and expense of a clandestine abortion are quite likely to experience negative after-effects, but this is not true in situations where abortion is legally sanctioned and widely accepted.”).

84. *Id.*

85. *See id.* (outlining what to say when abortion opponents argue that “[w]omen undergoing abortions suffer severe and lasting psychological sequelae”).

86. *Id.*

87. Dennis Mahoney, *Therapeutic Abortions—The Psychiatric Indication—A Double-Edged Sword*, 72 DICK. L. REV. 270, 288–89 (1968).

prevent mental illness, for abortion is not a prophylactic against psychosis, but rather a precipitant.”⁸⁸

When the American Medical Association debated abortion reform in 1967, one antiabortion physician contended that “all clinical experience shows that abortion is a mental wound as well as a physical wound.”⁸⁹

Roe borrowed significantly from discussion of the relationship between pregnancy and trauma in explaining the constitutional significance of the abortion decision. In explaining why women had a privacy interest in abortion, the Court stressed the psychological impact unintended pregnancy and childbirth had on women:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.⁹⁰

Pregnancy signaled mental problems and “a distressful life and future.”⁹¹ Women, whom the Court assumed to be caretakers, would have their mental health taxed by childcare, as would unwanted children.⁹² These harms followed inevitably from a woman’s sexual decisions.⁹³ Women became victims of their own choices, suffering on account of the “continuing stigma of unwed

88. John G. Herbert, *Is Legalized Abortion the Solution to Criminal Abortion?*, 37 U. COLO. L. REV. 291, 291 (1964) (citation omitted).

89. Martin Tolchin, *Doctors Divided on Issue*, N.Y. TIMES, Feb. 27, 1967, at 23.

90. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

91. *Id.*

92. *See id.* (“Mental and physical health may be taxed by child care.”).

93. *See id.* at 147, 153 (discussing how Texas’s purpose for the abortion statute was “to discourage illicit sexual conduct” and describing the harms that flow from an unwanted pregnancy).

motherhood” and the “[p]sychological harm” associated with unwed motherhood.⁹⁴

B. Vulnerable Mothers and Reproductive Choice

Because *Roe* foregrounded the question of mental illness, the opinion reinforced social-movement interest in debating the relationship between trauma, pregnancy, and abortion. In the aftermath of the decision, a circle of moderate pro-life activists offered a new legal argument about post-abortion trauma.⁹⁵ Central to this effort were members of American Citizens Concerned for Life (ACCL), a group the National Organization for Women (NOW) described as a pro-life, “pro-birth control, pro-sex education” organization.⁹⁶ Marjory Mecklenburg, one of the organization’s leaders, helped to formulate a theory addressing the relationship between trauma, motherhood, and abortion.⁹⁷ Mecklenburg became better known for her later role supervising federal family planning programs under the Reagan Administration,⁹⁸ but her role in the abortion debate was far more complex. A former home economics teacher, Mecklenburg became one of the most powerful women in pro-life politics, serving as the chairwoman of the nation’s largest national antiabortion organization, advising Gerald Ford’s presidential campaign, and influencing national debate on a variety of gender issues.⁹⁹

94. *Id.*

95. See Siegel, *supra* note 20, at 1658 (“In this therapeutic form, post-abortion syndrome was embraced by women in the antiabortion movement . . .”).

96. NAT’L ORG. FOR WOMEN, MAJOR NATIONAL GROUPS OPPOSED TO THE RIGHT TO CHOOSE 2 (1978) (on file with the Schlesinger Library, Harvard University, The NOW Papers, Box 54, Folder 42).

97. See Ziegler, *Possibility of Compromise*, *supra* note 28, at 575–77 (discussing the impact that Marjory Mecklenburg had in shaping the National Right to Life Committee).

98. See, e.g., ALEXANDRA M. LORD, CONDOM NATION: THE UNITED STATES GOVERNMENT’S SEX EDUCATION PROGRAM FROM WORLD WAR I TO THE INTERNET 143–44 (2010) (discussing Reagan’s nominations of Koop and Mecklenburg).

99. See, e.g., Ziegler, *Possibility of Compromise*, *supra* note 28, at, 572–80 (discussing Mecklenburg’s influence and career particularly with the National Right to Life Committee and American Citizens Concerned for Life); Mary

Mecklenburg's ACCL argued that both abortion and unintended pregnancy created psychiatric distress.¹⁰⁰ Partly for this reason, the organization supported mainstream pro-life initiatives, including a constitutional amendment that would prohibit private and public actors from performing abortions.¹⁰¹ However, these activists argued that the state could fairly ban abortion only if it provided far-reaching rights for pregnant women, mothers, and postnatal children.¹⁰²

Over time, these moderate activists formulated a new understanding of the right to choose. While not acknowledging any constitutional protections for abortion, these advocates insisted that reproductive choice required both financial and symbolic support for childbirth and childrearing.¹⁰³

The ACCL first used this understanding of reproductive choice during the campaign for a fetal-rights amendment in the mid-1970s.¹⁰⁴ Members of Congress had two constitutional amendments under consideration.¹⁰⁵ The Buckley Amendment, proposed by Senator James Buckley (Conservative-NY), stated:

Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 242 (2013) [hereinafter Ziegler, *Rights on the Right*] (discussing Mecklenburg's campaigning for and testifying on behalf of the so-called Adolescent Health Services and Pregnancy Prevention Act of 1978).

100. See *Abortion—Part IV: Hearings on S.J. Res. 6, S.J. Res. 10 & 11, & S.J. Res. 91 Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 94th Cong. 655 (June 19, 1975) (statement of Marjory Mecklenburg, President, American Citizens Concerned for Life) [hereinafter *Abortion Hearings*] (“During the early months of pregnancy, it is not uncommon for any woman to react with fear, resentment, and depression.”).

101. See, e.g., *id.* at 653–54 (arguing in support of the Human Life Amendment).

102. See Ziegler, *Possibility of Compromise*, *supra* note 28, at 578–79 (“[T]he organization’s philosophy held that fetal rights could be protected only if women were themselves guaranteed better legal and economic opportunities.”).

103. See *id.* at 575 (“[M]embers of the Mecklenburg faction supported or at least accepted broad access to family planning services, as well as publicly-funded daycare.” (citation omitted)).

104. See *id.* at 578–79 (“[T]he organization’s philosophy held that fetal rights could be protected only if women were themselves guaranteed better legal and economic opportunities.”).

105. See *Human Life Amendment: Major Texts* (Nat’l Comm. for a Human Life Amendment, Washington, D.C.) Feb. 2004, at 1, 3, <http://www.nchla.org/datasource/documents/HLAmajortexts.pdf> (describing the Amendments introduced by Senator Buckley and Representative Hogan).

“With respect to the right to life, the word ‘person’ . . . applies to all human beings, including their unborn offspring at every state of their biological development.”¹⁰⁶ Representative Larry Hogan (R-Md.) offered an amendment describing: “Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law.”¹⁰⁷

While endorsing such far-reaching bans on abortion, Mecklenburg focused on what the state owed mothers: “We need to ask what are the conditions of life which confront women who are troubled by an unintended pregnancy but who do not choose abortion. What are their rights? What is society’s duty to them and to the children they will bear?”¹⁰⁸

Mecklenburg formulated a new understanding of reproductive choice. The Supreme Court had set forth an idea of choice that mostly involved liberty from the state.¹⁰⁹ Mecklenburg instead saw choice as inextricably linked to the idea of welfare rights.¹¹⁰ If the state recognized a right to choose to bear a child, as Mecklenburg argued, then the state had to guarantee women the means to raise that child.¹¹¹ She asked Congress to support child care, sex education, family planning, and programs to encourage young girls to continue to pursue education in the setting of their choice.¹¹²

In the same period, reproductive-rights activists in organizations like the Reproductive Rights National Network (R2N2) and the Committee for Abortion Rights and Against Sterilization Abuse (CARASA) connected state support and

106. *Id.* at 1.

107. *Id.* at 3.

108. *Abortion Hearings, supra* note 100, at 654.

109. *See* *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be found in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, . . . in the Ninth Amendment’s reservation of rights to the people . . .”).

110. *See* Ziegler, *Possibility of Compromise, supra* note 28, at 579 (“[T]he only way to protect fetal rights was to [provide] . . . ‘more medical assistance for the unwed mother and her baby, programs to keep pregnant girls in school and . . . provid[e] for daycare centers and . . . prevent pregnancy.’” (quoting *Abortion Hearings, supra* note 100, at 643–53)).

111. *Abortion Hearings, supra* note 100, at 584–87.

112. *Id.* at 585–87.

reproductive freedom.¹¹³ These groups formed to offer a more radical alternative to the pro-choice movement—one that would fight for a more transformative agenda.¹¹⁴ In the late 1970s, CARASA, a New York-based reproductive-rights organization, described reproductive choice as the “[r]ight to decide when and whether to have/not have children; and [the] material possibility of making that choice.”¹¹⁵ For that choice to have meaning, CARASA argued, women needed access to birth control, child care, decent health care, and a decent income.¹¹⁶ In 1980, R2N2 argued that reproductive freedom required that the state do more than leave women alone.¹¹⁷ True freedom required “a multi-issue approach to abortion . . . capable of fighting for all the economic and social conditions necessary for true reproductive freedom.”¹¹⁸

Mecklenburg and the ACCL took a strongly different position on abortion.¹¹⁹ Just the same, some moderate pro-life activists and feminists agreed in significant part about the meaning of a right to choose.¹²⁰ Mecklenburg believed that the state had an obligation to protect and honor mothers—both by banning abortion and by providing concrete support for caretaking.¹²¹

113. See *Defend Women’s Right to Choose*, Draft Outline for CARASA (c. 1978) (discussing where the opposition was coming from and highlighting state politicians as someone to target) (on file with Bingham Library, Duke University, The Meredith Tax Papers).

114. See *id.* (discussing “reproductive freedom,” which included a broader agenda than just protecting the right to abortion).

115. *Id.*

116. See, e.g., *id.* (listing the “preconditions’ of free choice”).

117. See Marge Berer, *Whatever Happened to ‘A Woman’s Right to Choose?’*, FEMINIST REV., Summer 1988, at 24, 24 (“The phrase ‘women’s reproductive rights’ . . . was first coined in the USA by feminists who formed the campaigning Reproductive Rights National Network. The concept . . . links up all different aspects of birth control and childbearing . . .”).

118. WENDY KLINE, BODIES OF KNOWLEDGE: SEXUALITY, REPRODUCTION, AND WOMEN’S HEALTH IN THE SECOND WAVE 93 (2010).

119. See Hilgers, Mecklenburg & Riordan, *supra* note 14, at 178–79 (arguing that when abortion proponents argue that abortion is necessary to rid unwanted children, they are “really advocating the abandonment of women”).

120. See Ziegler, *Possibility of Compromise*, *supra* note 28, at 574 (“A wide variety of antiabortion leaders held liberal or moderate views on some social issues. For example, . . . endorsement of sex education in public schools.”).

121. See *id.* at 579 (“Mecklenburg laid out one vision of the moderates’ philosophy: the only way to protect fetal rights was to ‘work harder than ever to make abortion unnecessary.’”).

Some feminists agreed that real choice required social justice as well as liberty.¹²²

Mecklenburg elaborated on this idea during the fight for the School-Age Mother and Child Health Act of 1975,¹²³ a comprehensive program that would have set aside funding for pregnancy testing, comprehensive healthcare for newborns and toddlers, family planning, day care, continuing education, and adoption assistance.¹²⁴ Pro-choice activists endorsed the reform, as did the ACCL.¹²⁵ In testifying in favor of the bill, Mecklenburg elaborated on her idea of reproductive choice: “[M]any poor women, pressed by financial circumstances presently have only the ‘freedom’ to abort . . . Surely, advocacy of the ‘right of a woman to choose’ does include the right for her to choose to continue the pregnancy.”¹²⁶

The School-Age Mother and Child Act of 1975 failed to pass,¹²⁷ but the ACCL revived its campaign for reproductive choice in lobbying for the federal Pregnancy Discrimination Act (PDA).¹²⁸ Feminists viewed pregnancy disability reform quite differently than did Mecklenburg’s allies, presenting it as part of a larger project to separate women’s biological and social roles.¹²⁹ Those involved in the temporary disability struggle worked “to

122. See *id.* at 572 (“[P]ost-Roe compromise in the 1970s was more possible than is conventionally thought, especially on issues beyond abortion itself . . . [A]nti-abortion moderates campaigned for what they defined to be alternatives to abortion . . .”).

123. National School-Age Mother and Child Health Act, H.R. 10589, 94th Cong. (1975).

124. See *National School-Age Mother and Child Health Act of 1975: Hearing on S. 2538 Before the Subcomm. on Health of the Sen. Comm. of Labor & Pub. Welfare*, 94th Cong. 10–12 (1975) (outlining the proposed bill).

125. See, e.g., *id.* at 552–81 (statement of Jack Hood Vaughn of Planned Parenthood) (supporting the Act).

126. *Id.* at 499 (statement of Marjory Mecklenburg).

127. See, e.g., KRISTIN LUKER, *DUBIOUS CONCEPTION: THE POLITICS OF TEENAGE PREGNANCY* 71 (1996) (discussing the Act).

128. Pregnancy Discrimination Act, 42 U.S.C. § 2000e (2012); see also Ziegler, *Possibility of Compromise*, *supra* note 28, at 572 (stating that the ACCL “campaigned for what they defined as alternatives to abortion: for example, laws prohibiting pregnancy discrimination”).

129. See, e.g., Dinner, *supra* note 68, at 450–51 (discussing the Citizens’ Advisory Council on the Status of Women’s advocacy for pregnancy to fit into the “pre-existing sex-neutral . . . temporary disability paradigm”).

realize economic security for childbearing workers, without reinforcing sex-role stereotypes.”¹³⁰ Significantly, leading feminists often opposed any special protection for mothers.¹³¹ Describing pregnancy discrimination in this manner presented it as part of a larger effort to end women’s subordination in the family and the larger society.¹³²

In seeking to free women from sex stereotypes, feminists also presented publicly funded, universal day care as a fundamental right.¹³³ By the early 1970s, feminists made some progress in the quest to secure this right, when the Comprehensive Child Development Act of 1971¹³⁴ garnered significant support.¹³⁵ The ultimately unsuccessful law would have offered affordable child care services to families across the socioeconomic spectrum.¹³⁶

Moderate pro-lifers supported both protections against pregnancy discrimination and federally mandated childcare programs, albeit for different reasons.¹³⁷ The ACCL took up the issue of pregnancy discrimination after 1976, when the Supreme Court concluded that pregnancy discrimination did not constitute impermissible sex discrimination under the federal Civil Rights

130. *Id.* at 454.

131. *See id.* at 454–55 (discussing arguments of leading feminists).

132. *See id.* (“In advocating for distinct legal paradigms addressing the biological and social dimensions of reproduction, feminists aspired to unravel women’s capacity for pregnancy from the prescription of normative gender roles.”).

133. *See, e.g., id.* at 457–60 (discussing feminists’ arguments for childcare and their desire to “transform the family-wage system” as well as its political implications); Mary Ziegler, *The Bonds That Tie: The Politics of Motherhood and the Future of Abortion Rights*, 21 TEX. J. WOMEN & L. 47, 54–55 (2011) [hereinafter Ziegler, *The Bonds That Tie*] (discussing the 1970 White House Conference on Youth and Children and its arguments for publicly funded day care).

134. Comprehensive Child Development Act of 1971, 92 H.R. 6748, 92nd Cong.

135. *See, e.g.,* Ziegler, *The Bonds That Tie*, *supra* note 133, at 54–57 (discussing NOW’s emphasis on child development in advocating for day care). On the Act, see, for example, Dinner, *supra* note 68, at 461.

136. *See, e.g.,* Dinner, *supra* note 68, at 461 (discussing why the Comprehensive Child Development Act was unsuccessful).

137. *See* Ziegler, *Possibility of Compromise*, *supra* note 28, at 589–90 (discussing the compromise available after *Roe* because some pro-lifers, like Marjory Mecklenburg, supported state-funded support for alternatives to abortion).

Act.¹³⁸ In the 1973 Supreme Court case *Geduldig v. Aiello*,¹³⁹ the Court upheld a California disability policy that excluded pregnancy, concluding that such laws did not violate the Equal Protection Clause.¹⁴⁰ Several years later, in *General Electric v. Gilbert*,¹⁴¹ the Supreme Court concluded that Title VII of the Civil Rights Act of 1964 provided no relief.¹⁴² In the wake of *Gilbert*, a coalition of feminist and labor activists vowed to pass a law changing the result of the Court's decision.¹⁴³

Feminist advocacy for the PDA spoke “to sex equality, to women’s socioeconomic independence, and to the eradication of sex-role stereotypes.”¹⁴⁴ By contrast, in lobbying for the PDA, the ACCL elaborated on the connection between sex discrimination and reproductive choice:

[Pregnancy discrimination] has a severe impact upon low-income workers who are forced to take unpaid maternity leave at precisely the time when expenses are increased

When a wom[a]n is faced with losing her income for several weeks or months and perhaps with losing her job because of pregnancy, her decision to abort cannot be said to be the product of free choice of economic coercion.¹⁴⁵

138. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976) (holding that General Electric’s disability-benefits plan did not violate Title VII of the Civil Rights Act of 1964 because of its failure to cover pregnancy-related disabilities); Ziegler, *Possibility of Compromise*, *supra* note 28, at 581 (“The ACCL’s influence was also apparent in the public response to the Supreme Court’s 1976 decision in *General Electric Company v. Gilbert*.”).

139. 417 U.S. 484 (1974).

140. See *id.* at 497 (“The appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program’s protection. . . . [W]e hold that this contention is not a valid one under the Equal Protection Clause . . .”).

141. 429 U.S. 125 (1976).

142. See *id.* at 145–46 (“[I]ts disability-benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities.”).

143. See, e.g., Dinner, *supra* note 68, at 469–70 (“A coalition of labor, feminists, and civil rights groups, along with sympathetic congressional staff, mobilized in support of federal legislation to amend Title VII, which would override *Gilbert* . . .”).

144. *Id.* at 470.

145. *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor Standards of the Comm. on Human Res.*, 95th Cong. 432 (1977) (statement of Jacqueline M. Nolan-Haley, Special Counsel,

In advocating its own idea of reproductive choice, the ACCL ultimately joined feminists in supporting a version of the PDA that would require employers to fund leave after an abortion.¹⁴⁶ Abortion opponents in Congress, including Senator Thomas Eagleton (D-Mo.) and Representative Edward Beard (D-R.I.), had sought to amend the PDA to ensure that employers would not have to support employees receiving post-abortion care.¹⁴⁷ The ACCL publicly endorsed the bill with or without such an exception.¹⁴⁸ As ACCL member Dorothy Czarnecki explained: “I think a woman should be given her choice. This bill is good because it encourages people to remain pregnant rather than coerces them to abortion, but this [decision] would [depend on] a woman’s feelings. It is a matter of a woman’s choice that we would be allowing.”¹⁴⁹

If the Constitution truly protected a right to reproductive freedom, as the ACCL argued, that right included government assistance with the reproductive decisions women made.¹⁵⁰ This

American Citizens Concerned for Life) [hereinafter *Pregnancy Discrimination Hearings*].

146. See, e.g., *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy Part 2: Hearing on H.R. 5055 & H.R. 6075 Before the Subcomm. of Emp’t Opportunities of the H. Comm. on Educ. & Labor*, 95th Cong. 67 (1977) (statement of Dr. Dorothy Czarnecki, American Citizens Concerned for Life) [hereinafter *Legislation to Prohibit Sex Discrimination*] (testifying that by providing equal disability coverage for women who receive an abortion or go through with the pregnancy, a woman’s choice is preserved).

147. See, e.g., Martin Tolchin, *House Panel Bars Curb on Abortions in Women’s Aid Bill*, N.Y. TIMES, Feb. 3, 1978, at A11 (reporting on the Beard Amendment proposed to antiabortion legislation); *Senate Votes Pregnancy Benefits in Disability Plans for Workers*, N.Y. TIMES, Sept. 17, 1977, at A8 (reporting on a bill to amend the Civil Rights Act of 1964 and a proposed amendment by Senator Eagleton “that would have prohibited abortions from being considered a pregnancy-related medical expense that could be covered by” disability benefits).

148. See *Pregnancy Discrimination Hearings*, *supra* note 145, at 435 (statement of Jacqueline M. Nolan-Haley, Special Counsel, American Citizens Concerned for Life) (“I will discuss ACCL’s interest in this amendment and why the amendment is essential to secure protection and economic equality for pregnant women.”).

149. *Legislation to Prohibit Sex Discrimination*, *supra* note 146, at 67 (statement of Dr. Dorothy Czarnecki).

150. See *id.* at 67–68 (arguing that government protection and financial assistance with the repercussions of pregnancy was necessary to ensure that women truly did have a right to choose regarding their reproductive freedom).

claim united pro-choice and pro-life activists dissatisfied with the Court's reasoning in both *Roe v. Wade* and *Maher v. Roe*.¹⁵¹ *Roe* described a right to privacy broad enough to encompass decisions about abortion and contraception.¹⁵² *Maher*, a case on the constitutionality of state bans on the public funding of abortion, clarified that this right involved only a freedom from state interference rather than any entitlement to state support.¹⁵³ For influential activists on either side of the abortion issue, the freedom to choose had to include government support for caretaking.¹⁵⁴

Mecklenburg and the ACCL also demanded accommodations, rather than mere equal treatment, for unwed mothers.¹⁵⁵ The group lobbied consistently for a “comprehensive approach . . . [that would] provid[e] both medical care and psycho-social support.”¹⁵⁶ Eliminating discrimination against unwed mothers would require the creation of government programs ensuring access to healthcare, education, and employment.

Key sponsors of the PDA echoed this idea of reproductive choice. Pro-life Senators like Thomas Eagleton argued that sex discrimination could effectively coerce women into terminating a pregnancy.¹⁵⁷ Representative Ronald Sarasin (R-Conn.) similarly

151. 432 U.S. 464 (1977).

152. See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (discussing the line of decisions establishing a right to privacy).

153. See *Maher*, 432 U.S. at 473–74 (“[T]he right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.”).

154. See Ziegler, *Possibility of Compromise*, *supra* note 28, at 590 (“Because of the impact of these activists, important compromises remained viable in the years immediately after *Roe*, solutions involving contraception, daycare, or pregnancy discrimination rather than abortion itself.”).

155. See *Abortion Hearings*, *supra* note 100, at 655–66 (statement of Marjory Mecklenburg) (arguing that unwed mothers need state assistance with things such as education and practical skills and training).

156. *Adolescent Pregnancy: Hearing on H.R. 12146 Before the Subcomm. on Select Educ. of the H. Comm. on Educ. & Labor*, 95th Cong. 110 (1978) (statement of Marjory Mecklenburg).

157. See *Legislative History of the Pregnancy Discrimination Act of 1978: S. Comm. on Labor & Human Res.*, 96th Cong. 116 (1980) (statement of Senator Thomas Eagleton) [hereinafter *Legislative History*] (arguing that the PDA would rectify situations “where the price tag of a baby determines whether it is born or

argued that reproductive choice could not require a woman to sacrifice her career.¹⁵⁸ In the past, Sarasin suggested, women had to choose “between having children and working.”¹⁵⁹ The PDA gave a woman “the right to choose both, to be financially and legally protected before, during, and after her pregnancy.”¹⁶⁰ The legislative history of the PDA suggested that the law would “facilitate a woman’s choice to conceive and bear children without facing undue economic hardships.”¹⁶¹

Conventionally, scholars believe that *Roe* short-circuited the kind of partnership the ACCL successfully pursued.¹⁶² The PDA represented a successful post-*Roe* collaboration between abortion opponents and pro-choice activists. The version of the bill endorsed by the ACCL—one without a ban on abortion funding—garnered the support of NARAL and NOW.¹⁶³ Similarly, the ACCL partnered with Planned Parenthood in lobbying for the Adolescent Health Services and Pregnancy Prevention and Care Act, a law funding family planning, sex education, and child care for teenagers.¹⁶⁴

What can the ACCL’s campaign for reproductive choice tell us about post-*Roe* ideological entrenchment? First, the ACCL’s story shows that post-*Roe* politics created some incentive for compromise. Internal documents from the late 1970s suggest that ACCL members believed that pro-lifers could not be truly credible

not”); *see also id.* at 185 (Statement of Paul Tsongas) (arguing that the PDA would “put an end to an unrealistic and unfair system that forces women to choose between family and career”).

158. *See id.* at 208 (statement of Rep. Ronald Sarasin, Conn.) (“[I]t is a statement of the importance this country places on the family, of the fact that we must recognize the right of women to have families and to work.”).

159. *Id.* at 208–09 (statement of Rep. Ronald Sarasin).

160. *Id.*

161. *Id.* at 134 (statement of Rep. Baltasar Corrada).

162. *See Ziegler, Possibility of Compromise, supra* note 28, at 589 (“*Roe v. Wade* is seen to have marginalized moderates on either side of the abortion debate and, in so doing, to have undone the kinds of state-level compromise that had been unfolding at the state level.”).

163. *See Legislative History, supra* note 157, at 20 (listing organizations supporting the bill).

164. *See Adolescent Health Services and Pregnancy Prevention and Care Act of 1978: Hearing on H.R. 12146 Before the S. Comm. on Human Res., 95th Cong. 192–202 (1978)* (statement of Faye Wattleton, Planned Parenthood Fed’n of Am.) (urging Congress to adopt the law).

or influential unless they worked with the opposition to make abortion less necessary.¹⁶⁵ In order to be taken seriously, the argument went, pro-lifers had to be consistently concerned about vulnerable members of society, including pregnant women.¹⁶⁶

Second, the ACCL's experiences complicate our understanding of post-*Roe* extremism. At first, it seems to make sense to connect *Roe* to the radicalization of all gender politics. By putting off limits many state compromises on abortion, *Roe* removed any reason for pro-lifers to settle for second-best solutions. As the ACCL's story makes apparent, however, some activists believed that absolutist positions on abortion required compromise on other gender issues.¹⁶⁷ Seeking out common ground in this way would reduce the need for abortion and strengthen society's commitment to mothers' rights.

Later, as Part IV contends, it became more challenging to form alliances of this kind.¹⁶⁸ The radicalization we blame solely on *Roe* occurred gradually. Polarization, moreover, took place partly without the influence of the Court. Moreover, as Part III shows, pro-choice as well as pro-life activists responded to *Roe* by working to find shared legal solutions.

IV. Fetal Rights Beyond Abortion

In *Roe v. Wade*, pro-choice amicus curiae briefs argued that, in any conflict between women's rights and fetal rights, the woman's interest in autonomy should prevail.¹⁶⁹ After 1973,

165. See, e.g., AM. CITIZENS CONCERNED FOR LIFE, PURPOSES AND OBJECTIVES OF ACCL 1 (1974) (explaining ACCL's goal to "maximize the potential for cooperation in legislative and educational programs between ACCL and other citizens action groups where overlap of some concerns may occur/coalition building") (on file with Gerald Ford Memorial Library, University of Michigan, Box 17, The American Citizens Concerned for Life Papers, Folder "ACCL Philosophy and Objectives").

166. See *id.* (enumerating the goal of encouraging "a sense of responsibility for . . . pregnant women").

167. See *supra* notes 109–12 and accompanying text (describing the ACCL's support for child care, sex education, and family planning).

168. See *infra* Part IV (arguing that these alliances became more difficult after the emergence of the New Right).

169. See, e.g., Supplemental Brief for Planned Parenthood Fed'n of Am. and Am. Ass'n of Planned Parenthood Physicians as Amici Curiae Supporting

members of the abortion-rights movement had to consider whether support for legal abortion precluded any recognition of fetal rights.¹⁷⁰

Pro-choice activists debated these questions in the wake of legal struggles over fetal research. In contemporary politics, organizations like NOW consistently oppose most regulations on fetal research, suggesting that restrictions tend to curb medical progress and endanger abortion rights.¹⁷¹ In the immediate aftermath of *Roe*, by contrast, the relationship between abortion and fetal research—and even fetal rights—appeared far more fluid.¹⁷² Members of Congress and some organizations supportive of abortion rights endorsed limited protections for fetuses that did not conflict with a woman’s abortion decision.¹⁷³ Pro-choice activists debated the propriety of fetal rights in the context of scientific experimentation and late-term abortion.¹⁷⁴

Only gradually did pro-choice support for fetal rights come to seem a contradiction in terms. Again, the Court did not serve as the primary source of polarization.¹⁷⁵ Instead, as the pro-life

Petitioners at 19, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40) (“There is no constitutional right or compelling state interest in the fetus which can render constitutional the violation of women’s physicians’ rights . . .”); Brief for Orgs. and Named Women as Amici Curiae Supporting Petitioners at 20–21, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40) (“[E]ven if the position were accepted . . . that the fetus is a ‘person’ or ‘potential person,’ such recognition of the fetus would not provide the state with a compelling interest to justify encroachment upon the pregnant woman’s possession and free control of her own person.”).

170. *Infra* Parts IV.A–B.

171. See, e.g., *Bush Once Again Sacrifices Science to Politics*, NOW.ORG (Jul. 18, 2006), <http://www.now.org/issues/health/071806stemcellresearch.html> (last visited Jan. 15, 2014) (describing the President’s likely veto against a stem-cell-research bill) (on file with the Washington and Lee Law Review); *NOW Legislative Updates 2001*, NOW.ORG (Feb. 2001), <http://www.now.org/issues/legislat/200102.html#stem> (last visited Jan. 15, 2014) (describing how President Bush immediately began a pro-life agenda) (on file with the Washington and Lee Law Review).

172. See *infra* notes 177–93 and accompanying text (describing fetal research hearings).

173. See *infra* notes 178–84 and accompanying text (discussing Senator Edward Kennedy’s deliberation about fetal rights).

174. See *infra* notes 194–96 and accompanying text (deciding fetal rights do exist, but the fetus does not have any priority over the mother).

175. See ROSENBERG, *supra* note 25, at 166 (asserting courts do not provide a great deal of social change).

movement scored a string of victories in state legislatures, supporters of abortion rights began to reject any law that could set a precedent for recognizing fetal personhood.¹⁷⁶ For their part, abortion opponents often began to include laws on fetal research or “born alive” fetuses in multipart laws restricting abortion. For reasons having little to do with *Roe*, fetal rights seemed nothing more than an excuse for banning abortion.

A. Fetal Research and Vulnerable Human Subjects

In July 1973, several members of the National Institutes of Health urged the recognition of “human rights” for the aborted fetus, particularly in the context of fetal research.¹⁷⁷ Surprisingly, the lawmaker at the center of a campaign for fetal rights, Senator Edward Kennedy (D-MA), led the effort to protect abortion rights in Congress. Before *Roe*, Kennedy, a devout Catholic, had come out against the complete repeal of abortion restrictions.¹⁷⁸ NARAL had singled him out for criticism.¹⁷⁹ By 1974, however, Kennedy became one of the pro-choice movement’s strongest allies. He helped to engineer the defeat of the Bartlett Amendment, a failed ban on Medicaid funding for abortion.¹⁸⁰ In later years, Kennedy would maintain his alliance with the pro-choice movement.¹⁸¹

176. See *infra* notes 257–62 and accompanying text (discussing this progression to radicalism).

177. See Harold Schmeck, *Health Agency Report Proposes Limits on Fetal Experiments*, N.Y. TIMES, July 16, 1973, at 12 (“[S]taff members of the National Institutes of Health recommends [sic] prohibiting any experiments that would prolong the life of an aborted fetus once its ultimate survival was judged to be impossible.”).

178. See NARAL, *Senator Edward Kennedy* (c. 1972) (relating Kennedy’s pre-*Roe* opposition to “abortion on demand”) (on file with Schlesinger Library, Harvard University, Carton 1, The NARAL Papers, Carton 1, Folder “NARAL Executive Committee Meeting Minutes, 1974–75”).

179. See *id.* (responding to and criticizing Senator Kennedy’s remarks).

180. See, e.g., Marjorie Hunter, *Senate Upholds U.S. Abortion Funds*, N.Y. TIMES, Apr. 11, 1975, at 28 (reporting that Kennedy opposed the bill because he feared it would discriminate against the poor).

181. See, e.g., Amy H. Nemko, Case Note, *Saving FACE: Clinic Access Under a New Commerce Clause*, 106 YALE L.J. 525, 527 (1996) (discussing Kennedy’s role in reducing violence directed at reproductive health facilities).

Nonetheless, like other commentators, Kennedy saw some form of fetal protections as compatible with abortion rights.¹⁸² In May 1973, the generally pro-choice *New York Times* hinted at the complexity of the relationship between fetal research and abortion: “[D]oes anyone have the right to research on it without consent—and whose consent? The mother would ordinarily be the one to ask, but she has already asked for an abortion. Can she be said to have the best interest of the fetus at heart?”¹⁸³

When Congress held hearings on the subject of fetal research, Kennedy questioned “where if at all, [the] issue overlap[ped] with the abortion issue.”¹⁸⁴ Just the same, Kennedy framed fetal research as one example of unregulated and often harmful human experimentation.¹⁸⁵ In the 1970s, a number of medical scandals had attracted national media attention. One such scandal emerged in July 1972, when the Associated Press ran a story revealing the details of the Tuskegee study, a project begun forty years before on the effects of untreated syphilis on African-American men.¹⁸⁶ The 400 men involved in the study had no idea what the study involved, and no test subject had received proper treatment.¹⁸⁷ Other concerns surrounded public revelations about involuntary sterilizations.¹⁸⁸ To some observers,

182. See O. Carter Snead, *Science, Public Bioethics, and the Problem of Integration*, 43 U.C. DAVIS L. REV. 1529, 1538–39 (describing Edward Kennedy’s role in passing the National Research Act, Pub. L. No. 93-348, 88 Stat. 342 (1974), legislation designed to evaluate the ethical principles of human research).

183. Harold M. Schmeck Jr., *What Price Research?: Fetuses Medicine*, N.Y. TIMES, May 6, 1973, at 252.

184. *Fetal Research, 1974: Hearing Before the Subcomm. on Health of the S. Comm. on Labor and Pub. Welfare*, 93d Cong. 2 (1974) (statement of Sen. Edward Kennedy) [hereinafter *Fetal Research Hearing*].

185. See *id.* at 7 (reciting Kennedy’s questioning about fetal research causing mental retardation).

186. See, e.g., Jean Heller, *Syphilis Victims in U.S. Went Untreated for 40 Years*, N.Y. TIMES, July 26, 1972, at 1 (describing the participants as “guinea pigs” and noting they never received treatment even after effective syphilis medicine emerged).

187. See, e.g., *id.* at 1, 8 (stating that no doctor prescribed antibiotics for the syphilis patients). For further analysis of the “Tuskegee Experiment,” see generally SUSAN REVERBY, *TUSKEGEE’S TRUTHS: RETHINKING THE TUSKEGEE SYPHILIS STUDY* (2000); JAMES HOWARD JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1993).

188. See, e.g., REBECCA MARIE KLUCHIN, *FIT TO BE TIED: STERILIZATION AND*

fetal research represented another example of victimization through human experimentation.¹⁸⁹

In 1974, congressional hearings made apparent the distinctions between fetal research and abortion. Pro-life witness Andre Hellegers reasoned: “The case can no longer be argued under slogans such ‘Every woman has a right to control her own body’ since the fetus is no longer inside her body In brief, there is no longer any possible conflict between the fetus and its mother.”¹⁹⁰

In the absence of a conflict, could the fetus have any rights? Dr. Richard Behrman, a champion of fetal research, argued that decisions about fetal research “should be made by an uncoerced and reasonably adequately informed individual or individuals whose interests are substantially overlapping or identical to those of the proposed subject.”¹⁹¹ Kennedy believed that true protection required the establishment of a permanent scientific commission that would supervise all human experimentation, including any concerning fetuses.¹⁹²

The 1974 hearings raised a number of difficult questions for the pro-choice movement. Did pro-choice activists logically have to oppose restrictions on fetal research? Could activists reconcile fetal rights with women’s interest in reproductive autonomy?

These questions proved difficult for some pro-choice organizations. The American Civil Liberties Union (ACLU), a leading pro-choice organization, actually adopted a vision of fetal rights.

REPRODUCTIVE RIGHTS IN AMERICA 190 (2009) (describing some doctors’ resistance and dismissal of sterilization reform); *Sterilization: Newest Threat to the Poor*, EBONY, Oct. 1973, at 150, 150–53 (evaluating sterilization with special attention to its relationship with welfare).

189. See H.R. REP. NO. 93-224, at 11–12 (1973) (finding that the Committee on Interstate and Foreign Commerce “feels the present standards of ethical conduct make research on living fetuses unethical”).

190. *Fetal Research Hearing*, *supra* note 184, at 95 (statement of Andre Hellegers, Director of the Kennedy Institute for Bioethics at Georgetown University).

191. *Id.* at 49 (statement of Richard Behrman, Chairman of the Department of Pediatrics at Columbia University).

192. See Harold M. Schmeck Jr., *Conferees Agree to Ban Research on Live Fetus*, N.Y. TIMES, June 8, 1974, at 1 (stating although Kennedy favored a permanent national commission, the compromise established one for two years).

B. The ACLU and Fetal Rights

In the mid-1970s, the ACLU made a major contribution to the advancement of abortion rights. The organization's Reproductive Rights Freedom Project, founded in 1974, led efforts to defend *Roe* in the courts.¹⁹³ Nonetheless, the ACLU Privacy Committee proposed protections for fetal rights that its members believed to be consistent with *Roe*.

At a June 1976 meeting, the Committee members concluded that women's interests took priority, but if a woman had nothing to lose from the choice of one procedure or another, the state should recognize fetal rights.¹⁹⁴ The Committee focused on whether the *Roe* decision precluded any recognition of fetal rights: "Do we define abortion as relieving the mother of the pregnancy or as killing the fetus?"¹⁹⁵ The question set the agenda for latter battles within the ACLU.¹⁹⁶

In October 1976, disagreement within the Committee intensified. One member present took the position that the Fourteenth Amendment created "an affirmative obligation to protect and support life."¹⁹⁷ A child welfare expert argued that the Committee should "adopt the position that the right to abort is the right to kill," which was *Roe*'s "full implication[]."¹⁹⁸ Others insisted that "the medical profession [should] make decisions" about the breadth of abortion rights.¹⁹⁹

In October and November, the Committee agreed to recognize fetal rights, all the while balancing them against a woman's paramount right to reproductive freedom.²⁰⁰ While

193. See STAGGENBORG, *supra* note 64, at 59 (discussing the ACLU's legal efforts after *Roe*).

194. See ACLU MEETING MINUTES, June 1976, *supra* note 22, at 2 (stating "the doctor should choose the method that keeps the baby alive").

195. *Id.* at 3.

196. See *id.* (acknowledging that the questions posed at the meeting will control the Committee's agenda for the rest of the year).

197. AM. CIVIL LIBERTIES UNION, PRIVACY COMMITTEE MEETING MINUTES, OCTOBER 13, 1976, at 1 (1976) (on file with Mudd Library, Princeton University, Box 112, The ACLU Papers, Folder 8 "Rare Books and Manuscripts Division").

198. *Id.* at 2.

199. *Id.* at 3.

200. See Memorandum from Barbara Kaiser to Am. Civil Liberties Union Privacy Comm. 1 (Nov. 30, 1976) [hereinafter "Memorandum from Barbara

acknowledging that “the rights of the fetus can be limited by practical considerations,” the Committee concluded that “society must accept responsibility if the mother desires to be relieved of her obligation.”²⁰¹ The Committee also recognized that the knowledge that the fetus would survive might chill women’s reproductive decisionmaking, particularly late in a pregnancy.²⁰² Nonetheless, in November, the Committee concluded that women had no right to avoid knowing the “fate of the fetus,” given the importance of both fetal rights and the First Amendment interests of those who would otherwise speak out on the matter.²⁰³

The Committee turned next to the issue of fetuses that survived an abortion procedure.²⁰⁴ Again, the Committee reasoned that fetal rights and women’s abortion rights could coexist.²⁰⁵ Without threatening legal abortion, the Committee believed, the state could give the fetus rights to medical care after the completion of an abortion.²⁰⁶ As importantly, in any state that restricted abortion, the fetus had a right to financial support.²⁰⁷

In 1975, the federal government similarly tried to separate the issues of abortion and fetal rights. Congress chartered a group to study the question—the Department of Health, Education, and Welfare’s National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research—the Department of Health, Education, and Welfare—which approved

Kaiser] (stating that if a fetus is born alive, the physician should use “all available means to save its life”) (on file with Mudd Library, Princeton University, Box 112, The ACLU Papers, Folder 8 “Rare Books and Manuscripts Division”).

201. AM. CIVIL LIBERTIES UNION, *supra* note 197, at 2.

202. *See id.* at 2 (expressing concern that the recognition of fetal rights may “have an impact on a woman’s decision-making”).

203. Memorandum from Barbara Kaiser, *supra* note 200, at 2.

204. *See id.* (discussing that “fetal salvage” would vary based on hospital capabilities).

205. *See id.* (prioritizing the mother’s life but granting a fetal right to live as a secondary priority).

206. *See id.* (“[I]f the fetus should be born alive, it would be incumbent upon the doctors to keep it alive.”).

207. *See id.* at 2 (agreeing that the state should assume responsibility for the nurture of the child if the state mandated physicians to take all efforts to save a fetus born alive).

regulations requiring the preclearance of any research that harmed a fetus.²⁰⁸ The Commission required researchers to use only fetuses under twenty weeks of age and to show that their research did not compromise the chances of fetal survival.²⁰⁹ Like the ACLU Privacy Committee, the Commission discussed fetal rights as a subject that could be separated from abortion.²¹⁰

This Article next examines some of the reasons that collaboration between pro-choice and pro-life activists became so difficult later in the 1970s. The ACCL's project ran into difficulty as the pro-life movement forged a lasting partnership with the Republican Party.²¹¹ By the early 1980s, constitutional and political support for welfare rights had eroded, and the pro-life movement had adopted the social and fiscal conservatism of its new partners.²¹²

Political party realignment also undermined the kind of fetal rights proposal explored by the ACLU. The pro-life partnership with the New Right made its cause appear both antifeminist and anti-woman. In the same period, activists prioritized the passage of multirestriction laws, like those introduced in Akron, Ohio, and the State of Missouri.²¹³ These laws limited access to abortion in a variety of ways, and many multirestriction bills also addressed fetal research, the choice of abortion procedure, or post-abortion fetal care.²¹⁴ For pro-choice activists, these laws served as further evidence of pro-life desire to keep women in traditional roles.²¹⁵ If all fetal-rights laws sought to keep women in their place, pro-

208. See, e.g., *Weinberger Moves to End Ban on Research Involving Fetuses*, N.Y. TIMES, July 30, 1975, at 11 (describing new rules in place after the Secretary of Health, Education, and Welfare lifted the ban).

209. See, e.g., *id.* (discussing the rules for both therapeutic and nontherapeutic fetal research).

210. See *id.* (providing for therapeutic research if there was no substantial risk to the fetus).

211. *Infra* Part V.A.

212. *Infra* Part V.A.

213. See *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 421–22 (1983) (describing the Akron ordinance); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 52 (1976) (describing a Missouri statute of this kind).

214. See, e.g., *Planned Parenthood of Cent. Mo.*, 428 U.S. at 58–59 (describing the Missouri act at issue).

215. *Infra* Part V.B.

choice leaders believed, there was no way to reconcile the rights of women and unborn children.

V. Radicalization Outside the Court

Scholars have attributed a great deal of post-*Roe* polarization to the Supreme Court's sweeping decision. As Reva Siegel and Linda Greenhouse have shown, well before 1973, leaders of the Republican Party had their own reasons for escalating the abortion conflict.²¹⁶ As this Part contends, the struggle ratcheted up after 1973 for reasons having little to do with the Supreme Court. Beginning in the mid-1970s, political party realignment accelerated.²¹⁷ Socially conservative, evangelical Protestants mobilized to an unprecedented extent.²¹⁸ Political operatives like Paul Weyrich and direct-mail guru Richard Viguerie used abortion to bring new voters into the Republican Party, as did then-presidential candidate Ronald Reagan.²¹⁹ Pro-lifers had financial, ideological, and political reasons for partnering with the New Right.²²⁰ In forging a working relationship with social conservatives, abortion opponents took more extreme and consistently right-wing positions on a number of gender issues.²²¹ In response, pro-choice leaders expressed skepticism about any effort to recognize fetal rights.²²² For reasons having little to do with the Court, movement members, politicians, and political operatives deliberately and consistently made decisions that intensified abortion conflict.

216. See generally Greenhouse & Siegel, *supra* note 16.

217. See Mary Zeigler, *The Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281, 325 (2009) (asserting that Kennedy shifted to pro-choice views in order to support racial and social equality).

218. See Greenhouse & Siegel, *supra* note 16, at 2065 (analyzing the pro-life appeal for conservative evangelical protestants).

219. See *id.* at 2062–64 (discussing Viguerie's and Weyrich's political ideas to engage Protestants).

220. See *id.* at 2065 (asserting that these pro-lifers related to the "broad-based attack on cultural developments evangelical critics termed 'secular humanism'").

221. See *id.* at 2060–61 (listing some of the gender issues that abortion opponents would begin to oppose).

222. *Supra* Part IV.

A. Moving to the Right

As Daniel Williams has shown, the leaders of the emerging New Right viewed abortion as a promising wedge issue.²²³ The New Right, a name chosen by its leaders, emerged in the wake of the Watergate scandal.²²⁴ Weyrich, Viguerie, and their partners wanted to create a conservative movement outside the mainstream Republican Party.²²⁵ Social issues, like abortion, promised to win the support of Catholics, fundamentalist Christians, and others who conventionally voted for the Democratic Party.²²⁶

The New Right intensified conflict about abortion for political ends. In 1979, Weyrich and Viguerie met with Jerry Falwell and other leading evangelical Protestants to craft a conservative political agenda that would suit the newly active base.²²⁷ In framing a pro-family agenda, Weyrich “proposed . . . that abortion be made the keystone of [a new] organizing strategy, since that was the issue that could divide the Democratic Party.”²²⁸ Weyrich and the New Right took a number of concrete steps to deepen public divisions about abortion. Weyrich helped to fund the formation of absolutist pro-life organizations, like the American Life Lobby, and a pro-life political action committee, the Life

223. See DANIEL WILLIAMS, *GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 165–74 (2012) (“As New Right political operatives looked for controversial issues to highlight their campaigns against congressional liberals, they turned with increasing frequency to the subject of abortion.”).

224. See, e.g., DAVID H. BENNETT, *THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY* 393 (1988) (recounting how Watergate particularly helped the business of Richard Viguerie).

225. See, e.g., *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT DECISION* 314 (Linda Greenhouse & Reva Siegel eds., 2d ed. 2012) (stating these new Republicans wanted to realign voters with social issues).

226. See, e.g., WILLIAMS, *supra* note 223, at 169–72 (discussing the appeal the abortion issue possessed for the New Right).

227. See, e.g., LAURA KALMAN, *RIGHT STAR RISING: A NEW POLITICS, 1974–1980*, at 274 (2010) (discussing the formation of the Moral Majority and its religion-focused agenda); JOHN MICKELTHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* 83–85 (2004) (describing the Moral Majority’s derivation from evangelical groups).

228. Greenhouse & Siegel, *supra* note 16, at 2067.

Amendment Political Action Committee (LAPAC), that worked to put abortion on the top of the national political agenda.²²⁹

The abortion conflict also intensified as both political parties cemented their positions on abortion. During the 1976 presidential primary, incumbent Gerald Ford had identified as a moderate, refusing to take any position on a fetal-life amendment to the Constitution.²³⁰ By contrast, Ford's opponent, Ronald Reagan, took a strong pro-life position, drawing on movement rhetoric and endorsing a fetal-life amendment.²³¹ Although Ford defeated Reagan in the primary (and ultimately lost the election), Reagan's commitments made him a "darling of abortion opponents."²³² His unsuccessful primary run made clear the potential of abortion as an election issue.²³³ Promising pro-life voters dramatic constitutional and social change would, the argument went, bring Republicans a large and energetic group of new voters.²³⁴

Why was an alliance with the New Right and the Republican Party appealing to a diverse pro-life movement? As Part III suggests, some movement members endorsed welfare rights for women that would more easily fit in the Democratic, rather than Republican, party platform.²³⁵ Nonetheless, by the late 1970s, movement leaders had reason to join a larger conservative

229. See BEFORE *ROE V. WADE*, *supra* note 225, at 294 (analyzing how Viguerie and Weyrich planned to use these pro-life organizations to gain additional political capital and influence).

230. See DONALD CRITCHLOW, *INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT* 204 (1999) ("While Ford declared [*Roe*] must be upheld, he told a meeting of . . . Catholic Bishops that he believed government had 'a responsibility to protect life.');" BEFORE *ROE V. WADE*, *supra* note 225, at 292 (indicating Ford initially opposed *Roe* yet remained quiet about his views during his presidency despite his wife's pro-choice stance).

231. See, e.g., WILLIAMS, *supra* note 223, at 187–89 (mentioning Reagan's pro-life stance as part of his "shining city upon a hill" rhetoric); LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 149 (1992) (evaluating how endorsing restoration of the right to life for fetuses demonstrated Reagan's more conservative Republican platform).

232. TRIBE, *supra* note 231, at 148.

233. See *id.* (asserting that, despite lacking a prominent role in the actual election, abortion proved that it could affect substantial amounts of voters in the Republican primaries).

234. See *id.* (noting that the abortion issue could play a pivotal role in the largely Catholic northeast).

235. *Supra* Part III.

alliance. Financially, the New Right promised abortion opponents unprecedented support.²³⁶ Organizations like the Moral Majority and Christian Voice had an impressive financial record.²³⁷ At one point, in the late 1970s, the Moral Majority raised as much as \$1 million a week.²³⁸ In 1978, the NRLC, the largest national pro-life organization, had debts as large as \$25,000.²³⁹ Working with social conservatives promised to make the pro-life cause financially stable.

Political influence also seemed likely to follow from a partnership with social conservatives. After 1976, pro-life leaders like Carolyn Gerster of the NRLC and Paul Brown of the Life Amendment Political Action Committee began complaining about the difficulty of winning new Democratic supporters in Congress.²⁴⁰ By contrast, because of the influence of social conservatives, the Republican Party nominated Reagan, a pro-life stalwart, during the 1980 election season and endorsed an antiabortion constitutional amendment.²⁴¹

Working with the New Right and the Republican Party reshaped the pro-life movement's agenda. Before partnering with social conservatives, many pro-life organizations took no formal position on the ERA.²⁴² Later in the 1970s, convinced by

236. See, e.g., MICKELTHWAIT & WOOLDRIDGE, *supra* note 227, at 84 (describing the impressive Evangelical resources at the disposal to leaders like Falwell).

237. See, e.g., Ziegler, *Possibility of Compromise*, *supra* note 28, at 587–88 (stating, for example, that Christian Voice raised \$3 million for the presidential campaign).

238. See *id.* (assessing Falwell's audience at 2.5 million and noting they supported the Moral Majority with up to a \$1 million per week in December 1979).

239. See, e.g., CONNIE PAIGE, *THE RIGHT TO LIFERS: WHO THEY ARE, HOW THEY OPERATE, AND WHERE THEY GET THEIR MONEY* 86–87 (1983) (considering the organization in “chronic debt”).

240. See, e.g., John Herbers, *Convention Speech Stirs Foes of Abortion: Factor in Elections*, N.Y. TIMES, June 24, 1979, at 16 (quoting Gerster's wish that the pro-life movement had not joined a broader social movement); John Herbers, *Sweeping Right to Life Goals Set as Movement Gains New Power*, N.Y. TIMES, Nov. 27, 1978, at A1 (describing Jones discussing the difficulty of moderate political views gaining ground).

241. On the 1980 platform, see generally Stuart Taylor, Jr., *Politics of the Bench*, N.Y. TIMES, Oct. 28, 1980, at A23; LISA TAYLOR, *FEMINISTS AND PARTY POLITICS* 96 (2000).

242. See NAT'L RIGHT TO LIFE COMM., BOARD OF DIRECTORS MEETING

antifeminists and New Right leaders that the Amendment would make it impossible to overrule *Roe*, pro-lifers condemned the Amendment.²⁴³ As other members of the New Right coalition worked to undo the impact of decisions by the Warren and Burger Courts,²⁴⁴ pro-lifers took up the cause of opposing judicial activism, signaling opposition to decisions on matters from school prayer to busing.²⁴⁵

Political party realignment made the ACCL's project much more challenging.²⁴⁶ For many in the pro-life movement, common ground involved the provision of welfare rights for women.²⁴⁷ Abortion opponents like Mecklenburg believed that women who chose abortion were vulnerable and deserving of state support.²⁴⁸

During the 1980 election, however, Ronald Reagan tapped into public anxieties about the size, cost, and inefficiency of the welfare state. As Governor of California, Reagan had pioneered a "required work" program designed to cut the cost of entitlement

MINUTES, SEPTEMBER 20–21, 1975, at 2 (1975) (opposing the adoption of the ERA until its language became less ambiguous) (on file with Gerald Ford Memorial Library, University of Michigan, Box 8, The American Citizens Concerned for Life Papers).

243. See Letter from Judie Brown to Unnamed First Class Mailing Recipients (Oct. 17, 1977) (advising recipients that the NRLC would oppose the Equal Rights Amendment until it guaranteed rights to unborn Americans) (on file with Gerald Ford Memorial Library, University of Michigan, Box 10, The American Citizens Concerned for Life Papers, Folder "Board of Directors, 1975(1)–(5)").

244. For discussion of concern within the Religious Right and New Right about school prayer and the Supreme Court, see WILLIAMS, *supra* note 223, at 60–67. For discussion of the New Right's attack on busing, affirmative action, and other matters addressed by the Warren and Burger Courts, see JEROME HIMMELSTEIN, *TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM* 83 (1992).

245. See Mary Ziegler, *Grassroots Originalism: Judicial Activism Arguments, the Abortion Debate, and the Politics of Judicial Philosophy*, 51 U. LOUISVILLE L. REV. 201, 220–32 (2012) (discussing pro-life adoption of arguments about judicial activism).

246. See *supra* Part III.B (elaborating on the ACCL's goals as it related to welfare and abortion).

247. See *supra* notes 107–08 and accompanying text (reflecting on the ACCL's approach on state welfare for women with unwanted pregnancies).

248. See *supra* notes 100–01 and accompanying text ("Mecklenburg's ACCL argued that both abortion and unintended pregnancy created psychiatric distress.").

programs,²⁴⁹ and during the 1980 election, both Reagan and incumbent Jimmy Carter agreed that the “welfare burden” had become “too onerous for local governments to bear.”²⁵⁰ Following his election, Reagan called for “fundamental reform” of entitlement programs, making support available only to the “truly needy.”²⁵¹ In allying with the Republican Party and the New Right, the pro-life movement signed on to a small-government agenda.

As importantly, the vision of women’s rights advanced by social conservatives differed dramatically from the ideas Mecklenburg had promoted.²⁵² Later in the 1970s, in the campaign for the ERA, the New Right developed a different idea of women’s rights. Like Mecklenburg’s allies, ERA supporters believed that women and men were not yet equal.²⁵³ Led by antifeminist Phyllis Schlafly, the New Right instead contended that sex equality would harm, rather than help, women.²⁵⁴ In 1975, Schlafly contended that the ERA would “take away from women the rights they already have, such as the right of a wife to be supported by her husband, the right of a woman to be exempted from military combat, and your right, if you wanted it, to go to a single-sex college.”²⁵⁵ Pro-lifers gravitated toward this vision of women’s rights partly because Schlafly successfully

249. Peter Kihss, *Reagan Welfare Reform Called “Major Policy Success,”* N.Y. TIMES, July 24, 1980, at A17.

250. Joyce Purnick, *Moynihan Hails a Carter Pledge on Welfare Cost,* N.Y. TIMES, Oct. 22, 1980, at B1.

251. Bernard Weinraub, *Democrats Say Reagan Proposal Would Hit Pensions of 1.2 Million,* N.Y. TIMES, June 25, 1981, at B14. For a contemporary analysis of Reagan’s view of the “needy,” see *The Truly Needy,* N.Y. TIMES, Feb. 20, 1981, at A26.

252. See *supra* note 112 and accompanying text (discussing that Mecklenburg sought child care, sex education, family planning, and educational programs).

253. See, e.g., GAYLE YATES, *WHAT WOMEN WANT: THE IDEAS OF THE MOVEMENT* 52 (1975) (explaining that feminists saw “the need for a more extensive legal alleviation of discrimination against women”).

254. See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression,* 56 EMORY L.J. 815, 827 (2007) (discussing how Phyllis Schlafly posed messages to women tied to traditional family roles).

255. Judy Klemesrud, *Opponent of E.R.A. Confident of Its Defeat,* N.Y. TIMES, Dec. 15, 1975, at 53.

argued—contrary to what many feminists maintained—that the ERA would strengthen abortion rights.²⁵⁶ Schlafly explained in 1977 that feminists would soon learn that “the equal rights amendment and abortion are antifamily goals, and not what the American people want.”²⁵⁷ That year, prominent abortion opponents began attending anti-ERA rallies and adopting a larger antifeminist agenda.²⁵⁸ ERA politics left little room for the vision of women’s rights advanced by pro-lifers seeking common ground. Schlafly’s battle suggested that abortion opponents could not compromise with feminists without sacrificing the unborn.²⁵⁹

In this new climate, pro-life attorneys worked to redefine what reproductive choice meant to the movement. Rather than seeking other reproductive freedoms for women, pro-lifers could use the language of choice exclusively to undercut *Roe*. Beginning in the late 1970s, Americans United for Life (AUL), the pro-life movement’s leading public interest litigation firm, elaborated on this strategy in a string of victories in the courts.²⁶⁰ The AUL’s strategy assumed that *Roe* was good law but sought to narrow its protections.²⁶¹ Describing abortion as a right to choose, in this account, meant that the state had a broader power to regulate abortion so long as women retained the ultimate decision.²⁶² As the AUL’s brief explained: “If the abortion decision is so

256. See Siegel, *supra* note 254, at 827–28 (discussing how the New Right advocated against the ERA by equating it to the constitutionalizing of abortion).

257. Judy Klemesrud, *Women’s Movement at Age 11: Larger, More Diffuse, Still Battling*, N.Y. TIMES, Nov. 15, 1977, at 63 (quoting Schlafly).

258. See, e.g., Judy Klemesrud, *Equal Rights Plan and Abortion Are Opposed by 15,000 at Rally*, N.Y. TIMES, Nov. 20, 1977, at 32 (describing participation of Nellie Gray of March for Life and Mildred Jefferson of the National Right to Life Committee in a major antifeminist rally).

259. See *id.* at 827 (asserting that Schlafly “mobilized opposition by framing abortion and homosexuality as potent symbols of the new family form that ERA would promote”).

260. See Caitlin E. Borgmann, *Roe v. Wade’s 40th Anniversary: A Moment of Truth for the Anti-Abortion-Rights Movement?*, 24 STAN. L. & POL’Y REV. 245, 261 (2013) (analyzing the AUL’s two-prong strategy of slowly attacking *Roe*’s scope in litigation and creating legislation to protect pro-life interests).

261. See Siegel, *supra* note 20, at 1681 (describing the AUL as the coordinator of “the national legislative strategy designed to chip away at *Roe*”).

262. See Brief for Americans United For Life as Amicus Curiae Supporting Petitioner at 17, *Poelker v. Doe*, 432 U.S. 519 (1977) (No. 01-1015) (arguing that even if a woman reaches her decision to abort a child, a public hospital should not have to provide one if a physician finds it medically unnecessary).

private . . . it follows that government shall not itself be compelled to respond to the demand of the exercise of that right.”²⁶³

In the new pro-life movement, moderates’ campaign for reproductive choice appeared anomalous. Mecklenburg and her allies had demanded protections against sex discrimination, while the New Right argued that equality would be a step down for women. Advocates like Mecklenburg fought for the expansion of the welfare state that Reagan and the New Right intended to attack. *Roe* did little to undercut pro-life efforts to seek out compromise. However, later in the decade, changes to the political landscape made these efforts to find common ground more challenging.

As Part IV demonstrates, some in the pro-choice movement also sought consensus, exploring ways in which the state could protect fetal rights without undermining reproductive autonomy. By the early 1980s, pro-choice leaders viewed any fetal-protective law with much more skepticism. Two developments undermined any pro-choice interest in fetal rights. First, the New Right and the Religious Right made abortion part of a broader antifeminist agenda.²⁶⁴ In the new political climate, supporters of abortion rights more often saw fetal-protective laws as a vehicle for enforcing traditional gender roles. In the same period, abortion opponents promoted multirestriction laws designed to decrease access to abortion.²⁶⁵ These laws often included measures that protected fetuses outside the abortion context. Pro-choice activists began to oppose any fetal protective law, viewing such measures as an attack on *Roe*.

263. *Id.* at 9.

264. See, e.g., Rosalind Pollack Petchesky, *Antiabortion, Antifeminism, and the Rise of the New Right*, FEMINIST STUDIES, Summer 1981, at 207 (describing the New Right’s focus on antiabortion and anti-ERA goals at the 1980 Republican convention).

265. See, e.g., Brief for Americans United for Life as Amicus Curiae Supporting Respondent at 5–9, *H.L. v. Matheson*, 450 U.S. 398 (1981) (No. 79-5903) (supporting a parental-notification law in Utah).

B. Pro-Life and Antifeminist

Before the late 1970s, the pro-life movement had an ambiguous relationship with second-wave feminism. Major organizations like the National Right to Life Committee (NRLC) took no position on major feminist reforms like the ERA.²⁶⁶ Other organizations, like Feminists for Life, actively campaigned for the Amendment and laws allowing married women to take credit in their names.²⁶⁷ Even pro-choice activists viewed the pro-life movement as theocratic rather than antifeminist, imposing one set of religious beliefs on the rest of the country.²⁶⁸

In working with the New Right, the pro-life movement radically revised its positions. In the late 1970s, organizations like the NRLC came out against the ERA and campaigned against funding for feminist conferences like the one celebrating International Women's Year.²⁶⁹ Pro-lifers' alliance with the New Right made antiabortion activism appear synonymous with social conservatism.²⁷⁰ Pro-choice activists began to conclude that antifeminism motivated abortion opponents rather than religion or fetal rights. In a January 1978 fundraising letter, for example, NOW President Eleanor Smeal warned of "[a] major attack on [women's] rights."²⁷¹ In a *New York Times* editorial in June 1978, former NARAL leader Larry Lader presented the pro-life movement as an offshoot of far-right radicalism.²⁷² In 1980, Planned Parenthood President Faye Wattleton described abortion

266. See, e.g., Ziegler, *Possibility of Compromise*, *supra* note 28, at 576 (noting that the NRLC took no position on the ERA until 1977).

267. See generally Ziegler, *Rights on the Right*, *supra* note 99.

268. See, e.g., Ziegler, *Possibility of Compromise*, *supra* note 28, at 575 (describing how Mecklenburg realized she needed to split away from the Catholic Church into a secular entity if she wanted the public to characterize her pro-life views associated with female welfare rather than theology).

269. See, e.g., *id.* at 585–88 (“As abortion opponents became convinced that both the ERA and feminism were pro-abortion, groups like the NRLC began to condemn both in equal measure.”).

270. See *id.* at 588–89 (discussing how pro-life activists began endorsing unrelated, socially conservative reforms).

271. Dorothy Collins, *Abortion: The Issue Still Burns*, CHI. TRIB., Jan. 23, 1978, at 1.

272. See Larry Lader, *Abortion Opponent's Tactics*, N.Y. TIMES, June 11, 1978, at 19 (deeming the pro-life contingency “the spearhead of political fanaticism”).

opponents as “an increasingly vocal and at times violent minority which seeks to deny all of us our fundamental rights of privacy and individual decision-making.”²⁷³ To many in the pro-choice movement, pro-lifers’ partnership with the New Right made fetal-rights rhetoric appear to be nothing more than an effective repackaging of sexist views.

The new strategy adopted by pro-lifers reinforced this impression. Beginning in the mid-1970s, abortion opponents worked harder to promote multipart laws restricting access to abortion.²⁷⁴ Statutes and city ordinances required informed consent, spousal and parental consent.²⁷⁵ Other laws prohibited saline abortions, required life-saving fetal care after an abortion, or defined fetal viability more narrowly than had the *Roe* Court.²⁷⁶ These laws framed all fetal-protective measures as efforts to ban abortion.²⁷⁷

These efforts raised concerns that pro-lifers would use any recognition of fetal rights to attack *Roe*. If fetal-protective laws set a precedent for efforts to undermine abortion, the pro-choice movement could not support fetal rights without weakening the foundation for abortion rights.²⁷⁸

Immediately after *Roe*, activists on both sides of the abortion issue believed that compromise was both possible and desirable. The escalation of conflict came later, with little input from the courts. In the late 1970s, political party realignment that began before *Roe* accelerated. With the emergence of the New Right and the Religious Right, the Republican Party adopted a robust social conservatism, and the pro-life movement gained powerful new partners. Political reordering created new obstacles for those seeking common ground.

273. *Planned Parenthood Shifting to a Patriotic Theme*, N.Y. TIMES, Oct. 5, 1980, at 25.

274. *See supra* note 214 and accompanying text (describing states with multirestriction laws).

275. *Supra* note 214 and accompanying text.

276. *Id.*

277. *Id.*

278. *See, e.g.*, AM. CIVIL LIBERTIES UNION, PRIVACY COMMITTEE MEETING MINUTES, OCTOBER 13, 1979, at 1 (1979) (advising the committee that abortion should consist of killing the fetus, rather than removing the pregnancy, in order to protect *Roe*’s holding) (on file with Mudd Library, Princeton University, Box 112, The ACLU Papers, Folder 8 “Rare Books and Manuscripts Division”).

The history of *Roe*'s aftermath spotlights the influence of nonjudicial actors on post-*Roe* polarization. If we focus less exclusively on the Court, what difference does it make to contemporary scholarship? Part VI takes up this question next.

VI. *Roe and the Consequences of Judicial Review*

Backlash arguments address the consequences of asking too much of the courts.²⁷⁹ Backlash theorists use history to caution social movements against overreliance on the courts.²⁸⁰ *Roe*, however, serves as an example of the dangers faced by courts as well as by activists.²⁸¹ Using *Roe* as a paradigm, beyond backlash arguments illustrate the harms that judicial decisions can do to both the authority of the Court and to the larger society. In particular, scholars point to post-*Roe* polarization as a cost of judicial intervention in abortion politics.²⁸² By moving too fast, the Court alienated the pro-life movement, undid promising compromises, and hopelessly radicalized discussion.

Reasoning from *Roe*, legal scholars have developed a compelling account of the political costs of different interpretive methods. Richard Posner sees *Roe* as an example of the damage done by courts that reject or misunderstand pragmatism.²⁸³ Pragmatism asks the courts to consider, among other things, how to formulate opinions with desirable consequences.²⁸⁴ A more pragmatic Court, Posner predicts, would have arrived at a solution that would have commanded widespread support.²⁸⁵ Cass

279. See Greenhouse & Siegel, *supra* note 16, at 2028 (discussing backlash).

280. See *id.* at 2072 (stating that scholars often assume that *Roe* started the abortion conflict).

281. See *supra* Part II (describing how *Roe* does not fit into the conventional backlash framework).

282. See, e.g., ROSEN, *supra* note 4, at 82 (asserting that *Roe* empowered those extremists on either side of the abortion debate).

283. See POSNER, *supra* note 4, at 79 (stating *Roe* has deadlocked the experimentation and regulation of abortion).

284. For a brief discussion of Posner's understanding of pragmatism, see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 27 (1993).

285. See POSNER, *supra* note 4, at 125 (providing an example of a less binding holding, upholding the Texas statute at issue, in order to maintain a semblance of democratic input).

Sunstein similarly uses *Roe* to showcase the benefits of an alternative theory that he calls minimalism.²⁸⁶ Because *Roe* came down at a time when abortion was still divisive, the Court made a mistake by issuing a broad and philosophical ruling.²⁸⁷ *Roe*'s sweep undercut a process of state-by-state negotiation that could have lowered the temperature of debate and provided more opportunities for compromise.²⁸⁸

William Eskridge also views *Roe* as a prime source of polarization. Eskridge advises the courts to craft decisions that lower the stakes of ordinary politics and facilitate democratic deliberation.²⁸⁹ In issuing a far-reaching decision before any consensus formed, *Roe* convinced pro-life Americans that they could not accomplish their goals through working in ordinary politics.²⁹⁰ By alienating so many activists, Eskridge suggests, *Roe* unnecessarily escalated the abortion conflict.²⁹¹

Scholars like Eskridge, Sunstein, and Posner further use *Roe* in issuing prescriptions for courts concerned with the social and political costs of judicial review. As the Article has shown, however, the narrative on which they rely is flawed. The radicalization of abortion politics occurred gradually and in response to more than the Court's decision.²⁹² In the late 1960s and 1970s, abortion became a national political question, and leading Republican operatives used it to court new voters.²⁹³ Other scholars have shown that *Roe* alone did not produce

286. For explanation of Sunstein's minimalism, see generally CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (2001).

287. See *id.* at 114 (suggesting the Court should proceed narrowly, "in good minimalist fashion").

288. See, e.g., Sunstein, *supra* note 4, at 766 (arguing that a lack of compromise empowered the religious conservatives).

289. See William Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L. J.* 1279, 1302 (2005) ("Because strict enforcement invests the political process with greater neutrality, it contributes to lower stakes.").

290. See *id.* at 1312 (contending *Roe* threatened our democracy, radicalized traditionalists, and disowned pro-life Americans at least to an extent).

291. See ESKRIDGE & FEREJOHN, *supra* note 35, at 242–43 (discussing how the decision took the most moral issues away from families and states).

292. *Supra* Part V.

293. See *supra* note 227 and accompanying text (discussing the leaders of the New Right movement).

hopelessly divided abortion politics. This Article adds a new dimension to the discussion by showing that, for almost a decade after the decision, abortion politics little resembled the bitter, dysfunctional debate with which so many have found fault.²⁹⁴

To activists on both sides of the abortion issue, compromise seemed not only possible but strategically crucial. In the 1970s, pro-choice activists conducted a thoughtful conversation about whether and how fetal rights and women's rights could coexist.²⁹⁵ Supporters of abortion rights imagined fetal rights to financial support, informed consent by proxy, and a chance of survival.²⁹⁶ At the same time, these advocates reaffirmed their support for women's right to the safest abortion procedure available.²⁹⁷ *Roe* did not obscure potential differences between abortion and questions of fetal rights ex utero.

Some pro-life advocates also sought common ground in response to *Roe*. Far from arguing that there was no right to reproductive choice, moderate abortion opponents instead reworked the idea of privacy advanced by the *Roe* Court.²⁹⁸ These activists rejected the idea that a right to choose covered abortion. In other ways, however, they demanded broader reproductive rights than those set forth in *Roe*.²⁹⁹ As moderates framed it, reproductive choice required state support for motherhood—public funding for day care, contraception, and health care, to be sure, but also protections against sex and pregnancy discrimination.

Legal scholars urge judges to use *Roe*'s history in measuring the consequences of any potential decision.³⁰⁰ As the Article shows, however, we have mistakenly blamed *Roe* for events that occurred later and partly without the influence of the courts. Insofar as *Roe* offers an example, beyond backlash arguments

294. See *supra* notes 240–45 and accompanying text (describing the political shift at the beginning of the 1980s).

295. *Supra* Part IV.B.

296. *Supra* notes 204–07 and accompanying text.

297. *Supra* notes 200–03 and accompanying text.

298. *Supra* Part V.A.

299. See *supra* notes 262–63 (describing new pro-life legal strategies).

300. See *supra* notes 284–91 and accompanying text (analyzing different scholars' opinions on *Roe*'s judicial discretion).

exaggerate the influence of judicial decisions, neglecting the impact, motives, and negotiations of nonjudicial actors. That is not to say that judicial decisions do not matter or that legal scholars should not study the consequences of different modes of decision making. If *Roe* teaches us anything, however, it is that the courts play only one part in a much more complex process.

More accurately assessing *Roe*'s significance makes apparent new questions about abortion law and judicial review. Did *Roe* have any negative impact on abortion politics, albeit one less central than we might have previously believed? How did we come to believe that *Roe* produced a depressingly radicalized debate so much earlier and so much more thoroughly than is the case? A better historical understanding of consensus-seeking efforts after *Roe* is only the beginning of this inquiry.

This Article suggests that any lessons offered by *Roe*'s history for students of judicial review are more complex and less predictive than we have often thought. On its own, the Court did not cause and could hardly have anticipated the polarization of gender politics in the early 1980s. If judges wish to learn from *Roe*'s aftermath, the lesson is not a simple one involving the costs of judicial decisions that do too much too soon. If anything, *Roe*'s history suggests that legal academics need to attend better to the influence of nonjudicial actors on constitutional politics and on the meaning of blockbuster judicial decisions.

The history of compromise in the wake of *Roe* also provides a much needed dose of optimism about the future prospects in the abortion wars. For different reasons, Justices Scalia and Ginsburg describe *Roe* as an obstacle to the creation of a more rational and collaborative abortion debate.³⁰¹ Since the 1973 decision, the argument goes, nonjudicial actors have substantially less power to lower the stakes of abortion politics. The history examined here offers a more hopeful story. After *Roe*, activists on

301. Dissenting in *Casey*, Scalia concluded that *Roe* "destroyed the compromises of the past, rendered compromise impossible for the future" and inflamed . . . national politics." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 995 (1992). Justice Ginsburg has also contended that because the Court acted too quickly and disavowed an Equal Protection rationale, *Roe* "halted a political process that was moving in a reform direction and thereby . . . prolonged divisiveness and deferred stable settlement of the issue." Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992).

both sides of the abortion issue followed creative paths toward compromise.³⁰² The Court did not make these projects impossible to pursue. By extension, when the abortion battle intensified, a variety of nonjudicial actors, including politicians, activists, and operatives, shared responsibility.³⁰³ The world of 1970s abortion politics is in many ways removed from our own. Nonetheless, the story of *Roe*'s aftermath suggests that we can do more than we think to lower the temperature of the abortion wars.

Finally, the history of responses to *Roe* foregrounds the importance of legal solutions related to, but separate from, abortion. In the 1970s, compromise-minded activists appeared as unwilling to negotiate about the scope of abortion rights as are any advocates today. Nonetheless, for many on either side of the issue, *Roe* made more urgent the search for legal solutions that would lower the stakes of the abortion wars. Abortion opponents primarily looked for ways to reduce the need for abortion, both by targeting discrimination against women and by ensuring that women had adequate resources to support themselves. Pro-choice advocates searched for ways to dignify fetal life that would not directly undermine abortion rights.

Both strategies may have some promise today. Since at least the 1990s, leading voices in the pro-life movement have argued for the importance of demonstrating concern for women as well as for unborn children.³⁰⁴ On the pro-choice side, some organizations representing abortion providers have called for a more nuanced discussion of fetal life and fetal dignity.³⁰⁵

302. Compare *supra* notes 99–135 and accompanying text (describing Mecklenburg's ACCL priorities), with *supra* notes 195–210 and accompanying text (establishing what the ACLU considered fetal rights).

303. See *supra* notes 240–45 and accompanying text (describing the political shift at the beginning of the 1980s).

304. See Siegel, *supra* note 20, at 1656–78 (evaluating on more modern issues relating to women and abortion).

305. See, e.g., Frances Kissling, *Is There Life after Roe? How to Think about the Fetus*, LIFE ISSUES INST. (Winter 2004/2005), <http://www.lifeissues.org/breakingnews/2004/bn12-10-04fa.htm> (last visited Jan. 15, 2014) (asserting the values of both female choice and fetal rights) (on file with the Washington and Lee Law Review); Press Release, Nat'l Coalition of Abortion Providers, Abortion Providers Acknowledge Terminating Potential Human Life (Nov. 19, 1992) (releasing that, as abortion clinics, they do kill fetuses that, if born, would be babies) (on file with the Washington and Lee Law Review).

For the most part, however, activists have argued that the other side's position on abortion has destructive effects. Recently, with the advent of what Reva Siegel calls woman-protective antiabortion arguments, pro-lifers have stressed the ways in which abortion harms women.³⁰⁶ Since the early 1970s, pro-choice activists have asserted that abortion bans are anti-life and anti-child, harming children who are born to parents who do not want or cannot adequately provide for them.³⁰⁷ If anything, these arguments have exacerbated abortion conflict. Woman-protective arguments not only justify abortion restrictions but also draw on sex stereotypes that are offensive to many in the pro-choice movement. In turn, pro-choice arguments about the damage done to unwanted children do not square with pro-life claims that all lives, particularly those of the disabled, are equally worthy.

Social-movement responses to *Roe* suggest that compromise on related gender issues may be easier to achieve. Pro-life organizations like All Our Lives endorse access to contraception or legislation protecting women against domestic violence—goals endorsed by many feminist and pro-choice organizations.³⁰⁸ It may still be possible to create the kind of solution *Roe* supposedly destroyed.

VII. Conclusion

Can courts fuel social change? In answering this question, legal scholars and members of the Supreme Court turn to reactions to *Roe*. For backlash theorists, *Roe* illustrates the ways in which judicial decisions can set back a cause the Justices endorse. For other observers, *Roe* serves as an example of the

306. See Siegel, *supra* note 20, at 1656–78 (providing a history of the woman-protective antiabortion argument).

307. See, e.g., *Unwanted Child is Called Victim*, N.Y. TIMES, May 12, 1969, at 66 (discussing that unwanted children often have higher occurrences of child abandonment, abuse, and neglect); Reginald Stewart, *Akron Divided by Heated Abortion Debate*, N.Y. TIMES, Feb. 1, 1978, at A10 (evaluating a rift in the city council).

308. See, e.g., Jen R., *The Government Shutdown: Harming Real Lives*, ALL OUR LIVES PAST ACTIONS BLOG (Oct. 10, 2013), <http://www.allourlives.org/the-government-shutdown-harming-real-lives/> (last visited Jan. 27, 2013) (alerting readers to the risk the government shutdown posed to domestic-violence and rape-crisis shelters) (on file with the Washington and Lee Law Review).

damage judicial review can do the larger society. According to this account, opinions that do too much too soon produce polarization, undermine productive negotiations, and deform social-movement politics.

This Article offers a more nuanced perspective on the role played by the Court in gender politics. Far from putting an end to efforts to identify common ground, *Roe* intensified attempts made by some pro-choice and pro-life activists to find some form of consensus. When these efforts stalled, a variety of nonjudicial actors had at least as much responsibility as the Court.

Forty years later after it was decided, *Roe* remains one of the most iconic and impactful Supreme Court decisions of the past century—a touchstone for those seeking to understand the Court's role in American politics. We are right to believe that *Roe* matters, but in attributing so much about contemporary politics to the Court's decision, we have lost sight of the world left in *Roe*'s wake and the reasons for its disappearance. What, then, does *Roe* remind us? The lesson does not simply involve the influence of judicial review or the intractable polarization of the abortion debate. If *Roe* should serve as a symbol of anything, it is the complex interplay between party politics, social-movement strategy, and Supreme Court politics. By building on a deeper understanding of *Roe*'s history, we will better able to understand that complexity.