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Identity Contests: Litigation and the Meaning of Social-Movement Causes

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INTRODUCTION

What do we mean by a right to life? Should—or does—such a right cover only antiabortion claims? Or should the term apply more broadly—to debates about class and welfare, about the death penalty, or even about human rights? In the abortion wars, litigation strategy has helped to dictate the answers to these questions. Historians and legal scholars have studied the tensions between lawyers and the lay actors they represent, chronicling how lawyers modify and even limit the social changes activists demand.[1] By putting the attorney-client relationship center stage, scholars have sometimes obscured an equally important story about how litigation strategy—as in the case of the antiabortion movement—can make a difference to internal battles about the meaning of a social cause. This Article explores the influence of litigation on a different struggle, one involving a movement's constitutional vision and place in American politics. The Article uses the history of the antiabortion movement as an entry point for rethinking the role of litigation in the politics of social-movement identity, recovering how court-centered strategies transformed the meaning of a right to life. This history shows that victories in court can convince both lay actors and lawyers to discount alternative political identities and constitutional commitments, creating winners and losers in internal struggles over what defines a movement.

Prior to and even after the decision of *Roe v. Wade*,[2] a diverse group of lay activists and legal professionals argued for a right to life, supposedly rooted in the Declaration of Independence, human rights law, and even the Supreme Court's privacy jurisprudence. While movement members agreed on the importance of using rights language and

1. For examples of key studies showcasing the complexity of the attorney-client relationship, *see generally* MARK BRILLANT, THE COLOR OF AMERICA HAS CHANGED: HOW RACIAL DIVERSITY SHAPED CIVIL RIGHTS REFORM IN CALIFORNIA, 1941–1976 (2012); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2012); RISA GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE (2008); SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2009).

2. 410 U.S. 113 (1973).

reaffirming constitutional protections for the fetus, this apparent consensus concealed deeper fights about the meaning of a right to life. Because they disagreed about the identity of their movement, competing activists found themselves deeply divided about the kind of law reform agenda they should formulate and the kind of allies they should pursue. In particular, activists fought about whether to align with the political Right or Left.

Success in court proved to be a tipping point in internal battles over movement identity, empowering social conservative advocates who opposed "big government." When an incremental litigation strategy made headway in the Supreme Court, movement members rallied around strategies centered on success in court. In the legislative arena, movement members prioritized regulations that the Supreme Court might uphold, thereby chipping away at abortion rights, exposing the supposed overreach of the Supreme Court, and highlighting the supposed incoherence of the *Roe* decision. Over time, as abortion opponents channeled more resources into this strategy, the movement had reason to align with conservative organizations committed to small government and opposed to judicial decisions restricting school prayer and mandating busing. Victory in court strengthened the hand of some movement members and marginalized others.

This Article proceeds in five parts. Part I lays out the long history of claims based on a right to life, and traces the shifting arguments that shaped dialogue about the New Deal order, the Cold War, and the poverty rights movement. Part II chronicles how these existing political and social divisions over the right to life fractured the early antiabortion movement. Some activists connected antiabortion beliefs to an understanding of the right to life similar to that elaborated during the Cold War, a right that included defense of the traditional family and war on the sexual revolution. Others strongly disagreed. These activists built on the meaning of a right to life as elaborated during the New Deal to assert that protection of the fetus naturally extended to other vulnerable persons, including single mothers and the poor. By contesting what a right to life meant, abortion opponents shaped the kind of political alliance they would seek, the legal goals they would prioritize, and the recruits they could attract.

Part III examines how litigation strategies fundamentally changed the course of identity contests in the antiabortion movement. In particular, this Part looks at new tactics developed by antiabortion attorneys in Chicago. These lawyers paid lip service to the legitimacy of the Supreme Court and the precedential value of the *Roe v. Wade* decision,[3] all the while seeking to hollow out the *Roe* decision and reveal its logical shortcomings. When this strategy seemed to succeed, movement leaders applied it more broadly, focusing on the courts. As activists became preoccupied with overruling *Roe*, it became more appealing to align with groups concerned about judicial activism.

Part IV positions this narrative in the larger scholarship on law and social change. First, the history studied in this Article reinforces scholars' concerns about the dark side of winning in court. Even when litigation does not sideline movement radicals or discourage activists from pursuing more effective grassroots strategies, success in court can convince activists to swear off alternative visions of a cause. Victory in court, moreover, can create substantial path dependence, making it more costly and difficult to create a new identity and employ different tactics rather than to pursue established ones.[4]

Second, this history significantly contributes to studies on the impact of rights rhetoric[5] on social movements. The story of antiabortion constitutionalism builds on work highlighting the differing effects of rights rhetoric and litigation. By focusing on rights, competing antiabortion activists could make a remarkably fluid set of demands on the institutional status quo, both challenging and justifying existing privileges and

3. *Id.*

4. *See generally* JACOB S. HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE BENEFITS IN THE UNITED STATES 53–54 (2002) (defining path dependent outcomes as "developmental trajectories that are inherently difficult to reverse"). Because of the inertia associated with path dependence, it may encourage activists to adopt strategies that do not fully address contemporary political realities. *See id.*; *see also* Oona Hathaway, *Path Dependence in the Legal System: The Course and Pattern of Change in the Common Law System*, 86 IOWA L. REV. 607, 616 (2001) (explaining how "developments in the past constrain the processes of change in important and predictable ways").

5. By rights rhetoric, I refer to efforts to frame a claim, identity, or demand by reference to a fundamental (and often constitutional) right.

hierarchies. Indeed, it was in moving away from the language of legal rights that movement members adopted a narrower vision—and one certainly more disconnected from socioeconomic equality. At the same time, litigation itself tended to have a constraining effect, particularly since the movement lacked the public support to achieve its goals in the political arena. Lay actors and lawyers alike stayed away from arguments thought likely to jeopardize litigation strategies, and in the process narrowed their demands, pushed important arguments below the surface, and silenced voices once influential in movement circles.

I. CHARTING A RIGHT TO LIFE UNRELATED TO ABORTION, 1930–1973

Does the rhetoric of legal rights constrain movements for social change? The history of the antiabortion movement contributes to a larger scholarly debate about whether rights rhetoric stunts or expands movements for social change. While some legal and political philosophers insist that rights be taken seriously as a basis for jurisprudence,[6] other commentators question whether rights have any stable or objective content, calling attention to the expansion of judicial rights and "the endurance of the injustices that rights purported to address . . . ."[7] Examining antiabortion constitutional change

6. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 651 (1986) (arguing that in the case of the women's movement, "[r]ights discourse encouraged the articulation of feminist vision and furthered the process of political assertion"); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 415 (1987) (arguing that "the attainment of rights signifies the due, the respectful behavior, the collective responsibility properly owed by a society to one of its own").

7. *See* Karen Tani, *Rights and Welfare Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 370 (2012). Conservative critics have insisted that excessive use of rights talk destroyed community and hobbled institutions. *See, e.g.*, FRED P. GRAHAM, THE SELF-INFLICTED WOUND (1970); RICHARD E. MORGAN, DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME (1984); AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA (1993); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14–15 (1991). Critics on the left,

campaigns from the 1960s to the 1980s demonstrates the surprising mutability of a "right to life." Across time, a diverse group of activists used rights rhetoric to advance strikingly different agendas. Though often thought to offer hollow hope for change activists, rights rhetoric gave abortion opponents a crucial focal point for debate about movement identity.

Far from ratifying established hierarchies, some abortion opponents used rights language to demand changes to the distribution of wealth and the role of government in providing for the poor. Others deployed rights rhetoric in a fight for the status quo, defending the privileges of the traditional family and praising small government. Rights rhetoric emerges as fluid in its uses and impact. The history of the antiabortion movement further shows the difference that victories in court can make, marginalizing some activists and putting others in positions of power.

This Part explores the larger context of antiabortion identity struggles, recovering these historical battles about the meaning of a right to life and its relationship to sex, family, and welfare rights. It begins by unearthing New Dealers' arguments about a right to life involving a guaranteed standard of living. Next, the Part studies the transformation of the right to life in battles about professional identity and lawyering during the Cold War. Finally, it chronicles the reappearance of a right to life in the agenda of the welfare rights movement. These different visions of a right to life divided the antiabortion movement, as activists championed opposing ideas about what their movement meant and which legal goals they should pursue.

A. The New Deal Prompts Debate About the Right to Life

Abortion opponents did not pioneer the idea of a right to

such as some critical legal studies (CLS) scholars, asserted that rights reinforced existing power structures. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421 (1987); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). Postmodern critics argue that rights-based protections are unstable and indeterminate. *See, e.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

life. Instead, in opposing efforts to change the laws on abortion, activists have drawn on a rich and contradictory rhetorical tradition entirely outside of the abortion debate. The idea of a right to life has figured centrally in battles about human rights law, the welfare state, and the Cold War. Since the Declaration of Independence proclaimed "a right to life, liberty, and happiness,"[8] a variety of lawmakers, attorneys, and activists have framed their causes in reference to a right to life.[9]

During the 1930s, as the Supreme Court struck down core New Deal legislation, social workers, administrators, and legal commentators turned to a right to life in offering a constitutional argument for a larger social safety net. During the 1932–1937 terms, the Supreme Court's "Four Horsemen of the Apocalypse"—Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter—won enough votes to strike down the Agricultural Adjustment Act of 1933 and the National Industrial Recovery Act, as well as minimum wage laws and regulations of the coal industry.[10] These decisions relied on a robust understanding of constitutional rights to property and contract.[11] For example, in 1934, in *Nebbia v. New York*, a case involving the constitutionality of a New York law regulating the price of milk, the majority acknowledged that "neither property rights nor contract rights are absolute."[12] Nonetheless, led by the Four Horsemen, the Court insisted that "[u]nder our form of government, the use of property and the making of contracts are normally matters of private and not of public concern."[13]

Framing the right to life as protection of an individual's power to make a living, advocates of the New Deal responded that a broader social safety net would protect individual rights

8. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

9. *See infra* Part I.

10. *See* United States v. Butler, 297 U.S. 1 (1936) (deciding the Agricultural Adjustment Act); Schechter Poultry v. New York, 295 U.S. 495 (1935) (deciding the National Industrial Recovery Act). On the influence and views of the "Four Horseman," see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 20–24, 93–101 (1998); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 284–301 (2000); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: CONSTITUTIONAL REVOLUTION IN THE TIME OF ROOSEVELT 2, 36–43, 133–36, 155 (1995).

11. *See* CUSHMAN, *supra* note 10, at 12, 14, 77, 133–34.

12. 291 U.S. 502, 523 (1934).

13. *Id*.

rather than undermine them. These administrators, activists, and attorneys turned to the right to life in advancing their claims,[14] arguing that it implied the power to make a living.[15] New Dealers argued that with the dramatic growth of the government and the increasing complexity of the economy, the State could not guarantee the right to life merely by leaving individuals alone.[16] For that right to have any meaning, as advocates argued, the State had to act affirmatively to ensure that Americans could provide for their own basic needs.[17]

Writing the same year that *Nebbia* was decided, Aubrey Williams, an assistant administrator for the Federal Emergency Relief Administration, insisted that to protect the right to life, the State would have to provide some measure of economic security.[18] As the government expanded and the economy grew more and more complex, Americans could no longer guarantee themselves a living through "character and industry."[19] Williams argued that in spite of social, economic, and political changes, "[t]he right to life supposedly still means the right to security of existence."[20] The New Deal State, in Williams's view, did not stand in any tension with the Constitution. Instead, by creating welfare rights, the government would finally "take seriously a few of our forefathers' principles."[21]

Williams's argument—that the right to life guaranteed economic security—became a core justification for the New Deal order. During his time as governor of New York, Franklin Delano Roosevelt defended state economic intervention by proclaiming that "every man has a right to life, and this means

14. *See* Aubrey Williams, *Standards of Living and Government Responsibility*, 176 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 38–39 (1934); *Students Asked to Back NRA Drive*, N.Y. TIMES, Aug. 16, 1933, at 3. New Dealers also presented access to healthcare as one facet of a right to life. *See* S. J. Woolf, *Right to Life, Liberty, and Health*, N.Y. TIMES, Sept. 26, 1937, at 137 (quoting Dr. Thomas Parran of the American Public Health Association framing access to healthcare as part of a right to live). For more on the link between economic security and a right to live, see *Dr. Berle Praises Aims of New Deal*, N.Y. TIMES, Aug. 17, 1933, at 2.

15. *See* Williams, *supra* note 14, at 38–39

16. *See id.*; John A Ryan, *President Roosevelt's Economic Program*, 23 IRISH Q. REV. 194, 199 (1933).

17. *See supra* note 10 and accompanying text.

18. *See* Williams, *supra* note 14, at 38–39.

19. *Id.* at 38.

20. *Id.* at 39.

21. *Id.*

that he also has a right to make a comfortable living."[22] Grover Whalen, the chairman of the New York City Emergency Re-Employment Committee, rallied support for the National Recovery Act, insisting: "[T]here can be no successful criticism of a new system which primarily champions constitutional rights and . . . the very right to exist."[23] By 1944, then-President Franklin Delano Roosevelt announced a Second Bill of Rights connecting "rights to life and liberty" to "new goals of human happiness and well-being."[24] As Roosevelt explained: "[T]rue individual freedom cannot exist without economic security and independence."[25] However, the apparent success of those using a right to life in support of a guaranteed standard of living was short-lived. As this Article shows next, the Cold War and the social changes it produced moved the rhetoric of a right to life in a decidedly conservative direction.

B. The Right to Life Changes in the Crucible of Cold War Politics

In the aftermath of World War II and the shadow of the Cold War, the international community embraced an expansive understanding of the right to life that was reminiscent of the one championed by New Dealers. However, at home, attorneys and politicians made right-to-life rhetoric central to a defense of American supremacy, one rooted in the superiority of Christianity and the traditional family.

Internationally, at the start of the Nuremberg Trials in November 1945, human rights proponents faced criticism for

22. *See* Ryan, *supra* note 16, at 199.

23. *Students Asked to Back NRA Drive*, *supra* note 14, at 3.

24. President Franklin D. Roosevelt, State of the Union Address (Jan. 11, 1944), *available at* http://www.presidency.ucsb.edu/ws/?pid=16518, *archived at* http://perma.cc/8Y4N-984V. For more on the right to life articulated by political leaders during the New Deal, see PAUL D. MORENO, THE AMERICAN STATE FROM THE CIVIL WAR TO THE NEW DEAL: THE TWILIGHT OF CONSTITUTIONALISM AND THE TRIUMPH OF PROGRESSIVISM 225–26 (2013); William E. Forbath, *Caste, Class, and Equal Citizenship*, *in* MORAL PROBLEMS IN AMERICAN LIFE: NEW PERSPECTIVES ON CONSTITUTIONAL HISTORY 186–88 (Karen Halttunen & Lewis Perry eds., 1998); WENDY WALL, INVENTING THE AMERICAN WAY: THE POLITICS OF CONSENSUS FROM THE NEW DEAL TO THE CIVIL RIGHTS MOVEMENT 212 (2008). Ironically, the early right-to-work movement would draw on the idea of a right to life in attacking the New Deal. *See* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 72 (2014).

25. *See* Roosevelt, *supra* note 24.

punishing Nazi leaders for acts not formally criminalized at the time of their commission.[26] International law scholars and policy makers responded by articulating previously implicit rights, among them, the right to life.[27] In the human rights context, such a right covered protections from torture, murder, and forced sterilization. For example, a 1945 draft declaration of the International Rights and Duties of Man set forth a "right to life from the moment of conception . . . [that] includes the right to sustenance and support in the case of those unable to support themselves."[28] The UN Declaration on Human Rights would also include a right to life.[29]

At the start of the Cold War, leaders of the American Bar Association (ABA) transformed this rhetoric, expressing skepticism about internationalism, and using the right to life as the symbol of American commitment to Christianity, small government, and the traditional family.[30] As the Soviet Union expanded to include much of Eastern Europe, leading American attorneys sought to differentiate their own understandings of law and the legal profession. This vision of the right to life formed part of an American constitutional tradition centered on the importance of faith, small government, and the traditional family. In a 1947 speech, Chief

26. For discussion of the due process concerns surrounding the Nuremberg trials, see NORBERT EHRENFREUND, THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIAL CHANGED THE COURSE OF HISTORY 201–204 (2007); CHARLES ANTHONY SMITH, THE RISE AND FALL OF WAR CRIMES TRIALS: FROM CHARLES I TO BUSH II 113 (2012).

27. *See* American Declaration of the Rights and Duties of Man, OEA/Ser.L.V.II.23, doc. 21, rev. 6 (1948); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration].

28. *See Draft Declaration of the International Rights and Duties of Man*, WORLD AFF., 1945, at 200. In 1948, the final version of the declaration still mentioned a right to life, but modified references to conception that might have conflicted with laws on either abortion or the death penalty. *See, e.g.*, *The Baby Boy Case*, *in* INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES, AND ANALYSIS 329 (Francisco Forrest Martin et al. eds., 2006).

29. *See* Universal Declaration, *supra* note 27, at Art. 3. For contemporary discussion of the right to life in the context of human rights, see *"Right to Life" Added to Planned U.N. Pact*, N. Y. TIMES, May 28, 1952, at 9.

30. *See Human Rights: Not So Simple*, N.Y. TIMES, Mar. 7, 1956, at 32 ("In principle, we go along with any sincere declaration of human rights. . . . The Communists agreed to these lofty ideas too—with what spectacular hypocrisy the record shows."); *Eisenhower Urges Parley on Welfare*, N.Y. TIMES, Oct. 25, 1949, at 1.

Justice Vinson laid out his ideas for the future of the bar, explaining:

> I believe in America: in her high destiny under God to stand before the people of this earth as a shining example of unselfish devotion to . . . the Christian ideal of liberty in harmonious unity, built of respect for God's image in man and every man's life, liberty, and happiness.[31]

Chief Justice Vinson connected the right to life not to a guaranteed means of subsistence but to the superiority of American constitutionalism. The right to life stood for the virtues of the nuclear family, freedom from the State, and belief in God.

Rather than expanding the protections guaranteed by the Constitution to include the poor, this iteration of the right to life reflected a narrow, existing tradition that distinguished democracy from communism. The ABA-led effort to redefine lawyers' professional identity—one that would rely increasingly on the idea of a right to life—offers one powerful example of the campaign to protect American values from communist influence. In 1947, Attorney General (and future Supreme Court Justice) Tom C. Clark warned of a communist plot to infiltrate the bar, led by those who would "[use] every device in the legal category to further the interests of those who would destroy our government."[32] ABA leaders immersed themselves in Cold War politics, pitting the ABA against other attorneys.[33] Between 1948 and 1949, the ABA voted to expel all communist members and to support the activities of the House Un-American Activities Committee (HUAC).[34]

Efforts to counter subversive lawyering reflected a deeper fear of the growing power of government. In distinguishing

31. *See Age of Great Challenge: Chief Justice Vinson Tells Its Dangers and Needs*, 33 A.B.A. J. 1084, 1086 (1947).

32. Tom C. Clark, *Civil Rights: The Boundless Responsibility of Lawyers*, 32 A.B.A. J. 453, 456–57 (1947).

33. On ABA politics during the Cold War, see JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 231–38, 246–48 (1976); JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 56–69 (2013).

34. *See Communists and Communism: Association Votes in Support of the Mundt-Nixon Bill*, 34 A.B.A. J. 899 (1948).

democracy from communism, ABA advocates turned to the right to life, presenting it as a uniquely American ideal connected to the virtues of small government. Right-to-life arguments played an especially crucial role in the conflict between the ABA and the National Lawyers Guild (NLG) in the early 1950s.[35] Unlike the ABA, the NLG did not bar communists from joining, and the group attracted not only those with socialist or communist leanings but also civil-rights activists and civil libertarians.[36] In the 1950s, the NLG championed a robust understanding of the First Amendment, but the group's main push involved federally subsidized legal services for the poor.[37] In 1949, encouraged by a report issued by the Rushcliffe Committee in England, a Guild committee described privately funded legal aid as "mere charitable indulgence."[38] By contrast, as the NLG viewed it, Americans had a right to an attorney, and legal assistance represented a "categorical constitutional imperative."[39]

The ABA rejected this proposal as the "socialization" of the law[40]—in the words of Judge Richard Hartshorne, it represented a "threat to the independence of the profession."[41] While insinuating that the NLG was the "legal bulwark of the Communist Party," ABA lawyers developed a broader attack on expansive government power. In particular, ABA leaders argued that as the State expanded, individuals' constitutional rights came under fire. "Such governments," wrote Judge Robert N. Wilkin, "take property without compensation, and

35. On the conflict between the ABA and the NLG during the Cold War, see AUERBACH, *supra* note 33, at 200–36; MOLITERNO, *supra* note 33, at 59–60.

36. NAACP attorney and future Supreme Court Justice Thurgood Marshall—a strong opponent of communism—served on the NLG Board prior to 1949. *See* Ernesto Longo, *A History of America's First Jim Crow Law School Library and Staff*, 7 CONN. PUB. INT. L. J. 77, 94 (2007) ("Beginning in 1939, black lawyers were elected to the Guild's national board, and in 1943, Charles Houston and Thurgood Marshall, among others, became associate editors of the Lawyer's Guild Review."). On the NLG's ties to civil rights and civil liberties activism, see MOLITERNO, *supra* note 33, at 59–61.

37. *See* AUERBACH, *supra* note 33, at 236.

38. *Id.*

39. *See id.*

40. Robert Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 A.B.A. J. 100, 100 (1951).

41. Richard Hartshorne, *The Bar and the Indigent Criminal Defendant*, 37 A.B.A. J. 104, 104 (1951).

life without even a trial."[42]

In opposition to socialized government, ABA leaders articulated a uniquely American constitutional tradition—one that rejected the "regimentation" and socialism supposedly peddled by the NLG. American constitutionalism required respect for individualism, Christianity, and the patriarchal family.[43] In 1950, ABA President Harold J. Gallagher argued:

> The Soviet Union and its satellite states stand for the principle that the state is all powerful, that men are its mere servants. This is an atheistic concept. It ignores the human and divine dignity of man. It is a denial of the traditional concepts of the Declaration of Independence made effective in our Constitution.[44]

Praising small government and voicing concerns about expansive federal power, ABA attorneys distanced themselves from the New Deal order and from early demands for poverty rights, framing the right to life as part of a constitutional regime based on tradition, history, and protection of the nuclear family.

Despite the advances made by the ABA, struggles about the meaning of the right to life were far from over. Though attrition had almost destroyed the NLG, leaving the organization with only 600 members in 1956, a more expansive definition of the right to life reemerged at the outset of the War on Poverty.[45] The next section will explore how arguments about the right to life focused again on guarantees of government support.

42. Robert N. Wilkin, *What Are We Fighting For? The Need for Juridical Order*, 37 A.B.A. J. 1, 1 (1951).

43. On the connection between anticommunism and commitment to Christianity, small government, and the traditional family, see DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE 76 (2005); DANIEL FARBER, THE RISE AND FALL OF MODERN AMERICAN CONSERVATISM 110, 121–22 (2010).

44. Howard J. Gallagher, *Our Basic Freedoms: The President's Independence Day Address*, 36 A.B.A. J. 731, 731 (1950). For similar arguments of this kind, see *Bill of Rights Day Celebrated Here*, N. Y. TIMES, Sept. 25, 1948, at 32.

45. *See* GUENTER LEWY, THE CAUSE THAT FAILED: COMMUNISM IN AMERICAN POLITICAL LIFE 284–85 (1990).

C. During the War on Poverty, Right-to-Life Arguments Gain Momentum

In the 1960s and 1970s, as poverty lawyers brought their cases to the courts, right-to-life arguments became more expansive, sparking demands for new entitlements and welfare rights. Claims of this kind appeared as early as the 1950s. The author of a book on the right to life,[46] A. Delafield Smith, an attorney at the Office of General Counsel of the Federal Security Agency, contended in the late 1950s that social, political, and economic changes had made it necessary for the government to ensure an individual's right to make a living.[47] "The time must come," Smith explained, "when the declaration and implementation of a right to assistance . . . will lead to the enactment of a permanent self-operative system."[48] With the mobilization of welfare-rights advocates, arguments like Smith's became a centerpiece of movement advocacy. Poverty lawyers and grassroots activists began arguing inside and outside of court that the right to life guaranteed a minimum standard of economic security.

Members of the civil rights movement built on longstanding concerns about the intersection of poverty and discrimination, leveraging resources created by the War on Poverty.[49] Prior to the 1960s, Legal Aid Societies had enjoyed a virtual monopoly in poverty law services.[50] With new federal funding available for legal services for the poor, the number of poverty lawyers skyrocketed, climbing over 650 percent to

46. *See generally* A. DELAFIELD SMITH, THE RIGHT TO LIFE (1957).

47. *See* A. Delafield Smith, *Public Assistance as a Social Obligation,* 63 HARV. L. REV. 266, 288 (1949).

48. *Id.* Economist Alvin Hansen similarly argued that "[b]y and large the right to establish a business or to acquire free land and was adequate, in the nineteenth century, . . . to ensure the 'right to life, liberty, and happiness.' This is no longer the case." ALVIN H. HANSEN, ECONOMIC POLICY AND FULL EMPLOYMENT 15–16 (1947).

49. *See* FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POVERTY AND POLITICS IN MODERN AMERICA 69 (2007) ("The map of legal resources available to welfare recipients changed dramatically in the middle1960s.").

50. *See* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1965–1973 11 (1993).

2,500 in 1971.[51]

With the advent of the War on Poverty and increased federal funding, lawyers and activists used right-to-life rhetoric to demand basic necessities, welfare payments, and even access to credit. New organizations formed to advance this agenda, including law professor Edward V. Sparer's Center for Social Welfare Policy and Law, a group committed not only to providing the poor with access to routine legal services but also to guaranteeing a right to financial support.[52] Like Smith, Sparer asserted that the Constitution protected a right to live—shorthand for access to basic necessities.[53] As poverty law flourished, grassroots activists and lawyers picked up on Sparer's argument. Charles Rachlin and the legal office of the Congress for Racial Equality (CORE) began helping New York welfare recipients bring hearings to protect their rights.[54] Led by former CORE member George Wiley, the National Welfare Rights Organization (NWRO) also used the right to life in demanding access to credit.[55]

Similar rhetorical arguments soon shaped litigation in the Supreme Court. In 1968, in *King v. Smith*, attorney Martin Garbus challenged an Alabama statute denying payments under the Aid to Families with Dependent Children (AFDC) program to any woman in an extramarital sexual relationship.[56] The Court did not directly mention a right to life but struck down the Alabama statute, holding that federal law preempted it.[57] Interviewed by the *New York Times* following his victory, Garbus celebrated the demise of a law that deprived "helpless children" of their "right to life"—the AFDC payments on which so many families depended.[58] In the wake of *Smith*, the 1968 ACLU Biennial Conference passed a

51. *Id.* at 10.

52. *Id.* at 81–82.

53. *See id.* For Sparer's writings on the subject, see Edward V. Sparer, *The New Legal Aid as an Instrument of Social Change*, 1965 U. ILL. L. F. 57 (1965); Edward V. Sparer, *The Right to Welfare*, *in* THE RIGHTS OF AMERICANS: WHAT THEY ARE, WHAT THEY SHOULD BE 65 (Norman Dorsen ed., 1971).

54. *See, e.g.*, KORNBLUH, *supra* note 49, at 71; DAVIS, *supra* note 50, at 76, 92.

55. On the NWRO and the right to live, see KORNBLUH, *supra* note 49, at 126.

56. 392 U.S. 309, 314 (1968). The State deemed any man a woman was involved with outside of marriage a "substitute father." *Id.* at 311.

57. *Id.* at 326–27, 334.

58. Walter Goodman, *The Case of Mrs. Sylvester Smith: A Victory for 400,000 Children*, N. Y. TIMES, Aug. 25, 1968, at 62.

resolution stating that "income should be provided and guaranteed as a matter of right," and those present almost universally agreed "that constitutional justifications could be advanced for the theory of entitlement; [including] the right to life."[59]

The idea of a right to life spread from movement organizations to the academy. Sparer traveled around the country lecturing on a right to life that would "protect the rights of the powerless, the weak, and the dispossessed."[60] In 1969, ACLU leader and New York University law professor Norman Dorsen told the *New York Times* that Sparer's constitutional arguments "were sound legally as well as just in principle."[61] Charles Reich published a path-breaking article in the *Yale Law Journal* on the "new property," arguing that the poor sometimes had protectable interests in welfare payments and other forms of state support.[62] The work of scholars like Frank Michelman elaborated on a constitutional framework for welfare rights.[63]

Encouraged by the outcome in *King* and the flourishing of scholarship supporting their cause, poverty lawyers believed that a series of Supreme Court decisions in the 1960s signaled the justices' willingness to later recognize a substantive right to life. The Court's use of right-to-life rhetoric began in 1969, with *Shapiro v. Thompson*.[64] There, Vivian Thompson, a nineteen-year-old single mother, applied for AFDC support after moving to Hartford, Connecticut, to live with her

59. ACLU 1968 Biennial Conference, "Report on Workshop on Entitlement to Government Benefits" (June 20–25, 1968), *in* The ACLU Papers, Box 111, Folder 9, Department of Special Collections and Rare Books, Mudd Library, Princeton University.

60. Israel Shenker, *Guarantee of "Right to Live" Is Urged*, N. Y. TIMES, Sept. 28, 1969, at 40.

61. *Id.*

62. *See generally* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964); *see also* Charles Reich, *The Law of the Planned Society,* 75 YALE L.J. 1227, 1265 (1966).

63. *See* Frank Michelman, *Foreword: The Supreme Court 1968 Term—On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 11–13 (1969); Frank Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966–67 (1973). For similar arguments involving a right to live, see Bernard E. Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALB. L. REV. 210, 241–45 (1967).

64. 394 U.S. 618 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974).

mother.[65] Relying on a residency-requirement law, the State denied Thompson's request since she had not resided in state for a year at the time of her application.[66] The Supreme Court struck down the law, holding that it unconstitutionally burdened Thompson's right to travel.[67] In dicta, the Court emphasized the importance of welfare aid, "upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."[68] In 1970, the Court also handed down *Goldberg v. Kelly*, holding that welfare recipients were entitled to a hearing before the termination of benefits.[69]

Although the Court had not recognized a substantive right to life, poverty lawyers and activists were energized by their victories in *Shapiro* and *Goldberg* and continued to push for explicit recognition of the right to life. They next challenged a Maryland maximum-grant statute that capped the AFDC payment available to a family regardless of how many children required support in *Dandridge v. Williams*.[70] The *Dandridge* attorneys contended that the maximum-grant law interfered with the appellees' right to life:

> Fundamental rights include those rights basic to survival and well-being whether or not they are specifically expressed in the Constitution. Certainly, in any hierarchy of rights the right to bare necessities of life and minimal physical well-being ranks as high as the right to procreate, privacy, vote, marry or travel. Indeed, as mentioned previously, these rights presuppose the existence of a basic right to life and are dependent upon such a right to life.[71]

To the surprise of the *Dandridge* attorneys, the Court's decision in the case marked the beginning of a series of defeats that dashed some of the hopes created by *Shapiro* and *Goldberg*. The *Dandridge* Court held that the maximum-grant

65. *Id.* at 623–24.
66. *Id.*
67. *Id.* at 633–42
68. *Id.* at 627.
69. 397 U.S. 254 (1970).
70. 397 U.S. 471, 474–75 (1970).
71. Brief for Appellees at *44, Dandridge v. Williams, 397 U.S. 471 (1969) (No. 131) 1969 WL 119896 (citations omitted).

law neither conflicted with the federal Social Security Act nor violated the Equal Protection Clause, implying that future challenges to welfare laws would fail so long as "the State's action [was] rationally based and free from invidious discrimination."[72] Continuing this trend, in 1971, in *Wyman v. James*, the Court agreed that states could terminate welfare benefits if a recipient denied a caseworker access to her home.[73] In 1973, in *New York State Department of Social Services v. Dublino*, the Court upheld a work requirement more demanding than the one set forth in federal law.[74]

Nonetheless, for a variety of welfare rights activists and civil libertarians, the right to life remained a cornerstone of demands for a better standard of living for the poor. In the 1970s, in seeking access to consumer credit, members of the NWRO argued that the Constitution guaranteed Americans' basic needs.[75] A divided ACLU revisited the issue of a right to life at its 1972 Biennial Conference. Those in favor of advocating for economic rights argued that existing ACLU policies "add[ed] up to the right to an adequate standard of living."[76] Another member agreed that "[e]qual protection requires the elimination of poverty."[77] Others objected, stressing that the pursuit of a right to life would be tactically counterproductive and intellectually dishonest.[78] Ultimately, the organization voted to continue backing rights to economic security.[79]

Before the start of the abortion wars, right-to-life rhetoric remained a prominent feature of American constitutional discourse. Progressives, poverty rights lawyers, and New Dealers used the right to life to demand new protections for the poor. Anticommunists, conservatives, and members of the ABA drew on the right to life in offering their own vision of the Constitution, one focused on the importance of God and the

72. 397 U.S. at 487.

73. 400 U.S. 309 (1971).

74. 413 U.S. 405 (1973).

75. *See* KORNBLUH, *supra* note 49, at 126. For discussion of the NWRO's understanding of basic needs, see *id.* at 60; DAVIS, *supra* note 50, at 40–43.

76. ACLU, 1972 Biennial Conference Unedited Report: Economic Rights (June 10, 1972) (on file with The ACLU Papers, Box 111, Folder 9, Department of Special Collections and Rare Books, Mudd Library, Princeton University).

77. *Id.*

78. *See id.*

79. *See id.*

traditional family. Conflicts about the meaning of a right to life revealed deep social and political schisms along the lines of class, race, and ideology. The same fissures would plague the early antiabortion movement. As the next Part shows, the disagreements about the size and role of government that animated earlier fights about the right to life created a fault line in the antiabortion movement, dividing those who identified their cause with the political Right from those committed to a more responsive welfare state.

II. THE CREATION OF AN ANTIABORTION RIGHT TO LIFE

Social-movement struggles over identity—like the one that rocked the antiabortion movement—have profound stakes for groups seeking social change. Creating an identity often proves crucial for movement mobilization, empowering individual activists, and convincing them that their cause is worth pursuing.[80] Perhaps more importantly, movement identity helps to determine the recruits a movement will attract, the legal goals recruits can pursue, and the coalitions they can forge. As social movement scholars Doug McAdam and Debra Friedman argue, a movement's collective identity "will, in large part, determine both the number and kind of people who are likely to be attracted."[81]

In the mid-1960s, when states began to repeal or reform existing laws on abortion, those who would form the antiabortion movement fought intensely about how to define themselves, drawing on competing ideas about the right to life. These activists were predominantly white and Catholic, but the movement and its leadership included Americans with a variety of political beliefs and socioeconomic backgrounds, including Protestants, Jews, and other believers and non-

80. *See* Todd Schroer, *Technical Advances in Communication: The Example of White Racialist "Love Groups" and White Civil Rights Organizations*, *in* IDENTITY WORK IN SOCIAL MOVEMENTS 79 (Jo Reger et al. eds., 2008); *see also* Jane Jensen, *What's in a Name? National Movements and Public Discourse*, *in* SOCIAL MOVEMENTS AND CULTURE 107–26 (Hank Johnson et al. eds., 1995); Verta Taylor & Nancy Whittier, *Collective Identity in Social Movement Communities: Lesbian Feminist Mobilizations*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 104-130 (Aldon Morris et al. eds., 1994).

81. Doug McAdam & Debra Friedman, *Collective Identity and Activism: Networks, Choices, and The Life of a Social Movement*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 156–73 (Aldon Morris et al. eds., 1994).

believers.[82]

While agreeing that rights for the unborn child belonged to a longstanding constitutional tradition, movement members interpreted the constitutional right to life in very different ways, reflecting conflicting ideas about the size of government and the justice of the economic and legal status quo. In examining these understudied conflicts, section A focuses on activists who saw legal abortion as part of a broader attack on everything that made America unique, particularly traditional sexual mores and family values. Echoing the right-to-life rhetoric that had defined anticommunism, these abortion opponents condemned what they saw as a wave of selfishness that would undermine the family and the moral norms that had made the nation great. By contrast, section B illuminates the efforts of those who described the right to life as part of a broader protectionist, welfare agenda. These activists lobbied for laws protecting women, children, and the poor from both discrimination and financial insecurity.

This Part shows that disagreements about the meaning of the right to life created a larger rift in the antiabortion movement, as activists fought about how to link the abortion issue to other causes. Litigation—and victory in court—would change the course of internal battles dramatically. Seduced by the possibility of immediate success, movement members transformed their cause.

A. The Right to Life as a War against the Sexual Revolution

When states began reforming their abortion laws, some critics predicted that any change would unleash a wave of sexual promiscuity.[83] Arguments about illicit sex reflected a worldview that was centered on opposition to contraception, homosexuality, and the sexual revolution. While often citing

82. On the diversity of the movement see ZIAD MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS 192 (2008); Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE (Donald T. Critchlow ed., 1996).

83. *See* Frank Ayd, Jr., *Liberal Abortion Laws*, AMERICA, Feb. 1, 1969, at 130–32; CHARLES RICE, THE VANISHING RIGHT TO LIVE: AN APPEAL FOR A RENEWED REVERENCE FOR LIFE 125, 134 (1969).

Catholic doctrine, these activists echoed earlier understandings of the right to life, particularly anticommunist arguments about what sets Americans apart. According to these activists, a commitment to marriage, to the nuclear family, and to heterosexuality defined American constitutional tradition. Abortion threatened that tradition by nurturing a culture of selfishness, individualism, sexual experimentation, and pleasure-seeking.

Theo Stearns, a former hippie and the founder of Catholics United for Life, a group that picketed California abortion clinics, saw a connection between contraception and abortion because both involved "materialism and a mechanization of sex."[84] Charles Rice, an activist and law professor at Fordham and later Notre Dame, also argued that defending the right to life meant battling tolerance of homosexuality and birth control.[85] Rice condemned not only abortion but also "the philosophy of unrestraint" and "pursuit of pleasure" that he thought had torn the nation apart.[86] He argued that Americans should oppose abortion "not because it is sinful, according to the edict of any particular religion, but because it poses a clear and present danger to the endurance of the family as the basic unit of society."[87]

In seeking to protect the traditional family, some movement members identified a causal connection between the pursuit of pleasure, contraception, and abortion. Father Paul Marx, the founder of the antiabortion group Human Life International, explained this "contraceptive mentality" thesis as follows: "[T]he resolve to prevent a child from coming to be is often sufficiently strong that one will eliminate the child whose conception is not prevented."[88]

Others pinpointed what they saw as a cultural decline tied to the sexual revolution. Abortion opponent Dennis Caddy explained: "What we once termed 'selfishness' is now known as 'self-actualization,' 'self-fulfillment,' or some other euphemism."[89] Noted antiabortion scholar John Noonan

84. MICHAEL W. CUNEO, THE SMOKE OF SATAN: CONSERVATIVE AND TRADITIONALIST DISSENT IN CONTEMPORARY AMERICAN CATHOLICISM 64 (1999).

85. *See generally* RICE, *supra* note 83, at 125, 134.

86. *Id.* at 125.

87. *Id.* at 134.

88. CUNEO, *supra* note 84, at 62.

89. Dennis L. Caddy, *Is Self-Actualization Actually Selfishness?*, NAT'L PRO-

similarly argued that Americans had pursued legal abortion "because they wanted freedom, particularly sexual freedom."[90] Noonan explicitly tied the rise of abortion rights to changing gender roles, asserting that the momentum of the opposition grew because of "antagonism between the sexes."[91] The Society for a Christian Commonwealth (SCC), an absolutist group, summarized this understanding of the cause: "The SCC is dedicated to convincing all Americans that the attack on life in whatever form—birth control, abortion, euthanasia, genetic manipulation, denigration of sex—is wrong."[92]

Certainly, these hardliners drew on Catholic religious teachings about sex and contraception, and the hierarchy of the Catholic Church played a defining role in organizing and supporting antiabortion groups.[93] Nonetheless, hardliners' understanding of the antiabortion cause offered a deeper attack on shifting sexual mores and gender norms—one grounded in earlier anticommunist and pro-family rhetoric. The SCC's flagship publication, *Triumph*, contended: "The Soviet Union is a formally atheistic country, and while some Americans have taken comfort in the difference, they should not."[94]

Activists in organizations like the SCC reaffirmed that the right to life and all it represented played a crucial role in distinguishing democracy from communism. By extension, when women "assert[ed] the power to control and manipulate human life," women destroyed everything that made American

LIFE J. (1979), at 14, *in* The National Pro-Life Journal Folder, The Wilcox Collection, University of Kansas.

90. John Noonan, Jr., *Abortion in Our Culture*, NAT'L PRO-LIFE J. (1979), at 10–11 (on file with The National Pro-Life Journal Folder, The Wilcox Collection, University of Kansas).

91. *Id.*

92. SOCIETY FOR A CHRISTIAN COMMONWEALTH, PAMPHLET, "TOWARD A CHRISTIAN AMERICA: 1970, 1971 (n. d.) (on file with The Society for a Christian Commonwealth Folder, The Wilcox Collection, University of Kansas).

93. Bozell's SCC relied on a then-marginalized millenialist vision of Catholicism. *See* CAROL MASON, KILLING FOR LIFE: THE APOCALYPTIC NARRATIVE OF PRO-LIFE POLITICS 139 (2002). Other hardliners echoed the idea of a contraceptive mentality formulated by Pope John Paul II. *See* CUNEO, *supra* note 84, at 278–80. For discussion of Pope John Paul II's vision of a contraceptive mentality, see Arland K, Nichols, *Abortion and the Contraceptive Mentality*, CRISIS MAG., Jan. 21, 2013, *available at* http://www.crisismagazine.com/2013/abortion-and-the-contraceptive-mentality, *archived at* http://perma.cc/J9AQ-PJ6W.

94. MASON, *supra* note 93, at 142 (quoting Brent Bozell, *The Confessional Tribe*, TRIUMPH, July 1970, at 11–15).

democracy better than communism.[95] As one attorney wrote in 1963, these movement members connected abortion to "[t]he [in]stability of the marriage bond, . . . the corruption of youth, [and] the spread of sexual promiscuity."[96] Opposing abortion meant recognizing that "the state can, should, and does in fact legislate in the field of public morality."[97]

To advance their vision, activists formed their own organizations, including Brent Bozell's Society for a Christian Commonwealth, Randy Engel's United States Coalition for Life, and Theo Stearns' Catholics United for Life.[98] At other times, activists like Rice, Engel, and Bozell fought to set the agenda for larger, more influential groups like Americans United for Life and the National Right to Life Committee.[99] However, within organizations like the National Right to Life Committee and Americans United for Life, hardliners met resistance from advocates who voiced a very different vision of the right to life. Whether working on their own or in larger groups, as Section B shows, hardliners clashed with activists who understood the right to life—and the role of government in redistributing wealth—in very different terms.

B. The Right to Life as Protection for the Vulnerable and the Dependent

A second faction created a different right-to-life discourse, one that resembled New Deal arguments about economic security and protection of the vulnerable. Writing in 1972, Catholic feminist Sidney Callahan condemned abortion but endorsed broader support for the vulnerable, contending that "[t]he whole society has a responsibility for the next generation," regardless of how "immature, helpless, or different

95. *Id.*

96. William J. Kenealy, *Law and Morals*, 9 CATH. LAW 200, 204 (1963).

97. *Id.*

98. On the Society for a Christian Commonwealth, see MASON, *supra* note 93, at 140–49; MARK D. POPOWSKI, THE RISE AND FALL OF TRIUMPH: THE HISTORY OF A RADICAL ROMAN CATHOLIC MAGAZINE, 1966–1976 104, 126, 139, 214–16 (2012). For the USCL's account of its own history, see *Early History*, U.S. COALITION FOR LIFE, http://www.uscl.info/index.php?pr=History (last visited Jan. 25, 2014), *archived at* http://perma.cc/6BT3-5C9X. On Catholics United For Life, see CUNEO, *supra* note 84, at 64–65.

99. In chronicling battles over birth control in these organizations, Part II later discusses conservatives' influence over these groups.

[a person] is from white middle class adult males who have heretofore preempted the right to be fully human."[100]

After the Supreme Court decided *Roe v. Wade*, activists began insisting that the government's failure to support the poor and vulnerable forced some women to choose abortion. In July 1973, at the annual National Right to Life Convention, Senator Mark Hatfield (R-OR) told colleagues in the antiabortion movement:

> If we are to be for life, then we will be in the vanguard of those working to ensure that no human life comes into being ever need be threatened by abortion because of society's negligence to provide for the need of all its citizens. We are the ones who must guarantee that the critical conditions of life—for food, shelter, health, and education—are available to every person in our society . . . .[101]

Some of those who shared Hatfield's perspective drew a causal connection between abortion and an inadequate social safety net. They argued that women resorted to abortion only when denied the benefits and economic security they deserved. As Reverend Jesse Jackson, an early ally of the antiabortion movement, explained: "Politicians argue for abortion largely because they do not want to spend the necessary money to feed, clothe, and educate more people."[102]

These activists also believed that both unborn children and all poor people—particularly unwed mothers—had a right to state support. Influential Minnesota activist Fred Mecklenburg articulated this position:

> For the woman who becomes pregnant . . . , we need positive programs of assistance in providing first-rate medical, psychological, financial, and social assistance . . . . It is also

100. Sidney Callahan, *Feminist as Antiabortionist*, NAT'L CATH. REP., Apr. 7, 1972, at 11.

101. Press Release, From the Office of Senator Mark O. Hatfield (June 10, 1973), *in* The American Citizens Concerned for Life Papers, Box 4, National Right to Life Convention Folder.

102. Jesse Jackson, *How We Respect Life Is Over-Riding Moral Issue*, NAT'L RIGHT TO LIFE NEWS, Jan. 1977, at 5, *in* The National Right to Life News Collection, 1977 Box, Dr. Joseph R. Stanton Human Life Issues Library and Resource Center, Sisters for Life Convent, Bronx, New York.

> the only alternative which offers any possibility of success that will still preserve the basic values of respect for life that characterizes American democracy.[103]

Mecklenburg favored welfare rights both as a strategy for reducing the need for abortion and as a necessary extension of the right to life. Judith Fink, a founding member of the National Right to Life Committee (NRLC) and prominent activist, shared Mecklenburg's perspective. She called on her colleagues to support legislation against pregnancy discrimination, urging abortion opponents to help "change discriminatory insurance practices, improve supportive services for mothers and babies, and help pregnant workers with disability payments . . . ."[104] Fink believed that such measures would both prevent abortion and help poor women, and she argued that such laws represented "the minimum that must be done if we truly care about enhancing the conditions of life [for mothers and children]."[105]

Not surprisingly, the very different ideas of a right to life dividing welfare supporters from hardliners led movement members to embrace different legal reforms and policy objectives. Rather than working with conservative Catholics or Protestants, Mecklenburg and her colleagues often sided with Planned Parenthood and feminist groups in demanding legislation that outlawed pregnancy discrimination or guaranteed financial support for adolescent mothers.[106] As section C demonstrates next, political and legal disagreements about contraception brought fights about the right to life to the surface in explosive new ways.

103. Dr. Fred Mecklenburg, *Minnesota Should Seek Sexual Responsibility, Not "Easier" Abortions*, *in* The American Citizens Concerned for Life Papers, Box 23, Administrative File: People, General.

104. Press Release, American Citizens Concerned for Life, Pro-Life Group Says General Electric Corp. "Encourages Abortion" in *Gilbert* Case; Calls for Support of Legislation to Provide Pregnancy Disability Payments (Mar. 15, 1977), *in* The American Citizens Concerned for Life Papers, Box 16, Press Releases Folder.

105. Press Release, *supra* note 101, at 1.

106. Mary Ziegler, *Beyond Backlash: Legal History, Backlash, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969, 991–95 (2014).

C. Battles About Contraception Expose Fissures in the Antiabortion Movement

Clashes about birth control brought to the surface longstanding disagreements about the antiabortion movement's identity. Hardliners saw access to contraception as the reason so many Americans had sought out abortion. Moreover, for these abortion opponents, birth control and sexual pleasure reflected a dangerous form of selfishness that the movement had to combat. By contrast, activists like Judy Fink and Marjory Mecklenburg saw birth control as one resource the government should provide for women struggling to make a living. The battle over birth control exposed deeper questions about movement identity, objectives, and ideology. Should the antiabortion movement stand against the sexual revolution, or should defending the right to life primarily involve efforts to protect the economic security of all weak and vulnerable Americans?

In 1972, the birth control issue impacted Americans United for Life (AUL), the group that would become the leading antiabortion, public-interest litigation organization.[107] Antiabortion activists organized the AUL to educate the public about abortion and to signal the movement's educational pedigree and religious diversity.[108] Hardliners like Brent Bozell and Charles Rice played an instrumental role in the AUL's founding, as did ACLU member George Huntston Williams and Marjory Mecklenburg, the wife of Fred Mecklenburg and the Chairman of the NRLC.[109] However, even hardliners split on issues such as access to birth control and exceptional

107. *See* ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 16 (2008) (discussing the origins of the AUL's litigation efforts).

108. *See* Americans United for Life, *A Declaration of Purpose* (n. d.), *in* The Americans United for Life Papers, Box 91, Executive File, Concordia Seminary, Lutheran Church Missouri Synod (explaining that the organization's purpose was to demonstrate and draw attention to the evils of all anti-life policies); Fundraising Letter, Americans United for Life, (Aug. 10, 1972) *in* The Americans United for Life Papers, Box 91, Executive File, Concordia Seminary, Lutheran Church Missouri Synod.

109. For a list of the early AUL leadership, see Letter from George Huntston Williams to AUL Directors (June 19, 1972), *in* The Americans United for Life Papers, Box 91, Executive File, Concordia Seminary, Lutheran Church Missouri Synod.

circumstance abortions.

In detailing his opposition to "abortion on demand," Williams wrote a book chapter arguing in favor of contraception and sex education.[110] Since Williams predicated his opposition to abortion on a theory of sexual responsibility, he also favored exceptions to abortion bans under certain circumstances, including rape and incest.[111]

Bozell wrote a letter to sympathetic AUL members, including Charles Rice, arguing that the group was not truly pro-life because some members favored exceptions to abortion bans and access to "abortifacient" contraceptives.[112] Rice shared Bozell's anger. Dissatisfied that the AUL would not take a strong enough stand against the pill, and angry that the organization would not vote for a resolution opposing all abortion without exception, he and several of his allies resigned, while activists who favored birth control, like Marjory Mecklenburg and Williams, gained more influence.[113]

The fight over birth control and movement identity spread across movement organizations. The NRLC, the nation's largest organization, found itself deadlocked, split between supporters of Catholic President Edward Golden and Marjory Mecklenburg, a staunch supporter of birth control.[114] Hardliner Randy Engel called for Mecklenburg's expulsion from the group, arguing that she and her husband had called "for Uncle Sam to come into the bedrooms of Americans and assume a more dominant role than he already has."[115] Although resoundingly re-elected to the NRLC Executive Committee, Mecklenburg narrowly lost the presidential campaign to

110. *See* George Huntston Williams, *The Sacred Condominium*, *in* THE MORALITY OF ABORTION 169–71 (John T. Noonan ed., 1970).

111. *See id.*

112. Letter from Brent Bozell to John F. Hillebrand (Mar. 3, 1972), *in* The Americans United for Life Papers, Box 91, Executive File, Concordia Seminary, Lutheran Church Missouri Synod.

113. *See* PATRICK ALITT, CATHOLIC INTELLECTUALS AND CONSERVATIVE POLITICS IN AMERICA 187 (1993).

114. On the divisions between Golden and Mecklenburg, see WILLIAM P. MALONEY, THE OWL IN THE SAGUARO: REPORT TO OFFICERS AND BOARD OF DIRECTORS OF THE RIGHT TO LIFE COMMITTEE OF NEW MEXICO 5 (1974), *in* The American Citizens Concerned for Life Papers, Box 8, 1974 NRLC Board and Executive Committee Folder 1.

115. Letter from Randy Engel to NRLC Board of Directors (Mar. 30, 1974), *in* The American Citizens Concerned for Life Papers, Box 8, 1974 NRLC Board and Executive Committee Folder 1.

Golden and resigned to lead an organization that better reflected her view of the antiabortion cause.[116]

With activists championing radically different visions of the movement identity, abortion law and politics remained highly unpredictable throughout the later 1970s. Would the antiabortion movement align with the political Right or Left? Would activists maintain a single-issue focus? Or would abortion opponents instead embrace one of the broader agendas promoted by either hardliners or welfare supporters?

New absolutist organizations, like the American Life League (ALL) and the Pro-Life Action League (PLAL), formed to reshape the law on birth control, sex education, and the Equal Rights Amendment.[117] In 1977, Judie Brown, an abortion opponent who went on to found the ALL, spearheaded efforts to pass the first NRLC resolution against a constitutional sex-equality guarantee.[118] Later, Brown and her allies pushed for Ronald Reagan's proposal to include Title X in a state block-grant program, allowing conservatives at the state level to restrict or defund family planning.[119] Brown and her colleagues called on the movement to wage war on "pill-pushing Planned Parenthood."[120] As she explained:

> The real choice that adolescents have, who have been brainwashed by the 'new' sexual value system of Planned

116. On the fight surrounding Mecklenburg's election, see Meeting Minutes, NRLC Board of Directors 11 (June 7–9, 1974), *in* The American Citizens Concerned for Life Papers, Box 8, 1974 NRLC Board and Executive Committee Folder 1. On Mecklenburg's resignation and decision to join the ACCL, see Letter from Marjory Mecklenburg to NRLC Board of Directors (Oct. 8, 1974), *in* The American Citizens Concerned for Life Papers, Box 8, 1974 NRLC Board and Executive Committee Folder 1.

117. On the formation and positions of the ALL, see Michael W. Cuneo, *Life Battles: The Rise of Catholic Militancy Within the American Pro-Life Movement*, *in* BEING RIGHT: CONSERVATIVE CATHOLICS IN AMERICA 280 (Mary Jo Weaver & R. Scott Appleby eds., 1995); CUNEO, *supra* note 84, at 61–66. On the PLAL, see CUNEO, *supra* note 84, at 67–68, 76, 78; JAMES RISEN & JUDY THOMAS, THE WRATH OF ANGELS: THE AMERICAN ABORTION WAR 67, 111–13 (1998).

118. *See* Letter from Judie Brown to Recipients of First Class Mailing (Oct. 17, 1977), *in* The American Citizens Concerned for Life Papers, Box 11, 1977 NRLC Folder 7.

119. On the ALL's Title X campaign, see ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S 381 (2012). On the ALL's view at the time, see *The Pill and Politics*, A.L.L. ABOUT NEWS, Aug. 1981, *in* The A.L.L. About News Folder, Wilcox Collection, University of Kansas.

120. *The Pill and Politics*, *supra* note 119.

> Parenthood and the drug industry, is a choice between the acknowledged risks of oral contraceptives and abortion.[121]

Whereas absolutists like Brown called on the movement to destroy Planned Parenthood, those who connected welfare rights with opposition to abortion joined with family planning supporters to push protective legislation for the poor, pregnant women, children, and unwed mothers. Groups like Marjory Mecklenburg's American Citizens Concerned for Life (ACCL) lobbied with Planned Parenthood for the School Age Mother and Child Act of 1975, an ultimately unsuccessful bill that would have funded childcare, health care, family planning, and other services for adolescent mothers and children.[122] The group again sided with feminists in promoting the Pregnancy Discrimination Act of 1978, supporting the law with or without an exception for post-abortion leave for women.[123] In 1978, the ACCL helped to pass the Adolescent Health, Services, Pregnancy Prevention and Care Act, a law that provided extensive support and preventative services for young mothers.[124] These laws reflected a particularly influential vision of the meaning of the right to life—one built partly on efforts to expand the welfare state and the right to make a

121. *Teenagers, 'Responsible Sex Education,' and Contraceptives*, A.L.L. ABOUT ISSUES, Apr. 1981, *in* The A.L.L. About Issues Folder, Wilcox Collection, University of Kansas.

122. On the ACCL's support, see *School Age Mother and Child Health Act of 1975: Hearing Before the Subcomm. on Health of the S. Comm. of Labor and Welfare*, 94th Cong. 499 (1975) (statement of Marjory Mecklenburg). For a description of the proposed law, see *id.* at 1–2, 10–16. For Planned Parenthood's support of the law, *see id.* at 552–81 (statement of Jack Hood Vaughn of Planned Parenthood) (supporting the Act).

123. *See Discrimination on the Basis of Pregnancy: Hearings on S. 995 Before the Subcomm. on Labor Standards of the S. Comm. on Human Res.*, 95th Cong. 432–41 (1977) (statement of Jacqueline Nolan-Haley of American Citizens Concerned for Life) (showing group's support for the Act); *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy Part 2: Hearing on H.R. 5055 & H.R. 6075 Before the H. Subcomm. on Emp't Opportunities of the H. Comm. on Educ. and Labor*, 95th Cong. 66 (1977) (statement of Dr. Dorothy Czarnecki of American Citizens Concerned for Life); Letter from Marjory Mecklenburg to Representative James Tonry 1 (Mar. 8, 1978), *in* The American Citizens Concerned for Life Papers, Box 19, Fundraising Folder (explaining that the ACCL supported the PDA "as a pro-life bill with or without an abortion amendment").

124. *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., 422–40 (1978) (statement of Marjory Mecklenburg) (supporting the Act); *see id.* at 192–93 (statement of Faye Wattleton of Planned Parenthood).

living. The ACCL identified the root of the abortion problem as follows:

> [I]n the United States today by almost any standard 25 million people are poor, and discrimination against minority groups seems to be endemic. In practice, liberty and property are more valued than someone's life.[125]

The solution, in the view of ACCL members, involved more protective legislation, more robust antidiscrimination protections for women, and a better social safety net for the poor. As the group's official materials explained: "If troubled pregnant women are to have an opportunity to give birth to healthy babies we must create a society that cares about both and is willing to extend a hand of love and support."[126]

In the evolution of antiabortion politics, intra-movement identity contests helped to determine not only whether activists could pursue social change but also what kinds of shifts advocates could demand. As Part III will show, litigation further changed the course of internal identity struggles. Convinced that the movement stood the greatest chance of making progress in the courts, activists not only channeled more resources into litigation, but also reworked other arguments and plans to advance court-oriented strategies. To be sure, litigation represented only one of many factors—including political party realignment, the emergence of the New Right and the Religious Right, and even the personalities and biographies of different leaders—that set the terms of internal battles. Nonetheless, as Part III shows, litigation can transform internal fights about what a social movement means.

III. IDENTITY AND VICTORIES IN COURT

Unwilling to waver from their commitment to abortion bans with no exceptions, movement attorneys had consistently asked the courts to recognize rights of the fetus or to overrule

125. William C. Hunt & Joseph A. Lampe, *Strategy Considerations for ACCL Involvement in Abortion and Related Issues* 1–7 (n. d.), *in* The American Citizens Concerned for Life Papers, Box 18, 1977 Strategy Folder.

126. *ACCL Philosophy and Objectives* (n. d.), *in* The American Citizens Concerned for Life Papers, Box 17, ACCL Philosophy and Objectives Folder.

Roe outright.[127] However, in the mid-1970s, a group of lawyers working in Chicago began experimenting with a different litigation strategy. Rather than trying to convince the courts to recognize a constitutional right to life, these attorneys contended that *Roe v. Wade* protected only a narrow right to abortion. Even under *Roe*, these attorneys stressed that many abortion restrictions passed constitutional muster. Activists first hoped that the strategy would give legislators more freedom to restrict abortion. In the long term, by changing how the courts interpreted the *Roe* decision, antiabortion attorneys wanted to present it as unworkable and confusing. In particular, focusing on *Roe*'s flaws allowed attorneys to make the case that the decision represented a particularly egregious example of judicial overreach and the abuse of federal power. Highlighting the problems with the decision would set the stage for its overruling.

With the movement now focused on overruling *Roe,* activists made changes in the political arena, showcasing the supposed tyranny of the Court and thereby creating an argument that naturally appealed to conservative groups that were already angry about big government. And as abortion opponents focused more heavily on reshaping the Supreme Court, coalition politics became more important than ever. With powerful political allies, antiabortion activists hoped to exert more influence over both presidential elections and judicial selections. Starting in the early 1980s, movement members could most effectively influence the nomination process by siding with newly mobilized social conservatives. Litigation helped to transform the movement's strategy outside of court as well as in it. The movement's emphasis on litigation played an important part in pushing the movement to the political right.

In the mid-1970s, as section A explores, antiabortion attorneys refined a new incremental litigation strategy designed to narrow abortion rights and convince the public of the *Roe* Court's activism. Section B chronicles how activists and attorneys reworked this approach to litigation, making it into an overarching plan of attack for the movement. Section C fleshes out the profound political consequences abortion

127. *See generally* Ziegler, *supra* note 106.

opponents faced after building movement tactics around success in court.

A. The Birth of a Litigation Strategy

Litigation was nothing new to the antiabortion movement of the 1970s. In addition to defending existing abortion bans, some antiabortion activists went on the offensive, sometimes seeking the appointment of a guardian ad litem to represent fetuses scheduled for abortion.[128] After 1973, abortion opponents instead prioritized an Article V constitutional amendment—one that would rewrite the Fourteenth Amendment to outlaw all abortions.[129] Some movement members, including prominent movement attorney, NRLC and AUL leader Dennis Horan, questioned the wisdom of this tactic.[130] More fundamentally, Horan argued for the value of "a National Public Interest law firm, which would . . . spearhead litigation toward the ultimate goal of reversing *Roe v. Wade*."[131]

In trying to find new ways to attack the *Roe* decision, the AUL would become a very different organization, one focused on gradual changes in the courts. Quietly, the group honed a new litigation strategy that it debuted during the litigation of *Planned Parenthood of Central Missouri v. Danforth*.[132] *Danforth* involved a multi-restriction Missouri statute, requiring spousal consent, parental consultation, and written

128. The guardian ad litem cases included Byrn v. N.Y.C. Health & Hosps. Corp., 335 N.Y.S. 2d 390 (App. Div. 1972). For more on the *Byrn* case, see Robert E. Tomasson, *A Lawyer Challenges the Abortion Law*, N. Y. TIMES, Dec. 4, 1971, at 29; *Order Is Sought in Abortion Suit: Judge Is Asked to Put Curb on Practice During Trial*, N.Y. TIMES, Dec. 10, 1971, at 32; Judy Klemesrud, *He's the Legal Guardian for the Fetuses About to Be Aborted*, N.Y. TIMES, Dec. 17, 1972, at 48. For another key example of a guardian-ad-litem case, see Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971).

129. On the emphasis abortion opponents put on an Article V amendment in the mid-1970s, see Cassidy, *supra* note 82, at 146; PATRICIA MILLER, GOOD CATHOLICS: THE BATTLE OVER ABORTION IN THE CATHOLIC CHURCH 73 (2014).

130. On Horan's skepticism about antiabortion preoccupation with a constitutional amendment, see Letter from Dennis Horan to NRLC Policy Committee 1–3 (Sept. 5, 1973), *in* The American Citizens Concerned for Life Papers, Box 8, 1973 NRLC Folder 4 (telling colleagues that an amendment would "solve only some, but not all, of our problems" and would require "further state legislation in order to plug the loopholes").

131. *Id.*

132. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

consent before a woman could have an abortion.[133] The AUL intervened in one of the cases consolidated with *Danforth*, and an AUL board member, Dr. Eugene Diamond, was appointed as guardian ad litem for fetuses impacted by a similar Illinois antiabortion statute.[134] While the AUL's amicus brief in *Danforth* repeated many conventional antiabortion constitutional arguments,[135] the group emphasized that "each justice who joined in this Honorable Court's opinion in Roe v. Wade . . . recognized that the right of privacy . . . is subject to limitation."[136] The brief assumed that *Roe* required strict judicial scrutiny of all abortion restrictions but nonetheless argued that some regulations were narrowly tailored to serve an important state interest.[137] The brief highlighted dicta in *Roe* indicating that the abortion decision was stressful and high-stakes.[138] Informed-consent regulations survived strict scrutiny because "the requirement in no way infringes on [the woman's] right to have an abortion and does not regulate the procedure itself."[139]

Similarly, in defending Missouri's spousal-consent measure, the AUL emphasized that the Court had not decided the issue of fathers' rights.[140] "There is nothing in Roe which precludes the possibility that the state may raise separate 'compelling' interests beyond the two raised by the statutes of Georgia and Texas of Roe and Doe," the brief argued. "[H]ere, the state's interest is in [protecting] 'the relation integrity,' 'bilateral loyalty,' 'mutuality,' and 'harmony in living' of the marriage relation through balancing the procreative and parental rights of husband and wife."[141]

The Court's decision in *Danforth* represented surprising

133. *See id.* at 58–59.

134. *See* Motion and Brief, Amicus Curiae of Dr. Eugene Diamond and Ams. United for Life, Inc., in Support of Appellees in 74-1151 and Appellants in 74-1419 at *2–4, *Danforth*, 428 U.S. 52 (Nos. 74-1151, 74-1419), 1976 WL 178721.

135. *See id.* at *35–42.

136. *See id.* at *45.

137. *See id.* at *46 ("The issue before this Honorable Court, then, is whether the statutory provisions being challenged are protective of an important or 'compelling' state interest and whether they are 'narrowly drawn to express only the legitimate state interests at stake.'").

138. *See id.* at *83–85.

139. *Id.* at *12.

140. *See id.* at *12–13.

141. *Id.* In *Roe*, the Court highlighted state interests in fetal life and maternal health. *See* Roe v. Wade, 410 U.S. 113, 163 (1973).

progress for the antiabortion movement. The Court upheld several parts of the Missouri statute.[142] The majority rejected a challenge to the statute's definition of viability even though it made no mention of the *Roe* trimester framework.[143] The Court also drew on the AUL's logic in upholding a prior-consent requirement. "The decision to abort . . . is an important, and often a stressful one," Justice Blackmun wrote for the majority, "and it is desirable and imperative that it be made with full knowledge of its nature and consequences."[144] Even in striking down other parts of the statute, the Court framed these measures as extraordinarily broad—awarding a functional veto to either a woman's spouse or parents.[145]

The AUL built on the advances made in *Danforth* in a series of cases about one of the most intensely contested legal issues of the 1970s—the constitutionality of laws limiting the public funding of abortion. In 1976, Congress passed the Hyde Amendment, a ban on the use of federal Medicaid funding for most abortions, and many states followed suit.[146] In *Maher v. Roe*, the Court considered the constitutionality of a Connecticut law authorizing Medicaid funding only for first-trimester abortions that were deemed "medically necessary."[147] *Poelker v. Doe* involved a St. Louis policy that prevented the performance of elective abortions in city-owned hospitals.[148] In a final case, *Beal v. Doe*, the Court addressed whether Title XIX of the federal Social Security Act required states participating in the Medicaid program to fund abortions not certified as medically necessary by a physician.[149]

The AUL's brief in *Poelker* elaborated on the strategy pioneered in *Danforth*—claiming deference to *Roe* while rewriting its protections. First, the brief argued that the Court had assigned the abortion right partly to the physician, who could refuse to perform the procedure for any reason.[150] Under

142. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 63–65 (1976).

143. *See id.* at 63–65.

144. *Id.* at 67.

145. *See id.* at 69, 75.

146. Pub. L. No. 94-439, 209, 90 Stat. 1418, 1434 (1976).

147. Maher v. Roe, 432 U.S. 464, 470–77 (1977).

148. *See* Poelker v. Doe, 432 U.S. 519, 521–22 (1977).

149. *See* Beal v. Doe, 432 U.S. 438, 445–48 (1977).

150. *See* Motion and Brief, Amicus Curiae of Dr. Eugene Diamond and Ams. United for Life, Inc., in Support of Appellees in 74-1151 and Appellants in 74-1419

Roe, the *Poelker* brief argued that "the abortion decision is a medical decision that cannot be effectuated unless it is arrived at in consultation and in agreement with a physician."[151] Women had no right to access abortion. Rather, *Roe* gave women nothing more than the right to ask someone else to perform the procedure.[152] As the brief framed it, the Court had recognized a right belonging to a "woman in consultation with her physician, not the woman alone demanding of her physician."[153]

A second and ultimately more successful argument exploited the idea that abortion rights involved freedom from state interference and nothing more. As the AUL Legal Defense and Education Fund brief explained: "If the abortion decision is so private . . . it follows that government shall not itself be compelled to respond to the demand of the exercise of that right."[154] If a woman could not afford an abortion or required the services of a public hospital, the State had no constitutional obligation to help her.[155]

Maher, the lead case, relied on privacy reasoning similar to the AUL's to cut back on abortion rights. The majority quickly disposed of any argument involving discrimination on the basis of wealth or class.[156] In discussing a potential violation of the woman's right to privacy, the Court, like the AUL brief, emphasized that "there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity . . . ."[157] As the *Maher* Court framed it, poor women carried financial burdens that had little to do with the State. "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth," the majority explained.[158] "[S]he continues as before to be dependent on

at *7, 15, Planned Parenthood of Cent. Mo. v. Danforth 428 U.S. 52 (Nos. 74-1151, 74-1419), 1976 WL 178721.

151. *See* Motion and Brief, Amicus Curiae of Ams. United for Life, Inc. in Support of Petitioner John H. Poelker at 7, *Poelker* 432 U.S. 519 (No. 75-442).

152. *Id.*

153. *Id.*

154. *See* Brief for Ams. United for Life as Amicus Curiae Supporting Petitioner at 17, *Poelker* 432 U.S. 519 (No. 01-1015).

155. *See id.*

156. Maher v. Roe, 432 U.S. 464, 475 (1977).

157. *Id.*

158. *Id.* at 474.

private sources for the service she desires."[159] *Maher* followed the AUL brief in describing abortion—and perhaps privacy rights more broadly—as purely negative rights. If women enjoyed nothing more than freedom from state meddling, the State could deny poor women abortion funding with impunity.

Poelker and *Beal* picked up on the theme set out in *Maher*. In *Poelker*, the Court upheld the St. Louis ban on abortions in public hospitals, reasoning that the question presented was "identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth."[160] *Beal* concluded that state Medicaid bans did not conflict with the federal Social Security Act.[161] By emphasizing a narrow interpretation of *Roe* and asking only for incremental change, the AUL seemed to have made a substantial advance in the courts.

In antiabortion circles, *Maher*, *Poelker*, and *Beal* seemed to represent a crucial turning point. AUL leader Dr. Joseph Stanton used these victories in arguing that litigation was "the most important aspect of the pro-life movement at this time."[162] Mildred Jefferson, then the president of the largest national antiabortion organization, urged "[e]veryone who speaks in the right to life movement or who participates in the educational effort in any way" to read *Maher*, *Beal*, and *Poelker*.[163] The *National Right to Life News* described the 1977 wins in the Supreme Court as "historic."[164] Delighted by the success of its litigation strategies, the AUL redefined itself, elevating an attorney to the position of executive director and recognizing a "change in the thrust of the organization."[165] What had been an

159. *Id.*

160. *Poelker*, 432 U.S. at 521.

161. Beal v. Doe, 432 U.S. 438, 447–48 (1977).

162. Letter from Dr. Joseph Stanton to AUL Board of Directors 1 (Aug. 1977), *in* The George Huntston Williams Papers, Box 5, Folder 7, Andover-Harvard Theological Library, Harvard Divinity School.

163. Mildred Jefferson, *Lifelines*, NAT'L RIGHT TO LIFE NEWS, Aug. 17, 1977, at 9, *in* The National Right to Life News Collection, 1977 Box, Dr. Joseph R. Stanton Human Life Issues Library and Resource Center, Sisters for Life Convent, Bronx, New York.

164. Liz Jeffries, *Court Rules Funding Not Required*, NAT'L RIGHT TO LIFE NEWS, Aug. 17, 1977, at 1, 3, *in* The National Right to Life News Collection, 1977 Box, Dr. Joseph R. Stanton Human Life Issues Library and Resource Center, Sisters for Life Convent, Bronx, New York.

165. AUL Board of Directors Meeting Minutes 4–6 (Oct. 29, 1977), *in* The George Huntston Williams Papers, Box 5, Folder 7, Andover-Harvard Theological

educational organization now focused on incremental legal change.

B. Incrementalism Becomes an Overarching Plan of Attack

The success of incremental litigation encouraged the antiabortion movement as a whole to change direction, turning away from efforts to amend the Constitution or create direct protections for a right to life. The NRLC used the victories in *Maher* and *Poelker* to raise as much as $30,000—an extraordinary amount of money for an organization reportedly $25,000 in debt during that period.[166] Attorneys and political operatives across movement organizations drew on these victories in setting forth a new strategy. Rather than focusing solely on a fetal-protective Article V amendment, movement members began prioritizing efforts to chip away at *Roe* itself. As had been the case in *Maher*, *Poelker*, and *Beal*, activists could push through laws at the state and city level that would limit access to abortion.[167] Then, movement attorneys could persuade the Supreme Court to uphold those regulations. This strategy would, in the words of litigator James Bopp, Jr., give the "states . . . considerable latitude to regulate abortions short of prohibition."[168]

Movement attorneys hoped to reduce the number of abortions performed and convince women to forswear the

Library, Harvard Divinity School.

166. On the amount of money raised using the *Maher* and *Poelker* litigation, see *id.* at 3, 8. On the NRLC's reported debt in the period, see CONNIE PAIGE, THE RIGHT TO LIFERS: WHO THEY ARE, HOW THEY OPERATE, WHERE THEY GET THEIR MONEY 87 (1983).

167. For antiabortion accounts of this strategy, see James Bopp, Jr., *Akron Analysis*, NAT'L RIGHT TO LIFE NEWS, Oct. 10, 1979, at 3, *in* The National Right to Life News Collection, 1979 Box, Dr. Joseph R. Stanton Human Life Issues Library and Resource Center, Sisters for Life Convent, Bronx, New York; James Bopp, Jr., *Akron Type Laws Buoyed by Court Decisions*, NAT'L RIGHT TO LIFE NEWS, November 1979, at 20, *in* The National Right to Life News Collection, 1979 Box, Dr. Joseph R. Stanton Human Life Issues Library and Resource Center, Sisters for Life Convent, Bronx, New York; *AUL Perspective*, LEX VITAE, Feb. 1, 1979, at 5–6, *in* The Lex Vitae Folder, Wilcox Collection, University of Kansas.

168. Bopp, *supra* note 167; *see also AUL Perspective*, *supra* note 167 ("The challenge, therefore, to the Right to Life movement is to enact carefully drawn legislation and to present sound legal argumentation in the courts in support of these laws.").

procedure altogether. At the same time, by constantly undercutting and remaking the *Roe* decision, antiabortion attorneys could expose it as unworkable and constitutionally unsound. From start to finish, the movement would pursue restrictions with the "reasonable hope" that the Court would uphold them.[169]

Subsequently, movement attorneys experimented with a new incremental tactic in *Harris v. McRae*,[170] a case in which the constitutionality of the Hyde Amendment's ban on Medicaid funding for abortion was at issue.[171] Activists had already worked to narrow *Roe*'s protections, but in *Harris*, movement lawyers wanted to introduce chaos into abortion doctrine, strengthening the case that the 1973 opinion was unworkable. To advance this agenda, NRLC attorneys insisted that *Roe* and its progeny had created an "undue burden test."[172] As the NRLC brief in *Harris* maintained:

> [I]f the regulation impacts upon the abortion decision, the Court must find as a matter of fact that this burdens an individual's right to decide to . . . terminate pregnancy by substantially limiting access to the means of effectuating that decision.[173]

169. *Ruling on Akron Abortion Ordinance Called Victory*, NAT'L RIGHT TO LIFE NEWS, Oct. 10, 1979, at 1, 3, *in* The National Right to Life News Collection, 1979 Box, Dr. Joseph R. Stanton Human Life Issues Library and Resource Center, Sisters for Life Convent, Bronx, New York.

170. 448 U.S. 297 (1980).

171. *See supra* note 146 and accompanying text.

172. *See* Brief Amicus Curiae of the Nat'l Right to Life Comm., Inc. for Appellees Williams and Diamond at *5–11, Williams v. Zbaraz, 448 U.S. 358 (1980) (No. 79-4), 1980 WL 339450. The NRLC drew on dicta in *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976); and *Maher v. Roe*, 432 U.S. 464 (1977). *See* Brief as Amicus Curiae of the Nat'l Right to Life Comm., *supra* note 172, at *5–11. None of these cases clearly set forth an undue-burden test applicable to adult women. Both *Carey* and *Bellotti* involved the constitutional rights of minors. *See Carey*, 431 U.S. at 697–98; *Bellotti*, 428 U.S. at 147. *Carey* clearly required that a law be narrowly tailored to serve a compelling government interest. *Carey*, 431 U.S. at 689. While *Maher* did use undue-burden rhetoric, *see* 432 U.S. at 487, 489, the Court insisted that it had in no way retreated from the approach taken in *Roe* itself. The NRLC's undue-burden argument represented a new creation rather than a straightforward gloss on existing precedent.

173. Brief as Amicus Curiae for the Nat'l Right to Life Comm., *supra* note 172, at *6 (quotation omitted).

NRLC attorneys first insisted that not all abortion regulations had anything to do with a woman's abortion decision. So long as the government interfered only with doctors' prerogatives, judges should apply rational basis review.[174] The NRLC also asserted that even if a law impacted a woman's decision, not all burdens were undue.[175] As the NRLC reasoned, "a requirement for a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion."[176] If *Roe*'s meaning could be changed, abortion opponents hoped to argue more effectively that the decision was incoherent.

After *Harris* upheld the Hyde Amendment,[177] abortion opponents redoubled their commitment to hollowing out *Roe*'s protections. The movement pursued a two-part strategy. First, movement attorneys would convince the Court to narrow the right set out in the 1973 decision. At the same time, as abortion doctrine became increasingly unstable, advocates would highlight the activism of the Court, putting more pressure on the justices to undermine abortion rights or reject them altogether. For example, in 1981, NRLC leader John Willke denounced the activism of the *Roe* Court.[178] "The Supreme Court's 1973 abortion decision had no authentic basis in the Constitution," Willke asserted.[179] "Rather, it constituted the most extreme example of 'judicial activism' in this century."[180]

Starting in 1983, similar arguments played a central role in movement litigation, after antiabortion attorneys defended an Akron, Ohio, ordinance designed to survive judicial scrutiny.[181] The ordinance included measures requiring that

174. *See id.* at *6–11.

175. *See id.*

176. *Id.* at *7 (quotation omitted).

177. *Harris v. McRae*, 448 U.S. 297, 316–17 (1980).

178. *See Nomination of Sandra Day O'Connor: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 334 (1981) (statement of Dr. John Willke).

179. *Id.*

180. *Id.*

181. Abortion opponents submitted several amicus briefs in the Akron case. *See* Brief as Amicus Curiae of Feminists for Life in Support of Petitioner, City of Akron, City of Akron v. Akron Ctr. for Reprod. Health (*Akron I*), 462 U.S. 416 (1983) (No. 81-746), 1982 U.S. S. Ct. Briefs LEXIS 150; Brief of Amicus Curiae of the Catholic League for Religious and Civil Rights in Support of the Petitioner in No. 81–746 and the Respondent in No. 81–1172, *Akron I*, 462 U.S. 416, 1982 U.S. S. Ct. Briefs LEXIS 152; Brief as Amicus Curiae of Womankind, Inc. in Support of Petitioner, City of Akron, *Akron I,* 462 U.S. 416 (No. 81-746), 1982 U.S. S. Ct. Briefs LEXIS 1498; Brief as Amicus Curiae of Ams. United for Life in Support of

first-trimester abortions be performed in a hospital, mandating parental consultation and informed consent, setting forth a waiting period, and regulating the disposal of fetal tissue.[182] Although the Court in *Akron I* struck down major parts of the challenged ordinance,[183] Sandra Day O'Connor dissented, picking up on the undue-burden framework articulated by movement attorneys.[184] In a dissent joined by Justices Rehnquist and White, Justice O'Connor contended: "The 'unduly burdensome' standard is particularly appropriate in the abortion context because of the *nature* and *scope* of the right that is involved."[185] Importantly, O'Connor reiterated movement arguments that *Roe* was unworkable, reinforcing the view that the best way forward for the antiabortion movement was through the courts.[186]

C. The Antiabortion Movement Lays the Groundwork for Overruling Roe

The more success antiabortion litigators enjoyed, the more activists inside and outside of court emphasized the flaws of the *Roe* decision and the tyranny of the judiciary, aligning the movement with conservatives who were already upset about big government. In the aftermath of *Akron I*, the undue-burden test played an increasingly prominent role in the effort to get rid of *Roe*. Convincing the Court to rely on such a test would give states more latitude in restricting abortion. At the same time, by muddying abortion doctrine, antiabortion attorneys hoped to build a case for overruling *Roe*. Antiabortion attorneys—increasingly supported by the Reagan Administration—used the Court's inconsistent treatment of abortion laws as a justification for setting aside the *Roe* decision. The Court's very willingness to adopt the undue-burden test showed that *Roe* was unworkable—that the doctrine the justices applied was unsound and in need of

Petitioner, City of Akron, *Akron I*, 462 U.S. 416 (No. 81-746), 1982 U.S. S. Ct. Briefs LEXIS 1499.

182. *Akron I*, 462 U.S. at 422–25.

183. *Id.* at 452.

184. *See id.* at 452–73 (O'Connor, J., dissenting).

185. *Id.* at 463.

186. *See id.* at 458 (concluding that "[t]he Roe framework, then, is clearly on a collision course with itself").

constant revision. The movement's litigation strategy played up the irresponsibility and activism of the Court. As the movement put more emphasis on litigation, movement members already interested in aligning with the Republican Party and the political Right exercised more influence.

An amicus brief submitted on behalf of the United States highlighted *Roe*'s unworkability during the 1981 litigation of *Akron I*,[187] but efforts to destabilize *Roe* came most clearly to the surface in 1988, when the Court agreed to hear *Webster v. Reproductive Health Services*.[188] Like *Danforth*, *Webster* involved a multi-part Missouri abortion regulation, but a great deal had changed since 1976.[189] Ronald Reagan and George H.W. Bush had reshaped the Court, and those justices still strongly supportive of abortion rights—including Blackmun and Brennan—seemed close to retirement.[190] The Justice Department gave a ringing endorsement to arguments about *Roe*'s overreaching,[191] as did powerful and well-funded New Right and Religious Right organizations.[192] It seemed that the time had come to expose *Roe*'s supposed flaws and ask openly for its overruling.

The NRLC again took the lead in this effort, insisting that the Court once and for all reject its reasoning in *Roe*. "Failure to confront the issue of *Roe*'s viability," the NRLC noted, "would lead to . . . continued, interminable litigation of the

187. *See* Brief of the United States as Amicus Curiae in Support of Petitioners at *6–15, *Akron I*, 462 U.S. 416 (No. 81-746), 1982 U.S. S. Ct. Briefs LEXIS 1544.

188. 492 U.S. 490 (1989).

189. For the statute at issue in *Webster*, see *id.* at 498–504.

190. On contemporary perceptions that *Webster* would overrule *Roe*, see HOWARD BALL, THE SUPREME COURT AND THE INTIMATE LIVES OF AMERICANS: BIRTH, SEX, CHILDREARING, AND DEATH 104 (2002); LEE EPSTEIN & JOSEPH KOBLYKLA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 295–98 (1992).

191. *See* Brief for the United States as Amicus Curiae Supporting Appellants at *1, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88–605), 1989 WL 1127640 ("The United States continues to believe that Roe v. Wade unduly restricts the proper sphere of legislative authority in this area and should be overruled by this Court.").

192. For examples of the briefs submitted by Religious Right and New Right organizations in *Webster*, see Brief as Amicus Curiae of the Ctr. for Judicial Studies et al. in Support of Appellants, *Webster*, 492 U.S. 490 (No. 88–605), 1989 WL 1127626; Brief as Amicus Curiae of Am. Family Ass'n, Inc. in Support of Appellants, *Webster*, 492 U.S. 490 (No. 88–605), 1989 WL 1127633; Brief as Amici Curiae of Focus on the Family et al. in Support of Appellants, *Webster*, 492 U.S. 490 (No. 88–605), 1989 U.S. S. Ct. Briefs LEXIS 1543.

subject of abortion in this and lower courts."[193] The antiabortion movement's very preoccupation with litigation became an argument for overruling *Roe*: anything less would leave the Court to confront more challenges led by antiabortion attorneys. In the NRLC's analysis, the doctrinal uncertainty surrounding abortion—something very much pursued by antiabortion litigators—reflected the fundamental flaws in *Roe*. "Rather than making the lines of abortion procedure clearer," the NRLC argued, "the decisions of this Court have made the 'bright lines' of *Roe* blurred."[194]

Significantly, arguments about *Roe*'s incoherence resonated with a powerful group of allies, including Republican political leaders and New Right movement organizations. Recently-formed Religious Right organizations like Focus on the Family and the Family Research Council adopted the NRLC's reasoning wholeheartedly in *Webster*, arguing: "*Roe v. Wade* embarked this Court on a road of legislative line drawing, scientific and medical review, and judicial rulemaking unmoored to constitutional reasoning."[195] Amicus briefs submitted on behalf of the Justice Department and individual members of Congress followed a similar approach.[196]

Success in court created a kind of strategic path dependence for a movement desperate for signs of progress. In trying to replicate the results of *Maher*, *Poelker*, and *Beal*, leading antiabortion activists privileged efforts to chip away at *Roe* and expose its flaws.[197] The more the movement committed to arguments about judicial overreaching, the more abortion opponents could align with newly mobilized social conservatives angry about recent decisions of the Supreme Court.[198]

Right-leaning Americans had protested against perceived judicial tyranny since the Warren Court's decisions on school

193. Brief as Amicus Curiae of the Nat'l Right to Life Comm., Inc. in Support of Appellants at *11, *Webster*, 492 U.S. 490 (No. 88-605), 1989 WL 1127669.

194. *Id.* at *14.

195. Brief for the United States as Amicus Curiae Supporting Appellants at *1, *Webster*, 492 U.S. 490 (No. 88–605), 1989 WL 1127640.

196. *See id.* at 1; Brief as Amici Curiae of Hon. Chris Smith et al. in Support of Appellants at *10, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127607 ("Roe has proven to be inherently difficult to apply in any consistent and principled manner.").

197. *See supra* Part III.

198. *See supra* Part III.

prayer and criminal procedure. They had flooded the Supreme Court with letters of protest and even demanded the impeachment of Chief Justice Earl Warren.[199] When the federal courts began mandating intra- and inter-district busing as a remedy for school segregation, protesters again highlighted supposed judicial overreaching.[200] By the early 1980s, together with Ronald Reagan, Paul Weyrich's New Right united single-issue groups behind opposition to the damage done by "big government."[201] In a 1980 speech, for example, Reagan asserted that leaders of the federal government had "begun to think they can be parent; they can be teacher; they can be clergyman. And I think it is time to get the Government back to what it was supposed to be 200 years ago, and that is a servant of the people."[202] Reagan's message attracted grassroots conservatives concerned about "sex education in public schools, court rulings that have prohibited prayers in the schools and regulations that allow teen-age girls to have abortions without their parents' knowledge."[203]

Strategically, identifying a common enemy allowed social conservatives, in the words of one activist, to "get a lot more accomplished."[204] The New Right offered political expertise, access to direct mail networks, and financial stability to previously struggling single-issue groups.[205] United, social

199. On efforts to impeach Earl Warren, see CHRISTINE L. COMPSTON, EARL WARREN: JUSTICE FOR ALL 130 (2001); G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 247–48 (1982). On protests of the Warren Court's school prayer decisions, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 261–67 (2009); DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 62–67 (2d ed. 2012).

200. On the busing protests, see generally RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S (2d ed. 2012); JONATHAN RIEDER, CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM 2–3, 207–32 (1985).

201. *See* Mary Ziegler, *The Politics of Constitutional Federalism*, 91 DENV. U. L. REV. ONLINE 217, 223 (2014).

202. David E. Rosenbaum, *Conservatives Embrace Reagan on Social Issues*, N.Y. TIMES, Apr. 21, 1980, at B12.

203. *Id.*

204. Leslie Bennetts, *Conservatives Join on Social Issues*, N.Y. TIMES, Jul. 30, 1980, at B6.

205. On the pragmatic reasons antiabortion activists had for partnering with the New Right, see WILLIAMS, *supra* note 199, at 169–70; Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 248–54 (2013) [hereinafter Ziegler, *Women's*

conservatives appeared to have greater political influence. Moreover, the message advanced by Reagan and New Right leaders like Weyrich appealed to a variety of movement conservatives "concerned that the federal government [had] intruded in a massive way into such areas that concern them as the family, religion, and the home."[206] "The bottom line of pro-family people," explained anti-feminist Phyllis Schlafly, "is get the federal government off our backs."[207]

Throughout the 1970s, abortion opponents had remained largely on the sidelines of the academic and popular struggle over judicial restraint.[208] Indeed, movement members—divided by their views on the meaning of their cause and the goals they should pursue—generally agreed that the courts should go beyond the text and history of the Constitution in identifying constitutional rights, a move widely derided by critics of judicial activism.[209] The more abortion opponents fixated on an incrementalist litigation strategy, the closer the movement grew to other popular movements against supposed judicial overreach. In 1987, for example, when Reagan nominated Robert Bork to the Supreme Court, the *National Right to Life News* reported:

> The certainty of Bork-bashing by the abortionists has nothing to do with Judge Bork's personal views, which are unknown. Rather it has everything to do with his oft-repeated view that judges must exercise self-restraint, particularly in resisting the temptation to create "rights" not mentioned in the Constitution.[210]

Rights on the Right: The History and Stakes of Modern Pro-life Feminism]; Mary Ziegler, *The Possibility of Compromise: Anti-Abortion Moderates After* Roe v. Wade, 87 CHI.-KENT L. REV. 571, 588 (2012) [hereinafter Ziegler, *The Possibility of Compromise: Anti-Abortion Moderates After* Roe v. Wade].

206. Bennetts, *supra* note 204, at A1.

207. *Id.*

208. *See generally* Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-life Feminism*, *supra* note 205; Ziegler, *The Possibility of Compromise: Anti-Abortion Moderates After* Roe v. Wade, *supra* note 205.

209. *See id.*

210. *Bork Nomination Draws Massive Pro-Abortion Fire*, NAT'L RIGHT TO LIFE NEWS, Jul. 16, 1987, at 1, *in* The National Right to Life News Collection, 1987 Box, Dr. Joseph R. Stanton Human Life Issues Library and Resource Center, Sisters for Life Convent, Bronx, New York.

In 1988, in the aftermath of Bork's failed nomination, the *National Right to Life News* reiterated that theirs was a fight against judicial activism:

> A pro-life President can appoint judges who will honestly interpret the Constitution and reverse *Roe v. Wade*, putting the issue in the legislative arena where the pro-life movement has demonstrated against incredible odds that it can win.[211]

Movement preoccupation with incremental litigation strengthened the hand of those who identified their cause with the political right. Convinced that a fetal-protective amendment was out of reach, abortion opponents directed more and more attention to convincing the courts to reject or gut the *Roe* decision. If activists could not remake the Constitution, they hoped to transform the courts. Again, the most promising path seemed to lie with an alliance with critics of supposed judicial overreaching. However, as section D shows, litigation alone did not guarantee that abortion opponents would partner with the Right and the Republican Party. Since the 1970s, Republican operatives had worked to use abortion as a wedge issue, thereby wooing certain Catholic and Southern voters who had conventionally sided with the Democratic Party. In part, the alliance between abortion opponents and members of the Right represented the culmination of a longstanding campaign to expand the Republican base. At the same time, as the antiabortion movement struggled to shore up its finances and increase its influence, aligning with the Right seemed to be the most pragmatic choice. Abortion opponents focused so much on litigation partly because changes to the larger political climate made a partnership with the Right more realistic and valuable.

D. Litigation Plays a Part in a Much More Complex Story

Understanding how antiabortion litigators forged a

211. David N. O'Steen & Darla St. Martin, *What's At Stake for Babies in 1988*, NAT'L RIGHT TO LIFE NEWS, Jan. 1988, at 1, *in* The National Right to Life News Collection, 1988 Box, Dr. Joseph R. Stanton Human Life Issues Library and Resource Center, Sisters for Life Convent, Bronx, New York.

strategy attractive to the political Right requires an account of the larger political and social circumstances that solidified the relationship between the antiabortion movement and social conservatives. Antiabortion litigators had such success in building alliances with the Right partly because Republicans had consistently pursued antiabortion supporters. Moreover, in the aftermath of political party realignment, a financially-strapped antiabortion movement needed the support promised by a partnership with opponents of big government.

In part, abortion opponents turned to incremental litigation because they found a receptive audience in Republican and conservative strategists already courting Catholics and others who were uncomfortable with legal abortion. Starting in 1972, Richard Nixon tried to lure Catholics away from the Democratic Party, accusing his opponent, George McGovern, of supporting acid, amnesty, and abortion.[212] Later in the decade, as right-wing operatives worked to force the Republican Party to endorse more conservative policies, Paul Weyrich, an architect of the New Right, viewed abortion as a promising wedge issue.[213]

At the same time, political party realignment made an alliance with conservatives the only realistic option for an isolated antiabortion movement. As late as 1976, neither major presidential candidate (nor either party platform) had taken a strong stand on abortion.[214] By 1980, with Ronald Reagan at the helm, the Republican Party endorsed both a fetal-protective amendment and Medicaid funding bans.[215] In the same period, because of an ever-closer relationship with the women's

212. *See* Donald T. Critchlow, *Birth Control, Population Control, and Family Planning: An Overview*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE, *supra* note 82, at 14.

213. *See* Chip Berlet, *The New Political Right in the United States: Reaction, Rollback, and Resentment*, *in* CONFRONTING THE NEW CONSERVATISM: THE RISE OF THE RIGHT IN AMERICA 84–85 (Michael Thompson ed., 2007).

214. On the 1976 Democratic Platform, see Gerhard Peters & John T. Woolley, *Democratic Party Platform of 1976*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29606 (last visited Jan. 27, 2015), *archived at* http://perma.cc/GU5Y-FPVU. For the Republican Party Platform, see Gerhard Peters & John T. Woolley, *Republican Party Platform of 1976*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=25843 (last visited Jan. 27, 2015), *archived at* http://perma.cc/8RQU-RW94.

215. *See* Gerhard Peters & John T. Woolley, *Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=25844 (last visited Jan. 27, 2015), *archived at* http://perma.cc/22EZ-DHJB.

movement, the Democratic Party and incumbent Jimmy Carter supported *Roe* as the law of the land.[216] An alliance with critics of judicial activism—already attractive because of the movement's commitment to litigation—seemed to be the only viable strategy for an antiabortion movement seeking political relevance. A partnership with social conservatives also promised financial stability to a movement struggling to stay out of debt. Even the NRLC, the largest and most influential antiabortion organization, was in serious debt at a time when the Moral Majority, a Religious Right organization founded in 1979, boasted a $6 million budget.[217] The resources available through the New Right and Religious Right seemed particularly crucial when many in the antiabortion movement despaired of passing a fetal-protective amendment to the Constitution in the near term.

In 1982, with the movement claiming a majority in Congress and support in the White House, abortion opponents celebrated when a federalism amendment—one that would have allowed Congress and the states to restrict abortion—made it out of congressional committee for the first time.[218] However, with antiabortion activists deeply divided over whether the amendment went far enough, Republicans could not find the votes to overcome a filibuster led by Senator

216. *See* Gerhard Peters & John T. Woolley, *Democratic Party Platform of 1980*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29607 (last visited Jan. 27, 2015), *archived at* http://perma.cc/9ZF3-Y8ZR. As Linda Greenhouse and Reva Siegel have shown, the process of party realignment began before the *Roe* decision. Linda Greenhouse & Reva B. Siegel*, Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2052–78 (2011); *see also* Thomas J. Sugrue & John Skrentny, *The White Ethnic Strategy*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 174–75 (Bruce J. Shulman & Julian E. Zelizer eds., 2008); CHRISTINA WOLBRECHT, THE POLITICS OF WOMEN'S RIGHTS: PARTIES, POSITIONS, AND CHANGE 40–71 (2000).

217. On the NRLC's reported debt in the period, see PAIGE, *supra* note 166, at 87. On the Moral Majority's operating budget in the late 1970s, see DAN GILGOFF, THE JESUS MACHINE: HOW JAMES DOBSON, FOCUS ON THE FAMILY, AND EVANGELICAL AMERICA ARE WINNING THE CULTURE WAR 82–83 (2008). For more on the wealth accumulated by Religious Right organizations, see Maxwell Glen, *The Electronic Ministers Listen to the Gospel According to the Candidates,* NAT'L J., Dec. 22, 1979, at 2142–45.

218. *See* Bernard Weinraub, *Abortion Curbs Endorsed, 10-7, by Senate Panel*, N.Y. TIMES, Mar. 11, 1982, at A1. For background on the federalism amendment introduced by Senator Orrin Hatch (R-UT), see Leslie Bennetts, *Antiabortion Forces in Disarray Less Than a Year After Victories in Elections*, N.Y. TIMES, Sept. 22, 1981, at B5.

Robert Packwood (R-OR).[219] When the Senate voted down a second federalism proposal by a vote of 49-50-1, frustrated activists began looking for an alternative solution.[220]

With a constitutional amendment out of reach, many abortion opponents concluded that progress would come only with the remaking of the Supreme Court. In the late 1970s, AUL leader Dennis Horan reported that Jimmy Carter had blacklisted antiabortion candidates when filling federal judicial vacancies, further convincing abortion opponents of the importance of influencing presidential elections and judicial selections.[221] Ellen McCormack, a one-time antiabortion presidential candidate, agreed that the courts represented the movement's best chance for constitutional change.[222] The movement needed to ensure that "[p]ro-abortion forces" no longer had "more impact than pro-life forces in the judicial selection process."[223]

Just the same, the movement's investment in litigation made a substantial difference to abortion opponents' struggles over identity, coalition building, and legal priorities. By delivering tangible results, the movement's incremental approach—even applied outside the courts—attracted adherents who would not have otherwise embraced social conservatism. In a closely divided movement, the promise of progress made all the difference.

In the new world of abortion politics that litigators helped to create, those antiabortion activists who favored welfare rights struggled to find a place. Some, like Marjory

219. On the filibuster, see Robert Pear, *Filibuster Starts Abortion Debate*, N.Y. TIMES, Aug. 17, 1982, at A18; Robert Pear, *Baker Sets Vote After Labor Day on Ending Filibuster on Abortion and School Prayer*, N.Y. TIMES, Aug. 21, 1982, at 9; Steven V. Roberts, *Senate Kills Plan to Curb Abortion by a Vote of 47-46*, N.Y. TIMES, Sept. 16, 1982, at A1.

220. On the failure of the Hatch-Eagleton Amendment, see NAT'L COMM. FOR A HUMAN LIFE AMENDMENT, HUMAN LIFE AMENDMENT: MAJOR TEXTS 1–2 (2004), *available at* http://www.nchla.org/datasource/idocuments/HLAmajortexts.pdf, *archived at* http://perma.cc/WK94-8XEL.

221. *See Federal Judgeships Denied to Pro-Lifers, Says Horan*, NAT'L RIGHT TO LIFE NEWS, Feb. 1979, at 17, *in* The National Right to Life News Collection, 1979 Box, Dr. Joseph R. Stanton Human Life Issues Library and Resource Center, Sisters for Life Convent, Bronx, New York.

222. *See* Ellen McCormack, *Can Right to Life Do Anything About the Power of the Courts?*, ELLEN MCCORMACK REP., Jan. 1978, at 1, 6, *in* The Ellen McCormack Report Folder, Wilcox Collection, University of Kansas.

223. *Id.* at 5.

Mecklenburg, discounted their earlier positions. Reagan selected Mecklenburg to head the Office of Family Planning Programs in the Department of Health, Education, and Welfare, and Mecklenburg largely set aside her earlier support for birth control, promoting abstinence-centered education as an alternative.[224] Other activists maintained their earlier constitutional commitments but rarely shaped the conversation within the larger antiabortion movement.[225]

Social conservatives' fight against big government left little room for the protections for poor and vulnerable persons that were once demanded by antiabortion activists. The Reagan Administration committed to dismantling a welfare state that it viewed as inefficient and counterproductive.[226] Whereas some abortion opponents had argued that dependent and vulnerable persons had a right to more protection from the State, the Reagan Administration called on Americans to "escape the spider's web of dependency."[227] Reagan's dramatic

224. On Mecklenburg's nomination, see ALEXANDRA M. LORD, CONDOM NATION: THE U.S. GOVERNMENT'S SEX EDUCATION CAMPAIGN FROM WORLD WAR I TO THE INTERNET 143 (2010). While working for Reagan, Mecklenburg proposed a "squeal rule," requiring all federally funded clinics to report immediately if any adolescent requested contraception. *See* STEVE CHAPPLE & DAVID TALBOT, BURNING DESIRES: SEX IN AMERICA 79 (1989). The Reagan Administration first proposed the squeal rule in 1982, and in February 1983, a federal district court held that it was unlawful. *See* Associated Press, *U. S. Plans to Appeal Ruling on Teen-Ager Birth Control*, N.Y. TIMES, Feb. 17, 1983, at A21. When an appeals court affirmed this ruling, the Reagan Administration gave up on the squeal rule. *See* Marjorie Hunter, *Court Blocks Rule on Notice by Family Planning Clinics,* N.Y. TIMES, Jul. 9, 1983, at 5 (noting the first of four appeals-court decisions ruling against the squeal rule); *U.S. Drops Efforts for Notice of Child's Birth Control Use*, N.Y. TIMES, Dec. 1, 1983, at B13. Mecklenburg also reportedly oversaw the Adolescent Family Life Act of 1981 (AFLA), a grant program designed to curb adolescent pregnancy rates. In guiding the selection of AFLA reviewers and grantees, Mecklenburg supposedly promoted a policy vision that was both antiabortion and anti-birth control. JANICE M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES 88–97 (2002).

225. Groups like Consistent Life and All Our Lives continue to seek common ground on issues like the death penalty, contraception, equal pay for women, and nuclear proliferation. *See, e.g.*, Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-life Feminism*, *supra* note 205, at 262–63.

226. On Reagan's commitment to reshaping the welfare state, see STEVEN F. HAYWARD, THE AGE OF REAGAN: THE FALL OF THE OLD LIBERAL ORDER 245–46 (2001); DANIEL BÉLAND & ALEX WADDAN, THE POLITICS OF POLICY CHANGE: WELFARE, MEDICARE, AND SOCIAL SECURITY REFORM IN THE UNITED STATES 44 (2012).

227. Ronald Reagan, U.S. President, Address Before a Joint Session of Congress on the State of the Union (Feb. 4, 1986), *available at*

budget cuts—a 17.4 percent reduction in funding for the AFDC and a 14.3 percent cut to the Food Stamp program—shrank the social safety net.[228] Closely aligned with the Right, even those abortion opponents who defined themselves as champions of rights for the poor stood little chance of expanding the welfare state.

The movement's embrace of mainstream conservative politics alienated some hardliners who were persuaded that the movement had not done enough to reverse the sexual revolution, with the absolutists in the movement worrying that a court-centered strategy did too little to challenge lax sexual mores or to ban abortion outright. Organizations like Judie Brown's American Life League (ALL) and Joseph Scheidler's Pro-Life Action League took issue with the mainstream movement's emphasis on gradual progress. Brown and her allies pledged to "continue our support for only that legislation which recognizes the need for personhood to be extended to the preborn child."[229] Scheidler stepped up protests and "sidewalk counseling" outside of abortion clinics, paving the way for massive "rescue" protests in the late 1980s.[230] Absolutists, as Judie Brown explained, rejected the idea that incremental statutes had become the "only avenue open to [the pro-life movement] at the time 'politically.'"[231] If incrementalism prevailed, politicians could claim to be pro-life without ever delivering the kinds of legal protections the movement truly demanded. As an ally of Brown's explained, if legislators defeated compromise laws, "it would be easy to say that nothing is 'possible' so we must accept defeat and 'get on' to other things."[232]

http://www.presidency.ucsb.edu/ws/?pid=36646, *archived at* http://perma.cc/P9BZ-S3TT.

228. *See* JAMES PETRAS & MORRIS MORLEY, EMPIRE OR REPUBLIC?: AMERICAN GLOBAL POWER AND DOMESTIC DECAY 91 (1995).

229. *President's Column: Personhood, Please*, A.L.L. ABOUT ISSUES, Jan. 1982, at 1, *in* The A.L.L. About Issues Folder, Wilcox Collection, University of Kansas.

230. *See* RISEN & THOMAS, *supra* note 117, at 105–17. For Scheidler's perspective on antiabortion strategy, see JOSEPH SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTION (1985).

231. *President's Column: Beware of False Friends*, A.L.L. ABOUT ISSUES, Sept. 1981, *in* The A.L.L. About Issues Folder, Wilcox Collection, University of Kansas.

232. James Schall, *Political Wrong Turn Disheartens Pro-Lifers*, A.L.L. ABOUT ISSUES, Apr. 1982, 3, *in* The A.L.L. About Issues Folder, Wilcox Collection, University of Kansas.

Absolutists like Brown helped to create a schism in the movement not only by questioning the ideology of mainstream groups but also by relying more often on direct action protest. Over the course of the late 1980s and early 1990s, protestors blockaded 525 clinics, and law enforcement officials arrested over 31,000 pro-life protestors.[233] The fault line in the antiabortion movement carried forward into the early 2010s, as absolutists mounted state campaigns for constitutional amendments recognizing fetal personhood.[234] Frustrated again with the gradual progress promised by incrementalism, hardliners accused movement leaders of cowardice. Veteran absolutist Judie Brown attacked opponents of the personhood strategy for being "political [and] gutless."[235] "As a Catholic," she said, "[opposing a personhood strategy is] the most scandalous thing I've ever heard."[236]

The story of antiabortion litigation adds a new dimension to studies of law and social change. As Part IV explores, the case study developed in this article offers an opportunity to reconsider the costs for social movements of either winning in court or relying on legal rights.

IV. LITIGATION POLITICS

History offers an entry point into larger conversations about law and social change. While still spotlighting litigation, what Risa Goluboff calls the "new" legal history takes a different path—identifying multiple interpreters of law outside the courts and studying the difficulties inherent in the

233. *See* Mary C. Segers, *The Pro-Choice Movement Post-*Casey*: Preserving Access*, *in* ABORTION POLITICS IN AMERICAN STATES 233 (Timothy Byrnes & Mary Segers eds., 1995). For more on anti-clinic protest and violence, see WENDY SIMONDS, ABORTION AT WORK: IDEOLOGY AND PRACTICE IN A FEMINIST CLINIC 7–9 (1996).

234. For further discussion of contemporary conflict about the personhood movement, see Lauren Markoe, *After Mississippi Defeat, What About Personhood?*, CHRISTIAN CENTURY, Dec. 13, 2011, at 18; Cheryl Wetzstein, *State Abortion Curbs Rose in '11,* WASH. TIMES, Jan. 9, 2012, at A6 (detailing personhood battles in states like Mississippi and Colorado); Erik Eckholm, *The Christian Vote: "Personhood" Issue Hangs On*, N.Y. TIMES, Dec. 23, 2011, at A22 (explaining that the personhood movement was still active in spite of major defeat in Mississippi).

235. James T. McCafferty, *The Perils of Promoting Personhood*, 79 NEW OXFORD REV. 23, 24 (2012).

236. *Id.*

interactions between social movements and attorneys.[237] Litigation often figures centrally in these stories, as lawyers modify and sometimes narrow the claims of those they represent.[238]

As the history of antiabortion lawyering suggests, litigation can also shift the balance of power in contests between lay actors. Historians and legal scholars view the advantages of litigation with some skepticism. Scholars like Derrick Bell and William Rubenstein explore how the individual interests vindicated in lawsuits can crowd out other voices in large and diverse movements.[239] By focusing on the attorney-client relationship, historians like Risa Goluboff and Kenneth Mack explore how litigation can overshadow certain demands for change, including those involving socioeconomic rights.[240]

Without disputing the drawbacks of litigation, legal mobilization scholars highlight its important indirect effects.[241] Litigation can help to mobilize new movement members and energize those who have already joined the cause.[242] Moreover, activists use litigation to increase the salience of their cause, raise funds from foundations and allies, build influence over government officials, convince the public, and sway elites.[243]

237. *See* Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2322–23 (2013).

238. *See id.* at 2323 (summarizing current historical literature and arguing that the new studies "practice[] a history that emphasizes connections between laypeople and formal law—one that understands lawyers as mediators, facilitators, and gatekeepers").

239. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 98–127 (1991); Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 476–77 (1976).

240. *See* BROWN-NAGIN, *supra* note 1, at 7–9; GOLUBOFF, *supra* note 1, at 11–15; Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 258 (2005).

241. For discussions of legal mobilization scholarship, see Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969–79 (2011); Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 829–40 (2013).

242. *See* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 218 (1978); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 58 (1994); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 147 (Univ. of Mich. Press 2d ed. 2004) (1974); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 156–57 (2009).

243. *See* NeJaime, *supra* note 241, at 969–79; Depoorter, *supra* note 241, at

Like legal mobilization scholarship, this study looks at litigation's indirect impact litigation. However, while legal mobilization scholars often expose the value of court-centered tactics, the history studied here showcases indirect effects that are less obviously beneficial, or even harmful, to a movement. This study also reinforces the conclusion that litigation can reframe a cause, and the strategies used to pursue it, as legal tactics and arguments gain favor. As this Article shows, court-centered strategies influence more than the interactions of lawyers and those they represent. Because of the progress litigation promises, it can break the deadlock—defining struggles between lay members over identity, coalition building, and policy objectives.

A. The Perils of Progress

Recent legal scholarship makes a compelling case that losing in court can have unexpected consequences.[244] Far from setting a movement back, litigation losses can help a movement stake out an identity.[245] Failure appears to energize activists who are convinced that counter-majoritarian courts improperly intervened.[246] When courts refuse to act aggressively to create the desired change, movements can more effectively seek a remedy from legislatures, building on a traditional narrative about the limitations of court-centered strategies.[247]

In contrast, some commentators are often deeply skeptical about the indirect benefits of court-centered strategies. According to these scholars, judicial victories can trigger damaging backlashes.[248] To win in court, movements use up

829–40.

244. *See* NeJaime, *supra* note 241, at 971–1007; Depoorter, *supra* note 241, at 829–40.

245. *E.g.*, NeJaime, *supra* note 241, at 969–70, 979–80.

246. *See id.* at 986, 1006–07.

247. *See id.* at 986–87, 1006; Depoorter, *supra* note 241, at 818–19.

248. *See* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 166 (2013) ("Not only do court decisions make people aware of previously unnoticed social change and force politicians to take positions on issues they may have ducked, but they also force substantive resolutions of policy issues that may be very different from those supported by many voters. It is this aspect of judicial decisions that is the most important cause of backlash."); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 425 (2d ed. 2008); Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge), 104 MICH. L. REV. 431, 473

precious resources.[249] By creating a false sense of security, litigation can deradicalize movements, undermining the energy that forces change.[250] Such victories can legitimize a generally unjust system.[251] By directing attention to court-centered strategies, litigation can also marginalize the movement's radical wing and empower the elites.[252]

By studying the history of antiabortion litigation, we can see that the indirect benefits associated with litigation come with costs of their own. Court-centered strategies can create substantial path dependence. For both movement elites and many grassroots radicals, the progress promised by litigation proved irresistible. Success in court did not simply undercut more effective tactics or silence the movement's radical wing. Rather, litigation victories also convinced a diverse group of movement leaders to develop different approaches to lobbying, street protests, and media work. The more the movement won, the more activists committed to a strategy centered on judicial activism. Defining this tactic as less radical than those pursued earlier seems to miss an important part of the story. On the one hand, abortion opponents strengthened their relationship with social conservatives invested in a broad attack on changes to sexual mores and family structures. On the other hand, the movement gradually cast away transformative arguments for a larger welfare state.

Instead of deradicalizing the movement, winning in court gradually blinded abortion opponents to alternative identities, legal goals, and rhetorical tactics. This path dependence had important opportunity costs. As antiabortion activists invested

(2005) (arguing that court rulings cause backlash because "they alter the order in which social change would otherwise have occurred").

249. *See* Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261, 261–92 (Austin Sarat & Stuart Scheingold eds., 1998); ROSENBERG, *supra* note 248, at 10–12, 420–29; SCHEINGOLD, *supra* note 242, at 49–53.

250. *See* FORBATH, *supra* note 239, at 128–36; Bell, *supra* note 239, at 476–77, 515–16; Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 145, 145–63 (Austin Sarat & Stuart A. Scheingold eds., 2006).

251. *See* Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 64–66 (2011).

252. *See, e.g.*, Levitsky, *supra* note 250, at 157; Albiston, *supra* note 251, at 74–75.

in a litigation-driven strategy, previously appealing options, like those involving welfare legislation or protections for pregnant women, gradually became less relevant or even politically out of reach. By relying so heavily on one strategy, one political party, and one set of allies, antiabortion activists lost some of the flexibility and creativity that had defined the early years of the movement. Increasingly, the movement rose or fell with the fortunes of its partners on the Right.

At the same time, by helping to decide winners and losers in the struggle over movement identity, litigation victories marginalized influential movement strategists who were disturbed by the direction the cause had taken. Moreover, success in court further radicalized movement hardliners who believed that their colleagues had taken a wrong turn. Divisions between incrementalists and absolutists hobbled the movement's efforts to achieve constitutional change. By committing so much to a single strategy, the movement became more homogenous, drawing supporters from fewer communities.

Victory in court delivered just the kind of indirect benefit long spotlighted by legal mobilization scholars. Just the same, the movement's investment in litigation successes foreclosed other valuable political opportunities, pushing under the surface alternative demands for change.

B. Decoupling Rights Talk and Litigation

Critics of social-change litigation take aim not only at court-centered strategies but also at rights rhetoric. These commentators argue that rights-based strategies can deradicalize a movement, encouraging activists to seek a legally viable remedy rather than what members actually want.[253] At the same time, by prioritizing rights talk, movement members may set aside demands—particularly, those for redistributive remedies and economic justice—that fit poorly within a constitutional framework.[254] When movements

253. For discussion of the deradicalizing effect of both litigation and rights-claiming, see FORBATH, *supra* note 239 at 128–36; Albiston, *supra* note 251, at 64–66; Bell, *supra* note 239, at 476–77, 515–16; Levitsky, *supra* note 250, at 145–63.

254. *See* William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1440 (1986) ("A distinctive influence of the private rights

succeed in securing rights, moreover, their rights-claiming may legitimize an unjust system, demobilizing those who believe that the struggle is over.[255]

Historians have added nuance to the story of rights rhetoric, illuminating cases in which the language of rights advanced radical social causes and showing how activists brought together the language of legal rights and demands for redistributive justice. Antiabortion history adds a valuable new chapter to this narrative. From the very beginning, lay actors and lawyers in the antiabortion movement relied heavily on rights rhetoric and calls for constitutional change. This emphasis on rights did not drown out radical voices or make invisible demands for social economic justice; far from it. Instead, rights language accommodated a wide variety of surprising claims. Those committed to a broader social safety net and a more robust protectionist state effectively used the language of rights to advance their cause, challenging existing social arrangements.[256] Opponents of even the most mainstream aspects of the sexual revolution also relied on rights rhetoric to frame their beliefs and justify the social, cultural, and economic status quo.[257]

Instead of finding themselves constrained by the language of constitutional rights, antiabortion activists contested the meaning of the right they championed. Distinguishing the effects of litigation and rights rhetoric adds weight to arguments that the language of rights can strengthen social movements.

However, the history of antiabortion legalism cautions against generalizations about the perils of litigation or the

approach on liberal welfare discourse has been to deemphasize, and even to discourage, redistributive rhetoric and goals in liberal discussions of the welfare system.").

255. *Roe* itself has become a key example of the demobilizing effects of judicial victories on social movements. *See, e.g.*, Cass R. Sunstein, *Civil Rights Legislation in the 1990s: Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991) (arguing that *Roe* "spur[red] opposition and demobilize[ed] potential adherents"); Robin West, *From Choice to Reproductive Justice: De-constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1409–13 (2009) (arguing that *Roe* legitimated existing patterns of intimate conduct and established a "profoundly inadequate social welfare net and hence the excessive economic burdens placed on poor women and men who decide to parent").

256. *Supra* Part II develops this argument at greater length.

257. *Supra* Part II further analyzes this history.

virtues of rights talk. The appeal of litigation was only one of several factors pushing the antiabortion movement toward a focus on judicial activism. Political party realignment, the emergence of new social conservative groups, the financial struggles of the antiabortion movement, the rise of neoliberal politics, and the declining popularity of the welfare state all contributed to the transformation of antiabortion identity. The lessons offered by antiabortion history tell us only about the potential of litigation. A complex and ever-changing political landscape also often changes the course of contests over what a movement stands for.

At the same time, litigation can push aside competing visions of a movement's cause. The downsides of emphasizing litigation—path dependence and the loss of certain strategic alternatives—hamstrung the movement at a time when abortion opponents played down earlier arguments about constitutional rights.

CONCLUSION

Legal historians illuminate the complicated and ever-evolving relationships between lawyers and the communities they represent. As the history of the antiabortion movement shows, court-centered strategies can also make a difference to internal struggles between lay activists. These struggles have high stakes, determining what a cause means and who is more likely to support it. By providing clear signals of progress, victories in court convince movement members of the value of certain strategies and the impracticality of others. However, tactical debates can intersect with larger questions of ideology, priorities, and identity. The indirect benefits guaranteed by litigation can change the course of the contests about what a movement represents.

The story of antiabortion identity contests adds depth to debates about the value of litigation as a tool for social change. Historians, political scientists, and legal commentators have exposed the unanticipated costs of success in court. In addition to triggering a backlash, litigation victories can silence radical voices and demobilize activists convinced that the battle has been won. Legal mobilization scholars complicate this narrative, spotlighting the indirect benefits of either winning

or losing in court.

At least for the antiabortion movement, these indirect benefits came with a complex set of costs. Winning in court vindicated the antiabortion cause, energized movement members, and illuminated a potential path forward. For activists desperate for signs of progress, the tactics used in court promised further advances, even in the context of lobbying, media interactions, or street protests. The more activists won in court, the more movement leaders invested in litigation, tailoring their larger lobbying and media strategy to maximize the chances that *Roe* would be overruled. Over time, in advancing court-centered strategies, movement members put more emphasis on the overreaching of the *Roe* Court, thereby framing their cause in a way that resonated with potential allies on the Right. Those activists whose view of the cause did not square with new, litigation-first tactics lost influence. Over time, the movement lost some of the flexibility that had helped it navigate the political landscape.

The movement's story also adds weight to scholarship, recognizing that rights rhetoric—by contrast to court-centered tactics—can empower both social-change agents and countermovement members. The right to life represented a blank canvas onto which activists projected dramatically different values. Far from deradicalizing movement demands, right-to-life rhetoric made room for claims involving socioeconomic rights, marital-status discrimination, and equality between the sexes.

The effect of litigation on movement identity contests can be long-lasting, as the story of antiabortion battles shows. In the 1970s, a powerful group of abortion opponents demanded both broader access to birth control and an expansion of the welfare state. Today, activists holding similar views fight to find a place in antiabortion politics. The alliance between abortion opponents and the Republican Party has come to seem inevitable and unchanging. Litigation played a central role in bringing antiabortion politics to the present moment. As this story reminds us, victory in court not only helps to determine whether a social movement succeeds, but litigation also makes a difference as to what that movement means.