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Contesting the Legacy of the Nineteenth Amendment: Abortion and Equality From Roe to the Present

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CONTESTING THE LEGACY OF THE NINETEENTH AMENDMENT: ABORTION AND EQUALITY FROM *ROE* TO THE PRESENT

MARY ZIEGLER*

Beyond the question of suffrage, the Nineteenth Amendment raised the issue of what it would take for women in America to achieve equal citizenship. The meaning of both the Nineteenth Amendment and equality for women remain especially contested in broader conflicts about abortion—and of how those conflicts have changed in fundamental ways in the decades since Roe v. Wade. For some time, fetal rights were pitted against the kinds of concerns about equality for women that drove reformers to seek the vote in 1920. But by the early 1990s, the terms of the conflicts had changed, with both sides claiming to carry on the legacy of the Nineteenth Amendment.

Fights over the meaning of equality for women deepened the divide over abortion. To some extent, those on opposing sides of the abortion debate have always had clashing views of motherhood, gender roles, and the kind of lives women should pursue. But as both sides claim the legacy of the Nineteenth Amendment, agreement on basic facts about abortion has become much harder to find. The more everyone in the abortion debate seemingly agrees on the importance of equality for women, the less possible it seems to find any lasting consensus on what women need to protect their right to equal treatment under the law or their reproductive health. The contested meaning of equality in the abortion context not only changed the course of the abortion conflict but also mirrored and reinforced a shift in constitutional discourse away from an exclusive focus on constitutional rights and toward intense disagreement over basic facts.

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INTRODUCTION

Beyond the question of suffrage, the Nineteenth Amendment raised the issue of what it would take for women in America to achieve equal citizenship.¹ Perhaps unsurprisingly, for this reason the legacy of the Nineteenth Amendment remains contested—and nowhere more intensely than in the American debate over abortion. Consider the 2020 March for Life. The March is a massive, annual antiabortion protest that marks the anniversary of the *Roe v. Wade* decision. In 2020, the event did not feature claims about fetal rights or address the heartbeat bills and bans that had dominated headlines for the past six months.² Instead, organizers of the event focused on the Nineteenth Amendment, claiming that their movement carried on the legacy of the suffragettes.³ Arguing that “Pro-Life is Pro-Woman,” March leaders claimed that their war against legal abortion was just like the battle for votes for women.⁴

1. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1006–49 (2002) [hereinafter *She the People*] (describing debates about the legacy and meaning of the Nineteenth Amendment).

2. See, e.g., Kimberly Leonard, *March for Life Debuts “Pro-Woman” Theme for Antiabortion Rally*, WASH. EXAMINER (Oct. 15, 2019, 4:06 PM), <https://www.washingtonexaminer.com/policy/healthcare/march-for-life-debuts-pro-woman-theme-for-anti-abortion-rally> [https://perma.cc/29P8-ZLUB]; Julie Zauzmer & Sarah Puliam Bailey, *Trump Headlines March for Life Rally in Washington, Bringing Crowds and Extra Security to the Mall*, WASH. POST (Jan. 24, 2020, 3:23 PM), <https://www.washingtonpost.com/religion/2020/01/24/trump-headline-annual-march-life-rally-washington/> [https://perma.cc/GN45-H4G6]; March for Life Educ. and Def. Fund, *March for Life 2020 Life Empowers*, YOUTUBE (Oct. 15, 2020), <https://www.youtube.com/watch?v=9a4mEoX-bUs> [https://perma.cc/LAN5-B9BA].

3. See *supra* note 2 and accompanying text.

4. See Leonard, *supra* note 2.

The 2020 March for Life is just one reminder of how the meaning of the Nineteenth Amendment and the concept of equality for women remain contested in broader conflicts about abortion—and of how those conflicts have changed in fundamental ways in the decades since *Roe v. Wade*. For some time, the U.S. abortion debate appeared to pit fetal rights against the kinds of concerns about equality for women that drove reformers to seek the vote in 1920.⁵ But by the early 1990s, the terms of the debate had changed, with both sides claiming to carry on the legacy of the Nineteenth Amendment.⁶

While abortion-rights feminists argued that reproductive autonomy was necessary for women to fully participate in the political and economic life of the nation, abortion foes contended that abortion damaged women's health and economic well-being.⁷ Politically, antiabortion organizations reacted to internal polling indicating that Americans viewed their movement as extremist and anti-woman.⁸ Legally, antiabortion lawyers laid the groundwork for a renewed attack on *Roe* by challenging what they saw as the core premise of *Planned Parenthood v. Casey*, the conclusion that women relied on the availability of abortion to achieve social, political, and economic equality.⁹

Fights over the meaning of equality for women deepened the divide over abortion. To some extent, those on opposing sides of the abortion debate have always had clashing views of motherhood, gender roles, and the kind of lives women should pursue.¹⁰ But as both sides claim the legacy of the Nineteenth Amendment, agreement on basic facts about abortion has become much harder to find.¹¹ Abortion supporters and opponents consult different sources of evidence, rely on different experts, and consume different media.¹² As agreement on the facts about abortion becomes much harder to find, the meaning of the

5. See MARY ZIEGLER, *ABORTION AND THE LAW: ROE V. WADE TO THE PRESENT* 3–20 (2020).

6. See *id.* at 140–200.

7. See *id.*

8. See *id.*

9. See *id.*

10. See, e.g., KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984) (tracing conflicting worldviews about gender and abortion in the abortion debate); FAYE GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* (1988) (same).

11. See *infra* Part IV.

12. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

Nineteenth Amendment has never been more disputed. The more everyone in the abortion debate seemingly agrees on the importance of equality for women, the less possible it seems to find any lasting consensus on what women need to do to protect either their right to equal treatment under the law or their own reproductive health.

As this Article shows, the ideas of equality developed by abortion foes exposed new fault lines in the national conversation about women's place in American society. Rather than challenging the underlying premise of *Casey*—that women would and should participate in the economic and political life of the nation—abortion foes appropriated and transformed existing ideas about equality. First, antiabortion lawyers updated and transformed abortion-rights arguments about paternalism.¹³ Insisting that making abortion legal itself patronized women, these advocates asserted that women could (and should) choose to bear children without abandoning other economic or educational opportunities they pursued.¹⁴ Abortion foes insisted that those interested in women's economy could not rely on conventional sources of information, including the media, elite scientific organizations, governmental bodies, or official data.¹⁵ According to this narrative, women believed that they needed abortions because the government, the media, and the medical establishment hid the truth when it was politically incorrect.¹⁶ As this Article argues, the contested meaning of equality in the abortion context not only changed the course of the abortion conflict but also mirrored and reinforced a shift in constitutional discourse—away from an exclusive focus on constitutional rights and toward an intense disagreement over basic facts.

This Article proceeds in four parts. Part I mines the struggles of the decades immediately following *Roe* to understand an intensifying focus on equality arguments. Focusing on the years between 1992 and 2000, Part II explores the two antiabortion strategies to reframe equality arguments that emerged from *Casey*. Part III focuses on the partial-birth abortion struggle, and Part IV explores the evolution of antiabortion equality

13. See *infra* Part IV.

14. See *infra* Part IV.

15. See *infra* Part IV.

16. See *infra* Part IV.

arguments in the buildup to, and aftermath of, *Whole Woman's Health v. Hellerstedt*.¹⁷

I. TOWARD THE EQUALITY WARS

Roe v. Wade came down more than a half century after the ratification of the Nineteenth Amendment.¹⁸ But for nearly two decades after the decision, abortion-rights leaders emphasized arguments about both equality for women and the legacy of the Nineteenth Amendment.¹⁹ By contrast, antiabortion leaders primarily described the legacy of the Nineteenth Amendment in more abstract terms: equality for all, especially representation for the voiceless.²⁰ In this way, antiabortion leaders suggested that carrying on the legacy of the Nineteenth Amendment required the recognition of fetal rights rather than autonomy for women seeking abortion.²¹ This conflict launched an equality war—a debate about what constitutional equality meant for abortion.

Section A unearths fights about the legacy of the Nineteenth Amendment and abortion from the start of the abortion reform movement of the 1960s through the 1992 decision of *Casey*.²² It begins by studying the rise of equality arguments in the movement to reform or repeal abortion laws of the 1960s and early 1970s.²³ It explores how feminist lawyers and political activists developed an impressive repertoire of equality arguments in the period, many of them tied to the Equal Protection Clause of the Fourteenth Amendment.²⁴ But as this Section shows, in the 1960s and 1970s, antiabortion groups also made claims based on the Equal Protection Clause.²⁵ Indeed, competing visions of constitutional equality—and the legacy of the Nineteenth Amendment—shaped the litigation of *Roe v. Wade*.²⁶

Next, Section B explores the evolution of debates about equality and abortion in the decade after *Roe*. Only abortion-

17. 136 S. Ct. 2292 (2016).

18. 410 U.S. 113 (1973).

19. See *infra* Section I.A

20. See *infra* Section I.A

21. See *infra* Section I.A.

22. See *infra* Section I.A.

23. See *infra* Section I.A.

24. See *infra* Section I.A.

25. See *infra* Section I.A.

26. See *infra* Section I.A.

rights leaders working in the 1970s and 1980s generally presented themselves as the champions of equality for women.²⁷ In the late 1970s and early 1980s, antiabortion leaders prioritized a constitutional amendment and presented themselves as the successors of the suffrage movement.²⁸ But even after giving up on a constitutional amendment in 1983, antiabortion leaders still connected arguments about constitutional equality and the Nineteenth Amendment to fetal rights.²⁹ But conflicts about the legacy of the Nineteenth Amendment would only escalate further in the 1990s.³⁰ Even as those on opposite sides of the abortion debate theoretically agreed on the importance of equality for women, the clashing movements fiercely contested whether the fight for legal abortion carried on the legacy of the Nineteenth Amendment.³¹

A. *The Emergence of Equality Arguments in the 1960s
Fight to Legalize Abortion*

In the 1960s, a movement to change the criminal laws governing abortion gathered momentum. Until the late nineteenth century, most states had criminalized abortion only after quickening—the point at which a woman could detect fetal movement (usually, between fifteen and twenty weeks).³² The leaders of the American Medical Association (AMA), seeking a competitive advantage over midwives and other medical practitioners, presented so-called “regular” doctors as the defenders of fetal life.³³ In the final decades of the nineteenth century, the AMA successfully fought for much stricter abortion bans.³⁴ By the 1960s, however, these criminal laws came under fire from physicians who felt that criminal abortion restrictions prevented them from practicing medicine as they saw fit.³⁵ Some rallied around a model law drafted by the American Law Institute (ALI) in 1959,

27. See *infra* Section I.B.

28. See *infra* Section I.B.

29. See *infra* Section I.B.

30. See *infra* Section I.B.

31. See *infra* Section I.B.

32. See JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, at 126–35 (1979); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND THE LAW IN THE UNITED STATES, 1867–1973, at 10 (1997).

33. See MOHR, *supra* note 32, at 127–52.

34. See *id.*

35. See LUKER, *supra* note 10, at 192; REAGAN, *supra* note 32, at 10–27.

which would have made abortion legal in cases of rape, incest, severe fetal abnormality, or a threat to a woman's health.³⁶ Others demanded the complete repeal of criminal restrictions on abortion.³⁷ But until the late 1960s, arguments about equality for women did not dominate the early movement for abortion reform.³⁸ Unsurprisingly, then, the push for reform in the early-to-mid 1960s focused on arguments about the health benefits of legalization—the prevention of deaths due to illegal abortions and improvements to women's mental and physical health.³⁹ “[T]he morality of humane abortion,” wrote Larry Lader, a prominent advocate of abortion reform, “demands that we bring our laws up to date with medical progress.”⁴⁰

Even as supporters of legal abortion adopted a wider variety of rhetorical strategies, the movement for abortion reform primarily spotlighted claims about the benefits of legalizing abortion.⁴¹ For example, between 1963 and 1965, a rubella epidemic brought attention to the risk of birth defects,⁴² as did revelations in the early 1960s that thalidomide, a drug prescribed for morning sickness, could cause severe disabilities in utero.⁴³ Pointing to birth defects, supporters of abortion reform still framed abortion as the means to an end—in this case, the elimination of children with “severe abnormalities.”⁴⁴ “As a physician, I believe that in [the case of] a proven abnormality of a fetus it could be immoral and inhumane to subject the mother, her family and, perhaps, society to the burdens of bearing, nurturing and

36. See SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 34–50 (1991); REAGAN, *supra* note 32, at 221–39.

37. See YALE L. SCH., *BEFORE ROE V. WADE: VOICES THAT SHAPED THE DEBATE BEFORE THE SUPREME COURT DECISION* 32–60 (Reva B. Siegel & Linda Greenhouse eds., 2010).

38. See ZIEGLER, *supra* note 5, at 13–17.

39. See *id.*

40. Lawrence Lader, *The Scandal of Abortion Laws*, N.Y. TIMES, Apr. 25, 1965, at SM32.

41. See ZIEGLER, *supra* note 5, at 13–17.

42. See LESLIE J. REAGAN, *DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA* 1–30 (2010) [hereinafter *DANGEROUS PREGNANCIES*]; SARA DUBOW, *OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA* 65 (2011).

43. On the thalidomide controversy, see *DANGEROUS PREGNANCIES*, *supra* note 42, at 60–65; MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 12 (1987).

44. See ZIEGLER, *supra* note 5, at 13–17.

rearing an abnormal child,” wrote reform supporter Dr. Ruth Lidz in 1971.⁴⁵

But in the late 1960s and early 1970s, second-wave liberal feminists who backed abortion access began presenting abortion as a civil right that women deserved regardless of whether legal abortion would have broader societal benefits.⁴⁶ “[T]here is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process,” Betty Friedan, a celebrated feminist and prominent proponent of legalizing abortion, proclaimed in 1969.⁴⁷ Jane, an organization that helped women find safe abortion services or perform the procedure themselves, likewise presented abortion as a matter of equality for women.⁴⁸ “Only a woman who is pregnant can determine whether she has enough resources—economic, physical and emotional—at a given time to bear and rear a child,” Jane explained in a pamphlet.⁴⁹ “Yet at present the decision to bear the child or have an abortion is taken out of her hands by governmental bodies which can have only the slightest notion of the problems involved.”⁵⁰ Liberal feminists gained more influence in the abortion-legalization movement as doctors and patients voiced their dissatisfaction with existing reform laws.⁵¹ In some places, reform laws based on the ALI model had done nothing to lower the rate of illegal abortions.⁵² Besides, in the late 1960s and early 1970s, liberal feminists and other supporters of abortion access had won a string of victories in the courts, which were increasingly willing to apply a constitutional right to privacy in the abortion context.⁵³ These wins increased the odds that the Supreme Court would recognize a right to choose abortion.⁵⁴

45. Ruth Lidz, *Review: More Light on Abortion*, FAM. PLAN. PERSP., Jan. 1971, at 63, 63.

46. See Reva B. Siegel, *Abortion and the “Woman Question”: Forty Years of Debate*, 89 IND. L.J. 1365, 1367–73 (2014).

47. See YALE L. SCH., *supra* note 37, at 39.

48. See JANE, ABORTION—A WOMAN’S RIGHT, A WOMAN’S DECISION (1969–1973), <https://www.cwluherstory.org/jane-documents-articles/abortion-a-womans-decision-a-womans-right> [<https://perma.cc/8D2G-YBD7>].

49. *Id.*

50. *Id.*

51. See YALE L. SCH., *supra* note 37, at 127–97.

52. See Robert McFadden, *Flaws in Abortion Reform Found in an 8-State Study*, N.Y. TIMES, Apr. 13, 1970, at 1.

53. See YALE L. SCH., *supra* note 37, at 127–97.

54. See *id.*

When the Supreme Court agreed to hear two abortion cases, *Roe v. Wade*⁵⁵ and *Doe v. Bolton*,⁵⁶ activists on both sides invoked the Equal Protection Clause of the Fourteenth Amendment, offering sharply different ideas about what equality meant in the context of abortion. Feminist briefs reiterated claims that abortion bans stripped women of equality as well as autonomy.⁵⁷ Some of these claims zeroed in on nonwhite and low-income women most affected by criminal abortion laws—those who were more likely to face complications, and even death, as a result of dangerous illegal abortion procedures.⁵⁸ An amicus brief submitted on behalf of the National Welfare Rights Organization, the American Public Health Organization, and other groups stressed that even if there was no right to choose abortion, criminal laws still in place in the early 1970s violated the Equal Protection Clause because they denied abortion access to poor, often nonwhite women without “any rational connection to a legitimate state purpose.”⁵⁹ Other briefs stated more generally that denying access to abortion constituted sex discrimination under the Equal Protection Clause.⁶⁰ An amicus brief for New Women Lawyers argued that “the effect of the [abortion] laws is to force women, against their will, into a position in which they will be subjected to a whole range of *de facto* forms of discrimination based on the status of pregnancy and motherhood.”⁶¹

Antiabortion groups made their own claims under the Equal Protection Clause, but their arguments focused on the fetus rather than on the woman.⁶² The antiabortion movement in the early 1970s operated a sophisticated network of state-based organizations, many of them at least partly reliant on support

55. See 410 U.S. 113 (1973).

56. See 410 U.S. 179 (1973).

57. See Motion for Leave to File Brief Amici Curiae on Behalf Women's Organizations and Named Women in Each Case, and Brief Amici Curiae, 16–37, *Roe*, 410 U.S. 113 (Nos. 70–18, 70–40); Motion for Leave to File Brief and Brief Amicus Curiae on Behalf of New Women Lawyers, Women Health and Abortion Project, Inc., National Abortion Action Coalition, 25–34, *Roe*, 410 U.S. 113 (Nos. 70–18, 70–40) [hereinafter Motion and Brief of New Women Lawyers].

58. See *supra* note 57 and accompanying text.

59. See Motion for Leave to File Brief Amici Curiae in Support of Appellants and Brief Amici Curiae, 36, *Roe*, 410 U.S. 113 (No. 70–18).

60. See *supra* note 57 and accompanying text.

61. Motion and Brief of New Women Lawyers, *supra* note 57, at 27.

62. See Brief Amicus Curiae on Behalf of Ass'n of Texas Diocesan Attorneys, 118–32, *Roe*, 410 U.S. 113 (No. 70–18); Brief of Americans United for Life, In Support of Appellee, 4–11, *Roe*, 410 U.S. 113 (No. 70–18).

from the Catholic Church.⁶³ By 1973, however, the movement had reframed its cause as a secular fight for civil rights—a battle that could appeal to Protestants, Jews, and secular Americans, as well as Catholics.⁶⁴ This idea of a right to life ran through antiabortion briefs submitted in *Roe*. Joseph Witherspoon, a law professor at the University of Texas at Austin and a leading member of the National Right to Life Committee (NRLC)—then the largest national antiabortion group⁶⁵—cited the Court's recent jurisprudence using the Equal Protection Clause to invalidate some laws that discriminated against children born out of wedlock⁶⁶ to argue that abortion (not criminal abortion laws) violated the Equal Protection Clause.⁶⁷ If the Constitution sometimes forbade laws that discriminated on the basis of illegitimacy, Witherspoon reasoned, the Constitution also prohibited laws that allowed the destruction of unborn children based on the preferences of their parents.⁶⁸ In Witherspoon's words: "The consent or non-consent of the two sets of parents does not intrinsically relate to the child or any problem it might be creating for its parent or parents."⁶⁹ Instead, Witherspoon argued, "it is wholly connected with an evaluation of the right of the unborn child to its life and objective factors that might, under narrow circumstances, warrant the destruction of the child's life."⁷⁰ Similar arguments were central to antiabortion amici and scholars before *Roe*.⁷¹ These arguments also served as a vehicle for antiabortion claims about fetal personhood—if a fetus or unborn child counted as a legal person, that person would hold rights under the Due Process and Equal Protection Clauses, and abortion rights would be untenable.⁷² Groups like NRLC believed that recent medical developments, including the evolution of

63. See DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 5–20 (2016); MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 25–62 (2015).

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

65. See Mary Ziegler, *Originalism Talk: A Legal History*, 2014 B.Y.U. L. REV. 869, 870–88 (2015) [hereinafter *Originalism Talk*].

66. See generally Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277 (2015) (describing the limits and function of the Court's jurisprudence on illegitimacy).

67. See Brief Amicus Curiae on Behalf of Association of Texas Diocesan Attorneys, *supra* note 62, at 97.

68. *Id.*

69. *Id.*

70. *Id.*

71. See *Originalism Talk*, *supra* note 65.

72. See *id.* at 885–91.

fetology as a specialty, provided irrefutable evidence of personhood.⁷³

The Court in *Roe* did not seem to adopt either side's equality framework, instead framing abortion as a medical matter best resolved by patients and physicians.⁷⁴ While recognizing a broad right, the Justices described abortion as a decision left largely to doctors, and *Roe* rooted that right in concepts of autonomy and privacy.⁷⁵

B. Equality Arguments in the Immediate Aftermath of Roe

In the years immediately after *Roe*, equality arguments took on much more importance for abortion-rights supporters as antiabortion organizations lobbied for a constitutional amendment to ban abortion nationwide.⁷⁶ Although abortion foes did not have the votes in Congress to pass such an amendment,⁷⁷ influential antiabortion groups like NRLC and Americans United for Life (AUL) worked to pass laws to keep down the abortion rate.⁷⁸ These laws did everything from banning abortion funding to requiring the involvement of husbands or parents.⁷⁹

In defending these laws, AUL began moving away from equality claims, instead favoring arguments that narrowly interpreted *Roe* rather than rejecting it altogether.⁸⁰ This strategy delivered some results. The Court upheld a requirement that women give written consent before abortion in *Planned Parenthood of Central Missouri v. Danforth*.⁸¹ More importantly, however, the Court upheld both state and federal bans on abortion funding, including the Hyde Amendment, arguably the most important restriction passed since *Roe*.⁸²

In *Maher v. Roe*⁸³ and again in *Harris v. McRae*,⁸⁴ the Court emphasized that while the right to abortion gave women the right to be left alone, it did not entitle them to any government

73. See *id.* at 893.

74. See *Roe v. Wade*, 410 U.S. 113, 147–52 (1973).

75. See *id.* at 147–55.

76. See *Originalism Talk*, *supra* note 65, at 898–903.

77. See ZIEGLER, *supra* note 5, at 65.

78. See *id.* at 59–60.

79. See *id.* at 71–72.

80. See *id.* at 70–71.

81. 428 U.S. 52, 66–67 (1976).

82. See *Harris v. McRae*, 448 U.S. 297 (1980).

83. 432 U.S. 464, 473–74 (1977).

84. 448 U.S. at 317–18.

support.⁸⁵ "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions," the Court wrote, "it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."⁸⁶ *Harris* sent a warning to feminists about the *Roe* framework. On its face, *Roe* was hardly a strongly feminist opinion, but for supporters of abortion rights, the problems ran deeper. As abortion foes had recognized, the Burger Court might have continued to frame abortion as a matter of privacy while still upholding major abortion restrictions.

Feminist scholars responded by stressing a variety of strong, equality-based arguments for abortion.⁸⁷ Ruth Bader Ginsburg, a pioneering litigator and future Supreme Court Justice, contended that the abortion conflict would be less polarized if the Court had relied on the Equal Protection Clause instead of a privacy right.⁸⁸ Ginsburg believed that the Court's "heavy-handed judicial intervention" had made things worse.⁸⁹ So too had the Court's emphasis on privacy.⁹⁰ Ginsburg wrote that the Court's opinion was weakened by its "concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."⁹¹ Likewise, prominent feminist legal scholar Catherine MacKinnon chastised the *Roe* Court for ignoring what would truly be required for women to achieve equal citizenship.⁹² Summarizing what she saw as the perspective of the *Roe* Court, MacKinnon wrote: "Reproduction is sexual, men control sexuality, and the state supports the interests of men as a group."⁹³

Notwithstanding their experimentation with incremental restrictions, antiabortion groups had not given up on the equality wars and continued to champion arguments for fetal

85. *See id.*

86. *See id.*

87. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 375-79 (1985); Sylvia Law, *Rethinking Sex and the Constitution*, 136 U. PA. L. REV. 955 (1984); Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45 (Jay Garfield & Patricia Hennessey eds., 1984).

88. *See* Ginsburg, *supra* note 87, at 386.

89. *Id.* at 385.

90. *See id.*

91. *Id.*

92. *See* MacKinnon, *supra* note 87, at 45, 53.

93. *Id.* at 49.

equality. In the 1970s and early 1980s, antiabortion groups primarily championed a constitutional amendment criminalizing abortions nationwide.⁹⁴ Many of these constitutional proposals, including several circulating in Congress, redefined “person” for the purposes of the Fourteenth Amendment to include fetal life from the moment of fertilization.⁹⁵

Nevertheless, these arguments did not reflect an intense focus on equality for women within the antiabortion movement.⁹⁶ To the extent the antiabortion movement discussed equal treatment, antiabortion scholars focused on fetal rights, particularly the argument that *Roe* betrayed what antiabortion legal scholar Robert Destro called “the egalitarian philosophy embodied in the Declaration of Independence and the [F]ourteenth [A]mendment.”⁹⁷ However, some antiabortion groups acknowledged that women facing unplanned pregnancies themselves faced discrimination, including an inadequate social safety net and bias at work.⁹⁸ Self-described antiabortion feminists likewise claimed to understand the issue of sex equality better than their counterparts who supported access to abortion.⁹⁹ In the 1970s, antiabortion feminists tended to support a constitutional Equal Rights Amendment prohibiting sex discrimination and more robust laws protecting women against sex discrimination and sexual harassment.¹⁰⁰ But many of these activists also insisted that women’s capacity to gestate a pregnancy made them different from men in countless ways—and that abortion reflected society’s refusal to support pregnant women and mothers who wanted to parent while working.¹⁰¹ Activists like Pat Goltz, the founder of Feminists for Life, contended that *Roe* reflected a willingness on the part of the government to force women into abortion rather than honoring and supporting motherhood.¹⁰² However, while pro-life feminists led a variety of organizations, they wielded limited influence over the most powerful antiabortion

94. See WILLIAMS, *supra* note 63, at 212–29.

95. See ZIEGLER, *supra* note 63, at 42–45.

96. See *id.*; see also ZIEGLER, *supra* note 5, at 124–26.

97. Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1327 (1975).

98. See Mary Ziegler, *Women’s Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKLEY J. GENDER & JUST. 232, 239–40 (2013).

99. See *id.* at 238–39.

100. See *id.* at 237–39, 242–43, 245.

101. See *id.* at 243–45.

102. See *id.* at 238–39.

groups and did not set the terms of the discussion.¹⁰³ The anti-abortion movement almost exclusively focused on claims about what they saw as bias against unborn children.¹⁰⁴

Even as the antiabortion movement adopted a court-centered, incremental plan of attack against *Roe v. Wade* in the mid-to-late 1980s, antiabortion leaders still invoked the Equal Protection Clause primarily in defending fetal rights. The antiabortion movement gravitated to an incremental strategy because efforts to get an amendment out of Congress had repeatedly fallen short in the 1970s.¹⁰⁵ In the early 1980s, antiabortion forces felt far more hopeful. Ronald Reagan, the first president to emphasize his opposition to abortion, won a sweeping victory in 1980,¹⁰⁶ and Republicans who shared his views controlled both the House and the Senate.¹⁰⁷ Lacking a two-thirds majority to pass an outright constitutional prohibition, abortion foes found themselves too divided to settle on either a statute banning abortion or a constitutional amendment overturning *Roe*.¹⁰⁸ With a constitutional amendment out of reach, abortion foes gravitated toward a new strategy, one predicated not on changing the text of the Constitution, but in reversing *Roe* in the Supreme Court.¹⁰⁹ By campaigning and fundraising for Senate and presidential candidates, pro-lifers hoped to influence Supreme Court nominations.¹¹⁰ And by passing incremental restrictions, activists planned to create the kinds of laws that would allow the Court to later chip away at, and ultimately reverse, *Roe*.¹¹¹ But the laws pro-lifers championed primarily centered on the same claims about fetal rights and fetal equality that had been the hallmark of the constitutional amendment campaign.¹¹² NRLC proposed laws banning tort actions for wrongful life and wrongful birth, arguing that such measures clashed with the

103. See *supra* note 65 and accompanying text.

104. See ZIEGLER, *supra* note 5, at 126.

105. See *id.* at 71.

106. See *Originalism Talk*, *supra* note 65, at 876, 907. For more on Reagan's opposition to abortion, see RONALD REAGAN, ABORTION AND THE CONSCIENCE OF A NATION 21 (1984) (calling for protection of "two lives—the life of the mother and the unborn child").

107. See ZIEGLER, *supra* note 5, at 67.

108. See *id.* at 59.

109. See *id.* at 73–76.

110. See *id.* at 76–77.

111. See *id.* at 73–76.

112. See *id.*

personhood of the fetus.¹¹³ AUL embarked on a campaign to change state homicide laws to define unborn children as persons.¹¹⁴

Republican presidents soon transformed the Court, giving abortion laws a much better chance of surviving judicial review. President Ronald Reagan nominated Anthony Kennedy, Sandra Day O'Connor, and Antonin Scalia to the Court, and his successor, President George H. W. Bush, selected David Souter and Clarence Thomas.¹¹⁵ President Bush, like his predecessor, proclaimed his support for an antiabortion constitutional amendment, and many expected the new Republican majority to overturn *Roe*.¹¹⁶ The Court's 1986 decision in *Thornburgh v. American College of Obstetricians and Gynecologists* reinforced this conclusion.¹¹⁷ *Thornburgh* involved a standard multi-restriction abortion statute.¹¹⁸ Three years earlier, the Court had struck down a similar Akron ordinance.¹¹⁹ The outcome in *Thornburgh* was formally the same. But in *Thornburgh*, the majority supporting abortion rights had shrunk to five, and more judicial retirements seemed likely in the near future.¹²⁰

The predicted demise of *Roe* only deepened antiabortion lawyers' commitment to a fetal-centered strategy—one that increasingly demonized women or mocked their reasons for seeking abortion.¹²¹ Indeed, in the late 1980s, as they accelerated attacks on the *Roe* decision, groups like NRLC and AUL

113. See JEAN REITH SCHROEDEL, *IS THE FETUS A PERSON?: A COMPARISON OF POLICIES ACROSS THE FIFTY STATES* 177 (2000).

114. See BONNIE STEINBOCK, *LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES* 105–11 (1992).

115. On changes to the Supreme Court, see MARK KOZLOWSKI & ANTHONY LEWIS, *THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS* 18 (2006).

116. See Neil J. Young, *How George H. W. Bush Enabled the Rise of the Religious Right*, WASH. POST (Dec. 5, 2018, 4:00 AM), <https://www.washingtonpost.com/outlook/2018/12/05/how-george-hw-bush-enabled-rise-religious-right/> [https://perma.cc/N3LP-U38E]; see also Sarah McCammon, *Looking Back on President George H. W. Bush's Legacy on Abortion*, NPR (Dec. 4, 2018, 5:46 PM), <https://www.npr.org/2018/12/04/673398023/looking-back-on-president-george-h-w-bushs-legacy-on-abortion> [https://perma.cc/DR3N-VLG2].

117. 476 U.S. 747 (1986).

118. See *id.*

119. See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

120. See *Thornburgh*, 476 U.S. at 747.

121. See *infra* Part II.

prioritized campaigns that more openly condemned the behavior of pregnant women who sought abortions.¹²²

At the same time, abortion-rights lawyers took this opportunity to refine equality-based arguments that did not explicitly rely on *Roe*.¹²³ Because grassroots activists and attorneys who supported access to abortion believed that the Court would soon overturn *Roe*, they forged two alternative strategies.¹²⁴ In emphasizing arguments thought to have the broadest appeal, political activists committed to abortion rights highlighted concerns about governmental interference rather than equality for women.¹²⁵ By contrast, abortion-rights attorneys mined a rich tradition of equality arguments to offer the Justices reason not to reverse *Roe*.¹²⁶ Kathryn Kolbert and Linda Wharton, the attorneys later leading the challenge of the law at issue in *Casey*, took aim at the spousal-notification provision of the Pennsylvania law considered by the Court,¹²⁷ insisting that it imposed sex stereotypes on women victimized by domestic violence.¹²⁸ At the same time, Kolbert and Wharton also used concerns about equality to explain how *Roe* carried on the legacy of the Fourteenth Amendment.¹²⁹

II. EQUALITY AND THE PRESERVATION OF *ROE*

In 1988, President Reagan's last nominee, Anthony Kennedy, took his place on the Court. Many—including abortion foes—believed that Justice Kennedy would cast the deciding vote to reverse *Roe*.¹³⁰ AUL President Guy Condon similarly predicted that "[t]he additions of Justice Antonin Scalia and Justice Anthony Kennedy [would] upset the balance historically tilted in favor of abortion on demand."¹³¹ With Justice Kennedy on the Court, antiabortion lawyers doubled their efforts to get a test

122. See ZIEGLER, *supra* note 5, at 95–98.

123. See *infra* Part II.

124. See *infra* Part II.

125. See *infra* Part II.

126. See *infra* Part II.

127. See *infra* Part II.

128. See *infra* Part II.

129. See *infra* Part II.

130. See ZIEGLER, *supra* note 5, at 85.

131. Letter from Guy Condon, AUL President, to Reverend Richard John Neuhaus, Dir. of the Ctr. on Religion & Soc'y (Apr. 1988) (on file with the Catholic University of America Archives).

case before the Court that would spell the end for *Roe*.¹³² But in selecting a test case, advocates working with NRLC and AUL mostly ignored claims made by abortion-rights supporters concerning equality for women.

The years before the Supreme Court's 1992 decision in *Planned Parenthood v. Casey* exposed challenges facing antiabortion strategies to claim the legacy of the Nineteenth Amendment. Antiabortion groups recognized—courtesy of internal polling—that many Americans saw their movement as anti-woman.¹³³ But as part of the campaign to undo *Roe*, antiabortion leaders persisted in framing the reasons that most women chose abortion as trivial, or sometimes worse, thereby demonizing the women who chose to end their pregnancies.¹³⁴ NRLC first defended men seeking the right to block former partners from having abortions.¹³⁵ In these cases, the group sometimes painted women seeking abortion as shallow and self-serving.¹³⁶ In one such case, for example, NRLC argued that a woman sought an abortion because she did not want to gain weight or lose any time with her boyfriend. Meanwhile, NRLC portrayed the woman's boyfriend as an aspiring breadwinner and provider for the woman and her unborn child.¹³⁷ The group also sponsored laws that banned abortion as a matter of convenience or birth control, legitimizing the procedure only in cases of rape, incest, and severe threats to a woman's health.¹³⁸ These laws suggested that every other abortion—and the vast majority of procedures—were sought out by women who had not taken their own reproductive health seriously.¹³⁹

AUL likewise pursued a strategy that made it harder to marry antiabortion activism and arguments about the

132. See ZIEGLER, *supra* note 5, at 109–14.

133. See *id.* at 124–25.

134. See *id.*

135. See Martha Brannigan, *Suits Argue Fathers' Rights in Abortion: One Plaintiff Has Petitioned Supreme Court*, WALL ST. J., Aug. 23, 1988, at 29; see also David Savage, *Fathers' Appeal to Justices Asks Equal Rights to Children, Even Unborn*, L.A. TIMES, Sept. 25, 1988, at SD20.

136. See ZIEGLER, *supra* note 5, at 97.

137. See Respondent's Brief in Opposition to Petition for a Grant of Certiorari at 3–5, *Doe v. Smith*, 486 U.S. 1308 (1988) (No. 88–1837) (on file with the author); Petition for Writ of Certiorari at 8, 16, *Doe v. Smith*, 486 U.S. 1308 (No. 88–1837) (on file with the author).

138. Tamar Lewin, *States Testing the Limits on Abortion*, N.Y. TIMES, Apr. 2, 1990, at A14; Paul Houston, *Abortion Opponents to Press States to Legislate Wide-Ranging Curbs*, L.A. TIMES, Oct. 3, 1989, at OC18.

139. See *supra* note 138 and accompanying text.

Nineteenth Amendment. AUL promoted and endorsed the efforts of prosecutors who began pursuing criminal charges against pregnant people accused of using crack cocaine and other drugs during pregnancy.¹⁴⁰ The AUL designed the effort to reinforce the proposition that other areas of the law treated a fetus or unborn child as a rights-holding person—evidence, as AUL framed it, that *Roe* was a constitutional outlier.¹⁴¹ But again, AUL focused on pregnant women's supposed mistakes and selfishness, fueling anxiety about the relationship between equality for women and opposition to abortion.¹⁴² Moreover, accusations of misogyny became more common in the late 1980s after the rise of Operation Rescue, an organization that led massive, often-frightening blockades of abortion clinics.¹⁴³ Operation Rescue was an explicitly evangelical Christian organization known for its lawbreaking and claims that abortion was murder.¹⁴⁴ Blockades frightened many patients and reinforced the impression that the antiabortion movement cared little for either the well-being of women or the rule of law.¹⁴⁵

As the Supreme Court seemed poised to overturn *Roe*, pro-choice organizations shined a spotlight on abortion rights. In *Webster v. Reproductive Health Services*, the Court rejected a challenge to a Missouri abortion law.¹⁴⁶ Reconfigured by two Republican presidents, the Court also seemed more skeptical of *Roe* than ever. While only Justice Scalia wrote that the time had come to reverse *Roe*, other Justices seemed likely to join him in future cases.¹⁴⁷ A plurality denounced *Roe*'s¹⁴⁸ trimester

140. On AUL's involvement with these prosecutions, see Marney Rich, *A Question of Rights: Birth and Death Decisions Put Women in the Middle of Legal Conflict*, CHI. TRIB., Sept. 18, 1988, § 6, at 1; Jean Davidson, *Drug Babies Push Issue of Fetal Rights*, L.A. TIMES, Apr. 25, 1989, at 1.

141. *ACLU Contests C-Section Delivery of Viable Fetus*, LIFE DOCKET (AUL, Chicago, Ill.), Aug. 1988, at 2 (on file with the Southern Baptist Historical Society and Library, in the Southern Baptists for Life Papers, Box 1, File 1).

142. See ZIEGLER, *supra* note 5, at 96–98.

143. See JAMES RISEN & JUDITH L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 181–82, 258–61 (1998); DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 223–24 (2010); ZIAD W. MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS 87–88 (2008).

144. See ZIEGLER, *supra* note 5, at 98–100.

145. See *id.*

146. 492 U.S. 490 (1989).

147. See *id.* at 532–40 (Scalia, J., concurring in part and concurring in the judgment).

148. See *id.* at 509–22 (plurality opinion).

framework.¹⁴⁹ Justice O'Connor refused to join this part of the Court's opinion, but she had also strongly criticized the trimester framework and seemed unconvinced that the decision should remain in place.¹⁵⁰

After *Webster*, abortion-rights lobbyists and political activists downplayed arguments about equality and the legacy of the Nineteenth Amendment in a bid to maximize the number of voters who would support their cause on election day. *Webster* suggested that the federal courts would no longer reliably protect abortion rights.¹⁵¹ Groups like the National Abortion Rights Action League (NARAL) and Planned Parenthood believed that they would instead have to rely on politicians and voters to protect reproductive rights.¹⁵² NARAL argued that pro-choice advocates would be the most effective if they could prove to voters and politicians that most Americans already supported legal abortion.¹⁵³ The organization relied on focus groups, polling, and the counsel of political consultants to devise a strategy that would increase political support for the right to choose.¹⁵⁴ Arguments about equality for women did not seem to command enough support. Hickman-Maslin Research, a political polling firm working with NARAL, urged the group to avoid sex-equality arguments that some would view as "belligerent feminist rhetoric."¹⁵⁵

By contrast, feminist attorneys made equality arguments more important than ever to the case for preserving *Roe*. Since the mid-1980s, organizations like the American Civil Liberties Union (ACLU) Reproductive Freedom Project honed these arguments in cases involving abortion access for minors.¹⁵⁶ These cases proved both politically and constitutionally challenging for pro-choice lawyers. Politically, poll data showed consistent support for laws mandating parental involvement.¹⁵⁷

149. See *Roe v. Wade*, 410 U.S. 113, 156–62 (1973).

150. See *Webster*, 492 U.S. at 522–28 (O'Connor, J., concurring in part and concurring in the judgment).

151. See *id.* at 509–22 (plurality opinion).

152. See ZIEGLER, *supra* note 5, at 106.

153. See *id.*

154. See *id.* at 101–03.

155. *Id.* at 102 (quoting Hickman-Maslin Research to NARAL Re: "Do's and Don'ts" (Mar. 22, 1989) (on file with the Schlesinger Library, Harvard University, in The NARAL Papers, Box 204, Folder 9)).

156. See *id.* at 109–12.

157. See Lydia Saad, *Americans Favor Parental Involvement in Teen Abortion Decisions*, GALLUP (Nov. 30, 2005), <https://news.gallup.com/poll/20203/americans->

Constitutionally, pro-choice attorneys had to overcome the fact that the Court viewed minors' rights as less capacious than those of adults¹⁵⁸ because minors needed their parents' advice and support.¹⁵⁹ The ACLU responded partly by emphasizing the powerful costs faced by minors forced to have children before they were ready.¹⁶⁰

These arguments were center stage in *Hodgson v. Minnesota*,¹⁶¹ the Court's first major case since *Webster*. *Hodgson* involved a law requiring minors to notify both their parents (or other guardians) before obtaining an abortion.¹⁶² A separate part of the statute instituted a judicial bypass—a procedure allowing a minor to establish that she was unusually mature or that abortion would be in her best interest—that would apply if the Court held that the state could not otherwise constitutionally require the notification of both parents.¹⁶³ Together with antiabortion amici, Minnesota argued that most minors made damaging and unwise decisions when they failed to consult with their parents.¹⁶⁴ Antiabortion amici further asserted that abortion providers rushed minors into a decision without fully informing them of any of the risks they associated with the procedure.¹⁶⁵ The Elliot Institute, an antiabortion research organization, argued that “present law acts as a one way funnel which allows parents to pressure their daughters into abortions, yet prevents those parents who would support childbirth from helping their daughters avoid unwanted abortions.”¹⁶⁶

favor-parental-involvement-teen-abortion-decisions.aspx [https://perma.cc/N274-VZV4].

158. See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“[T]he Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences.”).

159. For an example, see Brief of Respondents at 9, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (No. 88–1125) [hereinafter Brief of *Hodgson* Respondents].

160. See ZIEGLER, *supra* note 5, at 109–12.

161. 497 U.S. 417 (1990).

162. MINN. STAT. §§ 144.343(2)–(7) (1988) (subdivision 2 held unconstitutional in *Hodgson*, 497 U.S. at 423).

163. See *id.*

164. See Brief of *Hodgson* Respondents, *supra* note 159, at 9; Brief Amici Curiae Focus on the Family and Family Research Council at 25–27, *Hodgson*, 497 U.S. 417 (No. 88–1125).

165. See Brief Amici Curiae Focus on the Family and Family Research Council, *supra* note 164, at 25–27; Brief Amicus Curiae of the Elliot Institute for Social Sciences Research and the American Academy of Medical Ethics at 10, *Hodgson*, 497 U.S. 417 (No. 88–1125).

166. Brief Amicus Curiae of the Elliot Institute for Social Sciences Research and the American Academy of Medical Ethics, *supra* note 165, at 10.

Feminist and pro-choice organizations responded not only by spotlighting the threat of domestic violence but also by highlighting the concrete costs faced by women who could not control their fertility.¹⁶⁷ Feminist and pro-choice organizations drew on a rich tradition of equality arguments in the abortion context, emphasizing the extent to which forced childbearing would deprive women (and especially minors) of the opportunity to pursue an education or a career.¹⁶⁸ The *Hodgson* briefs did not directly mention the Equal Protection Clause, but the connection between abortion access and equality remained center stage.¹⁶⁹ The ACLU contended that “[t]eenage motherhood eliminates life choices, not only for the teenage mother, but for her children.”¹⁷⁰

For the most part, these arguments did not convince the Court to strike down parental-involvement laws. *Hodgson* recognized that parental notification could endanger minors in abusive homes and reasoned that the two-parent notification law would be unconstitutional.¹⁷¹ Just the same, *Hodgson* reasoned that with the judicial-bypass provision, the law was constitutional.¹⁷² A companion case, *Ohio v. Akron Center for Reproductive Health*, upheld a similar law.¹⁷³ Nevertheless, equality arguments appealed to pro-choice attorneys looking for a sounder foundation for abortion rights, especially as they seemed to be increasingly in jeopardy.

By the early 1990s, the Supreme Court seemed to have a significant majority ready to overturn *Roe*.¹⁷⁴ In *Webster*, the Court looked as if it would inevitably be forced to reckon with *Roe*, especially after President George H. W. Bush placed two more Justices on the Court.¹⁷⁵ Few had any doubt that the Court would overturn *Roe* in a matter of years, if not months.¹⁷⁶ States raced to pass laws that would give the Justices an opportunity

167. See Brief for Petitioners at 20–22, *Hodgson*, 497 U.S. 417 (No. 88–1125) [hereinafter Brief of *Hodgson* Petitioners]; see also Brief for Appellees at 16–39, *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (No. 88–805).

168. See *supra* note 167 and accompanying text.

169. See *supra* note 167 and accompanying text.

170. See Brief of *Hodgson* Petitioners, *supra* note 167, at 13.

171. *Hodgson*, 497 U.S. at 440–58.

172. See *id.*

173. *Id.* at 502, 512–20 (1990).

174. See ZIEGLER, *supra* note 5, at 112–14.

175. See *id.*

176. See *id.*

to discard abortion rights. Guam banned all abortions,¹⁷⁷ states like Utah and Louisiana outlawed all but a handful of procedures,¹⁷⁸ and other states used more incremental restrictions as a vehicle.¹⁷⁹

When the Court agreed to hear *Planned Parenthood v. Casey*, equality arguments (some of them connected to the Nineteenth Amendment) played a more significant role in shaping the terms of debate. *Casey* involved Pennsylvania's multi-restriction law that required a waiting period, informed consent, and consultation with parents or husbands all before a woman could obtain an abortion.¹⁸⁰ Kathryn Kolbert and Linda Wharton, the attorneys leading the challenge to Pennsylvania's law, developed arguments linking abortion and equality. The most successful of these arguments explained why the government could not require women to notify their husbands before getting an abortion.¹⁸¹ Kolbert and Wharton insisted that the measure sacrificed women's rights in order to carry out what the state assumed to be men's childbearing preferences.¹⁸² This mandate, in turn, reflected "precisely the prohibited stereotype that wives should bear children."¹⁸³ Kolbert and Wharton expanded on this logic to explain why the equality concerns motivating the framers of the Nineteenth Amendment militated in favor of keeping *Roe* intact.¹⁸⁴ The suffragettes had framed the vote as a vehicle for women seeking better, more equal lives,¹⁸⁵ and Kolbert and Wharton described abortion access in similar terms.¹⁸⁶ "The option of safe, legal abortion has enabled great numbers of women to control the timing and size of their families and thus continue

177. See *Guam OKs Restrictive Abortion Bill*, CHI. TRIB., Mar. 16, 1990, § 1, at 5.

178. Tamar Lewin, *Strict Anti-Abortion Law Signed in Utah*, N.Y. TIMES, Jan. 26, 1991, at A10. On the Louisiana law, see Maralee Schwartz, *Strict Abortion Ban Voted in Louisiana: Backers Expect to Enact Nation's Toughest Curbs over Governor's Veto*, WASH. POST, June 15, 1990, at A1.

179. See ZIEGLER, *supra* note 5, at 112-14.

180. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855-61 (1992) (plurality decision).

181. Brief for Petitioners and Cross-Respondents at 6, 32-33, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902) [hereinafter Brief for *Casey* Petitioners and Cross-Respondents].

182. See *id.* at 48.

183. *Id.*

184. See *id.* at 45-53.

185. See generally *She the People*, *supra* note 1.

186. See Brief for *Casey* Petitioners and Cross-Respondents, *supra* note 181, at 33.

their education, enter the workforce, and otherwise make meaningful decisions consistent with their own moral choices," the two argued.¹⁸⁷ "As a result, women have experienced significant economic and social gains since *Roe*."¹⁸⁸ Other briefs more explicitly connected equality, suffrage, and abortion.¹⁸⁹ The American Historian's brief, for example, argued that a backlash to suffrage helped produce abortion bans by inspiring "popular fears that women were departing from a purely maternal role."¹⁹⁰

For the most part, antiabortion briefs repeated well-worn arguments that the Equal Protection Clause did not protect access to abortion but rather rights for fathers and unborn children. An amicus brief submitted by Catholics United for Life and other groups contended that the Fourteenth Amendment explicitly "secure[d] the rights to life and equal protection for every human being," even before birth.¹⁹¹ Focus on the Family, a leading religious right group that championed conservative positions on abortion and gay rights, highlighted the need for "a rule of equal treatment of fathers and mothers."¹⁹² Pennsylvania simply suggested that the Equal Protection Clause did not apply since abortion itself was unlike any other medical procedure.¹⁹³ An amicus brief submitted by Feminists for Life and other anti-abortion groups spotlighted what the brief framed as "the emotional, psychological and physiological repercussions" of abortion.¹⁹⁴

The Feminists for Life brief foreshadowed a broader shift in the debate. After *Casey*, both sides increasingly portrayed themselves as the champions of equality for women—at times invoking the Nineteenth Amendment itself. This shift arose for several reasons, most of them connected to *Casey* itself. *Casey* shocked abortion opponents who had widely expected the

187. *Id.*

188. *Id.*

189. See *infra* note 190 and accompanying text.

190. Brief of 250 American Historians as Amici Curiae in Support of Planned Parenthood of Southeastern Pennsylvania at 15–16, *Casey*, 505 U.S. 833 (Nos. 91–744, 91–902).

191. Brief of Catholics United for Life et al. as Amici Curiae in Support of Respondents and Cross-Petitioners at 3, *Casey*, 505 U.S. 833 (Nos. 91–744, 91–902).

192. Brief for Focus on the Family et al. as Amici Curiae in Support of Respondents and Cross-Petitioners at 7, *Casey*, 505 U.S. 833 (Nos. 91–744, 91–902).

193. Brief for Respondents at 31–32, *Casey*, 505 U.S. 833 (Nos. 91–744, 91–902).

194. Brief of Feminists for Life et al. as Amici Curiae in Support of Respondents & Cross Petitioners at 6, *Casey*, 505 U.S. 833 (Nos. 91–744, 91–902) [hereinafter Brief for Feminists for Life et al.].

Justices to reverse *Roe*.¹⁹⁵ The Court instead preserved what it called the essential holding of *Roe*: "A recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."¹⁹⁶ The decision was not a blowout for abortion-rights advocates, however, as it certainly eroded protection for abortion. In fact, *Casey* eliminated *Roe*'s trimester framework in favor of a rule that justified all abortion restrictions unless they were unduly burdensome.¹⁹⁷ And while *Casey* did not specify the parameters of its new "undue burden" standard, the Justices upheld all but one of the disputed Pennsylvania restrictions, suggesting that few abortion restrictions would count as unduly burdensome.¹⁹⁸

Casey also put abortion's effects on women at the heart of abortion jurisprudence.¹⁹⁹ The connection between equality and abortion lay at the foundation of the Court's decision to preserve abortion rights. In the Court's stare decisis analysis, the Justices considered whether any decision had generated significant reliance interests.²⁰⁰ Typically, reliance interests arise in business transactions and contracts where the parties plot out every detail well in advance.²⁰¹ The plurality suggested that abortion rarely involved advanced decision-making, but argued that concerns about constitutional equality made women's reliance interests just as central to *Casey*.²⁰² The Court emphasized that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."²⁰³ The plurality reached a similar conclusion in striking down Pennsylvania's husband-notification measure.²⁰⁴

But the plurality also used arguments about equality and abortion to justify Pennsylvania's informed-consent mandate, which required women to hear information about fetal development, adoption, and child support before obtaining an abortion.²⁰⁵ Feminists for Life and its allies argued that equal

195. See ZIEGLER, *supra* note 5, at 118.

196. *Casey*, 505 U.S. at 846.

197. See *id.* at 877.

198. See *id.* at 877-93.

199. See *id.* at 850-88.

200. See *id.* at 855-56.

201. See *id.*

202. *Id.*

203. *Id.* at 856.

204. See *id.* at 887-93.

205. See *id.* at 881-87.

protection arguments did not carry much weight because abortion actually undermined some women's physical and psychological well-being.²⁰⁶ The *Casey* Court seemed to accept this logic, as the plurality suggested that abortion could damage women's mental health.²⁰⁷ The state, in turn, could restrict abortion to protect women.²⁰⁸ *Casey* seemed to accept that the availability of abortion had facilitated equality for women;²⁰⁹ however, the Court also reasoned that if women made uninformed decisions, abortion would damage their health rather than allowing them to live more equal lives.²¹⁰ "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed," the plurality reasoned.²¹¹

After *Casey*, the antiabortion movement increasingly saw equality arguments as the only way forward. As an initial matter, groups like AUL wanted every state to pass a law exactly like the informed-consent measure in *Casey*.²¹² AUL thought these measures might convince individual women not to end their pregnancies²¹³ and also fit into a broader strategy to convince women and the larger community that abortion did not advance women's equality.²¹⁴ *Casey* grounded abortion rights in the idea that women relied on abortion access to achieve equal citizenship.²¹⁵ AUL and its allies plotted to overturn *Casey* by establishing that women could not and should not rely on a procedure that harmed them.²¹⁶

Soon, this logic of equality reached beyond informed-consent laws like the ones in *Casey*. Groups like AUL and NRLC first incorporated increasingly far-fetched claims into informed-consent statutes.²¹⁷ Some drew on the work of David Reardon, an Illinois-based antiabortion activist who had founded an

206. Brief for Feminists for Life et al., *supra* note 194, at 6–17.

207. *Casey*, 505 U.S. at 882.

208. *See id.*

209. *See id.* at 856.

210. *See id.* at 882.

211. *Id.*

212. *See* ZIEGLER, *supra* note 5, at 143–44.

213. *See id.*

214. *See id.*

215. *See id.*

216. *See id.*

217. *See id.*

organization to research and promulgate studies on the effects of abortion on women.²¹⁸ Reardon got his start working with Women Exploited by Abortion (WEBA), a support group for women who regretted their abortions, and he stressed that abortion often produced trauma and distress in women who chose it.²¹⁹ Some states wove arguments like Reardon's into abortion restrictions.²²⁰ AUL leaders were particularly keen on claims that abortion increased the risk of breast cancer, an argument emphasized by Joel Brind, an endocrinology professor at Baruch College.²²¹ While for some time research on abortion and breast cancer had been inconclusive, a definitive paper in the *New England Journal of Medicine* found no increased risk, and leading organizations from the American Cancer Society to the National Cancer Institute concluded that abortion posed no cancer risk.²²² Nevertheless, AUL persistently lobbied for the implementation of laws reflecting the misleading premise that abortion may increase the risk of breast cancer.²²³

Antiabortion groups continued promoting contested or widely rejected scientific claims because the movement was invested in the argument that abortion undermined equality for women. Some antiabortion leaders pushed for a new strategy that had less to do with the effects of abortion on women, arguing it was necessary because of recent setbacks. For example, President Bill Clinton, the first pro-choice president since the decision of *Roe*, won the 1992 election, and increasingly, antiabortion activists felt that their Republican allies had put abortion on the back burner.²²⁴ Some, like prominent activist Michael Schwartz, favored disengaging with the courts and the political branches to focus on grassroots protest and crisis pregnancy centers—businesses that try to convince women not to have abortions.²²⁵ Clarke Forsythe of AUL wrote a rejoinder to Schwartz explaining that to make progress, pro-lifers had to convince the nation that they championed the kind of equality for which the Nineteenth Amendment stood.²²⁶ For years, AUL put equality

218. *See id.* at 121.

219. *See id.*

220. *See id.* at 145.

221. *See id.* at 157–58.

222. *See id.*

223. *See id.*

224. *See id.* at 156.

225. *See id.* at 164.

226. *See id.*

arguments about abortion at the center of a new attack on *Cassey*.²²⁷ Forsythe suggested that political change would never occur until antiabortion equality arguments succeeded.²²⁸ “The challenge of public opinion over the next several decades is dispelling the notion of abortion as a necessary evil,” Forsythe wrote.²²⁹ He believed that his movement had convinced most Americans that “the fetus is a human life, if not a full child.”²³⁰ What remained to be done was “dispelling the myth that abortion is necessary,” by “convincing Middle America that abortion is bad for women, or at least not good.”²³¹

Abortion-rights groups refined their own equality arguments, especially given the rise of the movement for reproductive justice. For decades—even as abortion restrictions had the most serious effects on women of color and the poor—abortion-rights activists remained predominantly white and relatively wealthy.²³² Groups like NARAL and Planned Parenthood made halting, often inconsistent attempts to expand the involvement of nonwhite activists, but even well into the 1990s, leading organizations struggled to become more diverse.²³³ As such, independent organizations formed to demand an equality-driven agenda that would address the needs of more nonwhite women, like access to prenatal care, childcare, birth control, and protection from sterilization abuse.²³⁴ Some of these groups, like the National Women’s Health Network, had considerable staying power but lacked the financial resources and political connections of groups like NARAL.²³⁵ Others, like the Committee for Abortion Rights and Against Sterilization, fell apart due to internal divisions.²³⁶ Women of color launched their own organizations throughout the 1980s, but in 1997 these efforts found new cohesion with the formation of the SisterSong Reproductive

227. *See id.*

228. *See id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *See id.* at 100–01.

233. *See id.*

234. *See* JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT 5–27 (2010).

235. *See* SANDRA MORGEN, INTO OUR OWN HANDS: THE WOMEN’S HEALTH MOVEMENT IN THE UNITED STATES 130–65 (2002).

236. *See* NELSON, *supra* note 234, at 139–40.

Justice Collective.²³⁷ SisterSong fought for a more comprehensive reproductive justice agenda—one that situated abortion in the broader demands for social, economic, and racial equality.²³⁸

III. THE DEBATE OVER PARTIAL-BIRTH ABORTION: SCIENCE, EQUALITY, AND *GONZALES*

In the decades after *Casey*, the relationship between abortion and equality for women soon came to dominate the discussion, especially as opposing movements contested the reality of abortion in the United States. This was certainly the case during battles about partial-birth abortion (PBA), a label that abortion foes applied to dilation and extraction (D&X), a procedure whereby a provider removed a fetus intact rather than in pieces.²³⁹ NRLC obtained a copy of a paper presented by Dr. Martin Haskell at the national conference of the National Abortion Federation, a professional organization of abortion providers, that described in detail how D&X worked.²⁴⁰ Given widespread discomfort with late abortion, NRLC leaders believed that many would be disgusted by D&X and thereby saw an opportunity to turn the debate in their favor, especially after Republicans took over the House of Representatives in 1994.²⁴¹ On the surface, bans on PBA focused almost entirely on the fetus.²⁴² NRLC leaders claimed that the procedure caused fetal pain and started down a slippery slope to full-blown infanticide.²⁴³ By that point, however, equality arguments had become so central that they too defined conversation about the procedure.

The fight centered on whether the Constitution required the inclusion of a health exception, which would allow doctors to use D&X when the procedure would best protect patients' health or fertility.²⁴⁴ Abortion foes had not included an exception in the bill, arguing that it would swallow the broader ban.²⁴⁵ These groups often made a different claim—that the need for and

237. LORETTA ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 67 (2017); LORETTA ROSS ET AL., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* 48–54 (2004).

238. See *supra* note 234 and accompanying text.

239. See ZIEGLER, *supra* note 5, at 150.

240. See *id.* at 152–54.

241. See *id.* at 153–54.

242. See *id.*

243. See *id.*

244. See *id.*

245. See *id.*

safety of D&X was uncertain—and that in the face of this uncertainty, legislators should have considerable latitude to act.²⁴⁶ Although President Clinton repeatedly vetoed a federal PBA ban, similar measures succeeded in a wide variety of states.²⁴⁷ The Supreme Court agreed to hear a challenge to Nebraska's ban.²⁴⁸ In that case, *Stenberg v. Carhart*, the Center for Reproductive Law and Policy (now the Center for Reproductive Rights), the group challenging the law, made a variety of arguments, claiming that Nebraska's ban was impermissibly vague and burdensome because it swept in dilation and evacuation (the most common abortion procedure after the first trimester).²⁴⁹

But the need for a health exception for women's equality—and the relevance of scientific uncertainty—played a defining role in briefs on both sides of *Stenberg*.²⁵⁰ The Center for Reproductive Law and Policy contended that any alleged uncertainty regarding the safety of D&X relied on by Nebraska was irrelevant to the case because the right to choose allowed patients to control the most salient details of their own care, including the choice of abortion method.²⁵¹ Nebraska responded that if the impact of abortion on women was uncertain, lawmakers should have more freedom to act.²⁵² "Where, as here, . . . opinions by medical witnesses are in disagreement, the decision regarding the regulation of medical procedures should be left to the state legislature," Nebraska argued.²⁵³

In June of 2000, the Supreme Court rejected Nebraska's argument.²⁵⁴ The Court agreed that Nebraska's law was unconstitutionally vague and threatened access to dilation and evacuation as well as D&X.²⁵⁵ The Court also weighed in on how

246. See *id.* at 178.

247. See *id.* at 165.

248. See *Stenberg v. Carhart*, 530 U.S. 914 (2000). For the disputed statute, see NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999).

249. Brief of Respondent at 20–24, 33, *Stenberg*, 530 U.S. 914 (No. 99–830) [hereinafter brief of *Stenberg* Respondent]. Whereas dilation and extraction required the removal of an intact fetus, see JANIE BUTTS & KAREN RICH, NURSING ETHICS: ACROSS THE CURRICULUM AND INTO PRACTICE 76 (2005), dilation and evacuation requires the removal of the fetus, placenta, and uterine contents in parts, see Patricia Lohr & Richard Lyus, *Dilation and Evacuation*, in ABORTION CARE 88–95 (Sam Rowlands ed., 2014).

250. See Brief of *Stenberg* Respondent, *supra* note 249, at 20–24.

251. See *id.*

252. Brief of Petitioners at 46, *Stenberg*, 530 U.S. 914 (No. 99–830).

253. *Id.*

254. *Stenberg*, 530 U.S. at 937–43.

255. See *id.*

women's equality should shape questions of scientific uncertainty.²⁵⁶ Justice Breyer wrote for the majority:

[T]he uncertainty [present here] means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.²⁵⁷

Constitutional commitments to equality for women meant that states had to afford patients access to procedures that might be needed to protect their safety, even if evidence on the question remained uncertain.

Stenberg hardly slowed down the campaign to ban PBA—or the argument that uncertainty about the effects of abortion should justify sweeping regulations. In 2003, President George W. Bush signed the Partial-Birth Abortion Ban Act (“PBABA”) into law, and lawmakers emphasized so-called “new congressional facts” that conveniently supported their statements alleging D&X was never safer than other abortion techniques (and might even injure patients).²⁵⁸ Congress’s persistence was not surprising. Justice Kennedy, the Court’s usual swing vote, seemed receptive to Nebraska’s view of scientific uncertainty—he insisted that states had the constitutional authority to “take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature.”²⁵⁹ Moreover, antiabortion arguments for women’s equality increasingly relied on the idea of scientific uncertainty. Even if leading authorities in the medical field rejected the idea that abortion caused breast cancer or psychological trauma, claims about harm to women remained essential to strategies to reverse *Roe*.²⁶⁰

Even lawyers who did buy into the incremental strategy used by organizations like AUL increasingly argued that

256. *See id.*

257. *Id.* at 937.

258. *See ZIEGLER, supra* note 5, at 171.

259. *See Stenberg*, 530 U.S. at 961, 970 (Kennedy, J., dissenting).

260. *See ZIEGLER, supra* note 5, at 152–72.

abortion damaged women's equality. Harold Cassidy, a lawyer who had made a name for himself in surrogacy litigation, brought wrongful death lawsuits on behalf of women who claimed they had not understood what their abortions really involved.²⁶¹ Cassidy hoped to use these cases to build a different attack on *Roe*—one centered on the idea that abortion denied women a fundamental right to continue a relationship with their unborn children.²⁶² Cassidy's ally, Allan Parker, launched Operation Outcry, a project to collect and use affidavits from women who regretted their abortions.²⁶³ In the short term, Cassidy found himself at the center of a new strategy-planning effort launched by organizations that included the Alliance Defense Fund, a major funder of conservative Christian litigation, the Family Research Council, and Concerned Women for America.²⁶⁴ They proposed to "end . . . legal abortion" by arguing that "abortion harms women."²⁶⁵ The group proposed lawsuits and model laws to demonstrate the supposed "inherent conflicts of interest between the abortion industry and pregnant women."²⁶⁶ Their public relations working group agreed on the importance of focusing on the costs of abortion for women.²⁶⁷ The group planned to change the minds of those who thought that "abortion [was] good or necessary for women" but admitted that the message proposed was "temporary"—a stand-in for claims about fetal rights.²⁶⁸

Although Cassidy's group was short-lived, he and Parker continued to advance the argument that antiabortion activists carried on the legacy of the Nineteenth Amendment.²⁶⁹ Cassidy used the Coalition's strategy in South Dakota, where he helped lawmakers create a task force on abortion.²⁷⁰ The task force issued a report detailing what the state described as significant harm done by abortion to women.²⁷¹ Cassidy later worked to incorporate these ideas into a law that required patients to receive

261. *See id.* at 173.

262. *See id.* at 172–75.

263. *See id.*

264. *See id.*

265. *Id.* at 174.

266. *Id.*

267. *See id.*

268. *Id.*

269. *See id.*

270. *See id.* at 182–85.

271. *See id.*

certain disclosures about abortion, including a statement that the procedure could cause suicidal ideation.²⁷²

Arguments about abortion and women's equality also played a role in the legal defense of the PBABA. After *Stenberg* was decided, the death of Chief Justice Rehnquist and the retirement of Justice O'Connor allowed President George W. Bush to remake the Court.²⁷³ Many expected President Bush's nominees, John G. Roberts and Samuel Alito, to uphold the PBABA.²⁷⁴ When the Supreme Court agreed to hear *Gonzales v. Carhart*, antiabortion lawyers worked to weave arguments about equality for women into their amicus briefs.²⁷⁵ Walter Weber, an antiabortion attorney, argued that the case would turn on "[h]ow the Court dealt with contrary medical views in prior abortion cases."²⁷⁶ Clarke Forsythe of AUL thought that the most important thing would be to win over Justice Kennedy.²⁷⁷ To do so, Forsythe wanted to argue that "[n]o significant medical authority demonstrates that . . . D&X would be the safest procedure."²⁷⁸

When the parties briefed *Gonzales*, similar questions took center stage. The Center for Reproductive Rights insisted that there was no real scientific uncertainty about the benefits for D&X—and that additional research supported the need for the procedure since the decision of *Stenberg*.²⁷⁹ Abortion-rights amici likewise suggested that equality for women required the Court to pay attention to the weight of elite medical authorities, which suggested that some women might require access to D&X

272. See *id.* at 183–84.

273. On the Roberts nomination, see Peter Baker, *Bush Nominates Roberts as Chief Justice*, WASH. POST (Sept. 6, 2005), <https://www.washingtonpost.com/archive/politics/2005/09/06/bush-nominates-roberts-as-chief-justice/ddd7565e-5022-4347-8438-9d03b6f2a077/> [<https://perma.cc/TF6G-LR2X>]. On the Alito nomination, see Adam Liptak, *Alito Vote May Be Decisive in Marquee Cases This Term*, N.Y. TIMES (Feb. 1, 2006), <https://www.nytimes.com/2006/02/01/us/front%20page/alito-vote-may-be-decisive-in-marquee-cases-this-term.html> [<https://perma.cc/U7UW-7TA6>].

274. See *supra* note 273 and accompanying text.

275. See *infra* notes 290, 291 and accompanying text.

276. See ZIEGLER, *supra* note 5, at 178.

277. See *id.*

278. *Id.*

279. See Brief of Respondents at 3–47, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05–380).

to protect their health or fertility.²⁸⁰ Antiabortion briefs, in contrast, argued that concerns about equality resonated differently when medical authorities disagreed at all about the need for a procedure.²⁸¹ “As the evidence before Congress and the lower courts aptly demonstrates, there is some disagreement within the medical community about whether ‘partial-birth abortion’ is an accepted, safe and ethical medical procedure,” claimed the pro-life Liberty Counsel.²⁸² “In such cases, Congress and state legislatures are permitted to ‘take sides’ in the debate and are to be given wide latitude with regard to their final decision.”²⁸³

Allan Parker, the attorney leading Operation Outcry, took this claim a step further. In an amicus brief, Parker argued that the PBABA did not require a health exception because all abortions damaged women’s well-being.²⁸⁴ The brief cited what was described as evidence from research and the personal experiences of women post-abortion about the effects of the procedure on women’s equality.²⁸⁵ “The emotional and psychological pain does not go away, and therefore, abortion is a short term solution with long term negative consequences,” the brief argued.²⁸⁶

Abortion-rights briefs painted a very different picture of the relationship between equality, women’s health, and the federal ban. An amicus brief submitted by the National Women’s Law Center and other groups asserted that the lack of a health exception could have “a devastating impact on a woman’s life,” costing her job, lowering her wages, and making it difficult for her to care for her family.²⁸⁷ Suggesting that the law would also ban dilation and evacuation, the brief argued that the law would

280. See Brief of Planned Parenthood Respondents at 33–47, *Gonzales*, 550 U.S. 124 (No. 05–1382); Brief of Amicus Curiae NARAL Pro-Choice America Foundation et al. in Support of Respondents at 3–4, *Gonzales*, 550 U.S. 124 (No. 05–1382).

281. See ZIEGLER, *supra* note 5, at 177–80.

282. Brief for Amici Curiae Jill Stanek and the Ass’n of Pro-Life Physicians in Support of Petitioner at 20, *Gonzales*, 550 U.S. 124 (No. 05–1382).

283. *Id.* at 20–21.

284. See Brief of Sandra Cano, the Former “Mary Doe” of *Doe v. Bolton*, et al. as Amici Curiae in Support of Petitioner at 11–26, *Gonzales*, 550 U.S. 124 (No. 05–380).

285. See *id.*

286. *Id.* at 25.

287. See Motion for Leave to File out of Time in Case No. 05-380 Brief Amici Curiae and Brief Amici Curiae for the National Women’s Law Center and 31 Other Organizations Committed to the Safest Health Care for Women Supporting Respondent in Case No. 05-1382 at 14, *Gonzales*, 550 U.S. 124 (Nos. 05–380, 05–1382).

have "an even more substantial adverse effect on women's full and equal participation in society."²⁸⁸

The Supreme Court's decision to uphold the PBABA in *Gonzales v. Carhart* deepened conflict about abortion and women's equality. The Court held that the law was not unconstitutionally vague and that limiting language meant that it covered only D&X, not the more common dilation and evacuation.²⁸⁹ In evaluating whether the law was unduly burdensome, the Court offered a new take on the relationship between abortion and equality for women.²⁹⁰ The majority first addressed this question in considering whether the purpose of the federal law was unduly burdensome.²⁹¹ Justice Kennedy's majority drew heavily from Operation Outcry's amicus brief.²⁹² "Respect for human life finds an ultimate expression in the bond of love the mother has for her child," he wrote.²⁹³ "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."²⁹⁴ Invoking Operation Outcry's argument, *Gonzales* suggested that some physicians might not tell women in detail about what D&X involved.²⁹⁵ Outlawing D&X made sense because of the government's interest in "ensuring so grave a choice is informed."²⁹⁶

Questions of equality for women also came up in the Court's analysis of the law's effects.²⁹⁷ The majority held that if the effects of the law on women's health were unclear, the government had latitude to regulate.²⁹⁸ *Gonzales* highlighted the "documented medical disagreement [about] whether [PBABA]'s prohibition would ever impose significant health risks on women."²⁹⁹ The majority recognized that the evidence contradicted some of Congress's findings.³⁰⁰ Nonetheless, the Court

288. *Id.* at 23.

289. *Gonzales*, 550 U.S. at 134-66.

290. *See id.* at 159-63.

291. *See id.*

292. *See id.*

293. *Id.* at 159.

294. *See id.*

295. *See id.*

296. *Id.*

297. *See id.* at 159-64.

298. *Id.*

299. *Id.* at 162.

300. *See id.*

held that lawmakers had “wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”³⁰¹

Justice Ginsburg criticized the Court for retreating from women’s equality.³⁰² She suggested that the Court had ignored substantial evidence that D&X was the safest procedure for women.³⁰³ Justice Ginsburg especially took the Court to task for assuming that women would regret abortions.³⁰⁴ “The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks,”³⁰⁵ she continued, “instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.”³⁰⁶

As *Gonzales* suggested, fights about whether equality for women required access to abortion created new areas of disagreement. When abortion foes tried to overcome the hurdle created by *Stenberg*, antiabortion groups launched their own expert organizations, such as Physicians Ad Hoc Coalition for Truth about Partial-Birth Abortion, and gathered their own data.³⁰⁷ Antiabortion leaders questioned the legitimacy of medical organizations like the American College of Obstetricians and Gynecologists (ACOG), suggesting that they necessarily supported abortion and prioritized political correctness over women’s health and equality.³⁰⁸ Those on opposing sides of *Gonzales* disagreed, not only about whether the Constitution recognized a right to choose (or what that right required) but also about whether a specific abortion procedure was dangerous or necessary to protect women’s health.³⁰⁹

IV. FROM WHOLE WOMAN’S HEALTH TO JUNE MEDICAL

The disagreements that *Gonzales* left in its wake only multiplied as the years went on. Following the midterm elections of 2010, state lawmakers passed an unprecedented number of abortion restrictions—while 205 passed in the two years

301. *Id.* at 163.

302. *See id.* at 169–71 (Ginsburg, J., dissenting).

303. *See id.* at 175–76.

304. *See id.* at 183–84.

305. *Id.* at 184 (emphasis in original).

306. *Id.*

307. *See* ZIEGLER, *supra* note 5, at 150.

308. *See id.* at 145–60.

309. *See id.*

between 2011 and 2013, only 189 had passed in the prior decade.³¹⁰ These restrictions reflected the work of the Tea Party, a movement that mostly approved of Medicare and Social Security but opposed “big government” when it provided benefits to those perceived as undeserving, including immigrants, low-income, BIPOC, or young Americans.³¹¹ The Tea Party backlash propelled Republicans to victory in the 2010 midterm election and created new opportunities to pass abortion restrictions.³¹²

Many of the abortion laws passed by Tea Party lawmakers built on ideas of scientific uncertainty and equality for women at issue in *Gonzales*. Groups like NRLC and AUL pushed laws banning abortion at twenty weeks, arguing that the laws prevented fetal pain.³¹³ Most medical authorities believed that fetal pain was not possible so early in pregnancy,³¹⁴ however, similar to activists’ arguments in *Gonzales*, NRLC leaders argued that scientific uncertainty—and the presence of some doctors who disagreed—gave lawmakers room to act.³¹⁵ Both groups presented these laws as steps to advance the kind of equality for women that the Nineteenth Amendment purportedly provided. AUL described these laws as “Women’s Health Protection Acts” or “Women’s Late-Term Pregnancy Health Acts,” intended to

310. See *More State Abortion Restrictions Were Enacted in 2011–2013 Than in the Entire Previous Decade*, GUTTMACHER INST.: NEWS IN CONTEXT (Jan. 2, 2014), www.guttmacher.org/article/2014/01/more-state-abortion-restrictions-were-enacted-2011-2013-entire-previous-decade [<https://perma.cc/YB3X-4B7X>].

311. On the Tea Party, see THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 3–19 (2013); Charles S. Bullock III, *Conclusion* to KEY STATES, *HIGH STAKES: SARAH PALIN, THE TEA PARTY, AND THE 2010 ELECTIONS* 187–201, 211 (Charles S. Bullock III ed., 2012).

312. See *supra* note 309 and accompanying text.

313. On the strategic advantages of a fetal pain law, see Open Memorandum, Mary Spaulding Balch, State Legislation Dep’t Dir., Nat’l Right to Life Comm., *Constitutionality of the Model Pain-Capable Unborn Child Protection Act* (July 2013), <http://www.nrlc.org/uploads/fetulpain/Fetal-Pain-The-Evidence.pdf> [<https://perma.cc/XXH5-L53U>].

314. For the Journal of the American Medical Association article, see Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS’N 947, 947–54 (2005). For the American College of Obstetricians and Gynecologists’ position, see *Facts Are Important—Fetal Pain*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (July 2013), <https://web.archive.org/web/20170521213601/www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactAreImportFetalPain.pdf> [<https://perma.cc/S89Q-65WM>].

315. On the view that fetal pain is possible earlier in pregnancy, see *Fetal Pain: The Evidence*, DOCTORS ON FETAL PAIN, www.doctorsonfetalpain.com (last visited Sept. 26, 2017) [<https://perma.cc/E9C3-85NR>].

eliminate fetal pain and to prevent the complications that women suffered more often in later-term abortions.³¹⁶

Arguments about abortion and equality heated up among abortion-rights supporters as well. Groups like Planned Parenthood and NARAL began to work more closely with champions of reproductive justice like the SisterSong Reproductive Justice Collective and All Above All. In conjunction, these groups began to link abortion to other questions of health care and equality for women, especially those who were BIPOC.³¹⁷ Even in politics, abortion-rights advocates spotlighted arguments about a war on women—claims that picked up on abortion foes' opposition to the contraceptive mandate of the Affordable Care Act.³¹⁸ In 2011, President Barack Obama's Administration added eighteen forms of female contraception to the list of preventative services made available under the Affordable Care Act without a co-pay.³¹⁹ A failure to provide coverage resulted in a one hundred dollar per day penalty for each affected individual.³²⁰ Initially, the contraceptive mandate exempted churches but not religious nonprofit businesses.³²¹ As a result, the exemption did not cover a wide group of actors, including religious universities, hospitals, and for-profit businesses.³²²

Citing faith-based objections, some religious employers refused to subsidize what they saw as abortion-inducing drugs,

316. See AMS. UNITED FOR LIFE, DEFENDING LIFE 2019: FROM CONCEPTION TO NATURAL DEATH 354–74 (2019), <https://aul.org/wp-content/uploads/2019/04/Defending-Life-2019.pdf> [<https://perma.cc/N4KR-9UE7>]. On the antiabortion regulations introduced in the period, see Audrey White & Becca Aaronson, *Anti-Abortion Groups Push a New Round of Rules*, N.Y. TIMES, Nov. 23, 2012, at A25.

317. See, e.g., Abigail Abrams, "We Are Grabbing Our Own Microphones:" How Advocates of Reproductive Justice Stepped into Their Stoplight, TIME (Nov. 21, 2019, 7:33 AM), <https://time.com/5735432/reproductive-justice-groups> [<https://perma.cc/H5EW-NXHL>]. For All Above All's work, see *About, ALL ABOVE ALL*, <https://allaboveall.org/about> (last visited June 5, 2020) [<https://perma.cc/4EC7-2WQ5>].

318. For examples of the "war on women" arguments, see Beth Baker, *Fighting the War on Women*, MS., Spring 2012, at 27–31; *The GOP War on Women Continues*, BALT. SUN, Aug. 2, 2012, at A16; Susan Ferrechio, *Mourdock's Rape Comment Restarts "War on Women,"* WASH. EXAM'R, Oct. 25, 2012, at 22.

319. See ZIEGLER, *supra* note 5, at 190–95. On the contraceptive mandate and the controversy surrounding it, see Sarah Kliff, *Lawmakers Debate Contraceptive Mandate*, WASH. POST, Feb. 17, 2012, at A3; *Health, Faith, and Birth Control*, L.A. TIMES, Aug. 1, 2012, at A16; Kim Geiger & Noam Levey, *The Nation: New Take on Birth Control*, L.A. TIMES, Feb. 16, 2012, at A7.

320. See ZIEGLER, *supra* note 5, at 193.

321. See *id.*

322. See ZIEGLER, *supra* note 5, at 190–95.

including the birth-control pill, the morning-after pill, as well as Intrauterine Devices (IUDs).³²³ These employers believed that these contraceptives were abortifacients because they blocked the implantation of a fertilized egg.³²⁴ ACOG classified none of these birth control methods as abortifacients.³²⁵ According to ACOG, emergency contraception prevented ovulation, while copper IUDs either stopped fertilization or blocked implantation.³²⁶ Regardless, some employers felt that the government had trampled on their religious freedom by passing such a mandate.³²⁷ Antiabortion organizations—many of which had hesitated to talk about contraception—condemned the birth-control mandate.³²⁸ Abortion foes also renewed their campaign to defund Planned Parenthood, an organization that performed an increasing share of the nation's abortions.³²⁹

These efforts prompted abortion-rights supporters to accuse their opponents of launching a war on women.³³⁰ Because the antiabortion movement had taken on access to both contraception and abortion, supporters of reproductive rights insisted that their opponents wanted to force women to assume more

323. For an overview of some of these arguments, see Dave Andrusko, *Bishops Urge House and Senate to Act to Address Religious Liberty Crisis Brought on by Obama Mandate*, NAT'L RIGHT TO LIFE NEWS (Sept. 16, 2012), <https://www.nationalrighttolifenews.org/2012/09/bishops-urge-house-and-senate-to-act-to-address-religious-liberty-crisis-brought-on-by-obama-mandate> [https://perma.cc/F6RV-7F3U].

324. For an example of advocacy against the contraceptive mandate and what members viewed as abortifacients, see *AUL's Legal Team Files 29th Brief Defending Conscience Rights of Americans Opposed to Life-Ending Drugs*, AMS. UNITED FOR LIFE (Jan. 11, 2016), <https://aul.org/2016/01/11/auls-legal-team-files-29th-brief-defending-conscience-rights-of-americans-opposed-to-life-ending-drugs> [https://perma.cc/HA3D-KZTB].

325. *Access to Contraception*, COMM. OP. NO. 615 (Am. Coll. of Obstetricians and Gynecologists, Wash., D.C.), Jan. 2015, <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2015/01/access-to-contraception.pdf> [https://perma.cc/89Q9-CCCL].

326. See *id.* at 2; see also Brief of Amici Curiae American College of Obstetricians and Gynecologists, et al. in Support of the Government, *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (No. 13-354).

327. See ZIEGLER, *supra* note 5, at 192.

328. See *id.*

329. On the campaign to defund Planned Parenthood, see *AUL Renews Call for Congressional Investigations into Planned Parenthood Finances and Taxpayer Abortion Funding*, AMS. UNITED FOR LIFE (July 12, 2011), <https://aul.org/2011/07/12/aul-renews-call-for-congressional-investigation-into-planned-parenthood-finances-and-taxpayer-abortion-funding> [https://perma.cc/TM5L-YHE8]; Erik Eckholm, *Planned Parenthood Sues Abortion Foes*, N.Y. TIMES, Jan. 15, 2016, at A22.

330. See ZIEGLER, *supra* note 5, at 191–92.

traditional roles—or to punish them if they refused.³³¹ “War on women” rhetoric put more emphasis on the connection between abortion and equality.³³²

This newfound emphasis was displayed prominently in the Supreme Court’s 2016 decision, *Whole Woman’s Health v. Hellerstedt*. Three years prior, AUL encouraged Texas lawmakers to adopt two related pieces of model legislation that could expand states’ ability to put clinics out of business: (1) the Women’s Health Protection Act and (2) the Abortion Providers Privileges Act.³³³ The Women’s Health Protection Act required abortion clinics to comply with regulations governing ambulatory surgical centers (ASCs).³³⁴ The Abortion Providers Privileges Act demanded that abortion providers have admitting privileges at a hospital within thirty miles.³³⁵ While AUL argued that both measures protected women from unscrupulous, greedy providers willing to damage their health,³³⁶ abortion-rights proponents insisted that the laws would force the vast majority of Texas clinics to close, stripping women of access not only to abortion but also to other forms of health care.³³⁷ The battle about Texas’s law boiled down to whether abortion advanced or undermined the kind of equality at the heart of the Nineteenth Amendment.

The Supreme Court not only struck down both laws, but also seemingly refuted claims that abortion damaged women’s health.³³⁸ A five-to-three majority redefined *Casey*’s undue-burden standard, requiring a court to “consider the burdens a law imposes on abortion access together with the benefits those laws confer.”³³⁹ Antiabortion lawyers had argued that the undue-burden test worked similarly to constitutional rational basis, requiring broad deference to lawmakers, especially when scientific matters were contested.³⁴⁰ The *Whole Woman’s Health* balancing test made it harder for states to pass laws with questionable justifications or no justification at all.³⁴¹ It seemed that states

331. *See id.*

332. *See id.*

333. *See* ZIEGLER, *supra* note 5, at 198–99.

334. *See id.*

335. *See id.*

336. *See id.*

337. *See id.*

338. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

339. *Id.* at 2309–12.

340. *See* Mary Ziegler, *Substantial Uncertainty: Whole Woman’s Health v. Hellerstedt and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 105–06.

341. *See Whole Woman’s Health*, 136 S. Ct. at 2309–12.

would have an especially hard time passing laws claiming (without evidence) to protect women.³⁴²

Whole Woman's Health illustrated that the Court's idea of an undue burden would make it much harder for antiabortion lawmakers to claim that abortion made women sick or undermined their equality. The Court not only demanded proof that specific abortion laws protected women but also refused to grant lawmakers broad deference when scientific claims were contested.³⁴³ Texas asserted that the admitting-privilege provision would guarantee continuity of care, but the Court could not find a single incident in which the provision would have guaranteed a better outcome.³⁴⁴ The Justices also credited evidence that the requirement, if implemented, would force the closure of roughly half of the state's abortion clinics.³⁴⁵ The majority reached a similar conclusion about the ASC requirement.³⁴⁶ According to the majority, the rare cases in which complications arose often started well after a woman left a clinic, when an ASC provision would add no value.³⁴⁷ Moreover, many abortions involved pills, not surgery, and would be unchanged by any of the requirements of the Texas law.³⁴⁸ The Court found convincing evidence that the provision would force the closure of all but seven or eight of the state's nearly fifty clinics.³⁴⁹

Whole Woman's Health shot a hole through antiabortion strategies based on ideas about equality for women. Antiabortion leaders argued that the procedure had no relationship to women's equality because it caused psychological and physical harm.³⁵⁰ The *Whole Woman's Health* Court seemed skeptical of these arguments. The Justices emphasized that abortion had few complications and described the procedure as extremely safe.³⁵¹ The Court also described a framework that would be applied to any similar law—one in which courts would closely examine the facts of a case rather than deferring to lawmakers' views about what was going on.³⁵²

342. *See id.*

343. *See id.*

344. *See id.* at 2311–14.

345. *See id.*

346. *See id.* at 2315–18.

347. *See id.*

348. *See id.*

349. *See id.*

350. *See supra* Part II.

351. *See Whole Woman's Health*, 136 S. Ct. at 2310–18.

352. *See id.* at 2309–12.

For a time after *Whole Woman's Health*, it seemed that the equality wars would die down. Larger antiabortion organizations, especially NRLC, noted that *Whole Woman's Health* did not clearly apply to fetal-protective, as well as woman-protective, regulations.³⁵³ After all, the Court had not tackled a twenty-week abortion ban that was also part of Texas law.³⁵⁴ In 2018, after the retirement of Justice Kennedy, the Court's long-time deciding vote in abortion cases, rank-and-file abortion foes no longer felt that they would have to emphasize arguments about women's equality.³⁵⁵ Brett Kavanaugh, President Donald Trump's first nominee to the Court, struck many as the fifth vote to reverse *Roe*, and state legislatures began introducing sweeping bans that almost universally focused on fetal rights.³⁵⁶ Ten states banned abortion at the sixth week of pregnancy, claiming that physicians could detect a fetal heartbeat at this point in gestation.³⁵⁷ Georgia added the recognition of fetal personhood to its bill.³⁵⁸ Alabama banned all abortions at the point of fertilization with no exception for rape and incest.³⁵⁹

These laws reflect an apparent shift in antiabortion strategy.³⁶⁰ While larger groups like NRLC and AUL still favored a more incremental approach (and often focused on claims about women's equality), some absolutist groups believed that their movement would make the most progress by asking for what it really wanted: fetal rights and absolute abortion bans.³⁶¹

353. See *NRLC Responds to Supreme Court Decision in Whole Woman's Health v. Hellerstedt* (June 27, 2016), <https://www.nrlc.org/communications/releases/2016/release062716/> [<https://perma.cc/5XL2-FCCR>].

354. See *id.*

355. See ZIEGLER, *supra* note 5, at 203–04.

356. See *id.*

357. Elizabeth Nash et al., *State Policy Trends 2019: A Wave of Abortion Bans, but Some States Are Fighting Back*, GUTTMACHER INST. (Dec. 2019), https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back?gclid=CjwKCAjw2uf2BRBpEiwA31VZj4HjzcnhkY-ukD0RYS02SGX54jd-Mv2Ae1z06C2XnjdrN9xw8ICoCLR0CpF4QAAd_BwE [perma.cc/FT5B-ENF].

358. See Ari Bee, *Georgia's Complete Abortion Ban Would Give Rights to a Fertilized Egg*, REWIRE NEWS GRP. (Mar. 21, 2019, 12:47 PM), <https://rewire.news/article/2019/03/21/georgias-total-abortion-ban-would-give-rights-to-a-fertilized-egg/> [<https://perma.cc/DDE6-88Z6>].

359. Rick Rojas & Alan Blinder, *Alabama Abortion Ban Is Temporarily Blocked by a Federal Judge*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/us/alabama-abortion-ban.html> [<https://perma.cc/7YM6-F5R4>].

360. See *infra* note 361 and accompanying text.

361. Caroline Kitchener, *Antiabortion Leaders Have Supported Rape and Incest Exceptions for Decades. Here's Why That Is Suddenly Changing*, WASH. POST (June

Politicians—protected by gerrymandering and running for reelection primarily by turning out core supporters—pushed bills that struck many as extreme.³⁶²

But equality arguments remain central to the conflict. Anti-abortion leaders continued promoting the claim that abortion hurt women by undermining their physical and mental health, thereby making them less equal. Some backed informed-consent laws requiring patients to learn about a procedure said to reverse medication abortions, notwithstanding the fact that research had shown the procedure to be unsafe.³⁶³

The 2020 March for Life focused heavily on the Nineteenth Amendment.³⁶⁴ The event described abortion as “the ultimate exploitation of women.”³⁶⁵ On what basis did the event’s organizers make this claim? Jean Mancini of March for Life and other organizers argued that since the legalization of abortion, millions of female fetuses had been aborted.³⁶⁶ Official promotions for the event presented abortion as a false solution for women faced with economic difficulties, asking protestors to fight for equality as the suffragettes did one hundred years ago.³⁶⁷ The March also suggested that empowerment for women required women to embrace their “fertility” rather than seeking abortion.³⁶⁸ The March helped to elevate a new antiabortion argument for women’s equality.³⁶⁹ These arguments framed abortion

11, 2019), <https://www.thelily.com/antiabortion-leaders-have-supported-rape-and-incest-exceptions-for-decades-heres-why-that-is-suddenly-changing/> [https://perma.cc/8RJD-UY3K].

362. Mary Ziegler, Opinion, *The Heartbeat Bills Were Never the Real Threat to Abortion Rights*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/opinion/abortion-supreme-court.html> [https://perma.cc/XRA2-WDQA].

363. Kayla Epstein, *Some Lawmakers Push “Abortion Reversal” Treatments. A Study Shows How Dangerous They Are*, WASH. POST (Dec. 24, 2019, 3:57 PM), <https://www.washingtonpost.com/health/2019/12/24/some-lawmakers-push-abortion-reversal-treatments-new-study-shows-how-dangerous-they-are/> [https://perma.cc/P6EN-XNZH].

364. See *supra* note 2 and accompanying text.

365. See March for Life Educ. and Def. Fund, *supra* note 2.

366. See *supra* note 2 and accompanying text.

367. See *supra* note 2 and accompanying text.

368. See *supra* note 2 and accompanying text.

369. See Maryann Gogniat Eidemiller, *Women Advocate for the Unborn by Leading National Pro-Life Organizations*, OUR SUNDAY VISITOR (Jan. 17, 2020), <https://www.osvnews.com/2020/01/17/women-advocate-for-the-unborn-by-leading-national-pro-life-organizations/> [https://perma.cc/X9QU-U4RX]; Charles C. Camosy, *Pro-Life Leader: Trump’s Pro-Life Legacy Depends on Reversal of Roe v. Wade*, CRUX (Oct. 12, 2019), <https://cruxnow.com/interviews/2019/10/pro-life-leader-trumps-pro-life-legacy-depends-on-reversal-of-ro-v-wade/> [https://perma.cc/Z5NN-T3L6]; Catherine Glenn Foster, *March for Life Was Also a Model of*

as defeatism—unnecessary for women who could pursue careers while parenting.³⁷⁰

But more conventional antiabortion arguments for equality had not gone anywhere. Just consider the arguments at the heart of the Supreme Court's most significant abortion case in years, *June Medical Services v. Russo*.³⁷¹ *June Medical* involved a Louisiana law identical to the admitting-privileges law struck down in *Whole Woman's Health*.³⁷² The district court found that the law would force the closure of all but one clinic in the state.³⁷³ But the Fifth Circuit Court of Appeals upheld the law, reasoning that circumstances in Louisiana differed from those in Texas.³⁷⁴ The court emphasized evidence that Louisiana's law might have provided some kind of benefit—the fact that state “hospitals perform[ed] more rigorous and intense background checks” and that the law would bring abortion clinics into compliance with laws requiring other ambulatory surgical centers to have admitting privileges.³⁷⁵ The court also questioned the burden created by the law.³⁷⁶ The Fifth Circuit emphasized that doctors challenging the law “sat on their hands” and never applied for admitting privileges, assuming that they would be refused.³⁷⁷ The Fifth Circuit reasoned that because abortion providers had not tried hard enough to get admitting privileges, they could not prove that the law would create an undue burden.³⁷⁸

AUL again hoped that laws alleged to protect women—in addition to arguments that women could not rely on abortion—would set the Court on a path to overturning *Roe*, but five Justices, including Chief Justice Roberts, wrote that the admitting-

Intersectionality, WASH. EXAMINER (Jan. 25, 2020, 12:01 AM), <https://www.washingtonexaminer.com/opinion/op-eds/march-for-life-was-also-a-model-of-intersectionality> [<https://perma.cc/MT74-QNZT>].

370. See *supra* note 2 and accompanying text.

371. *June Med. Servs. v. Russo* (*June Med. Servs. III*), 140 S. Ct. 2103 (2020); see *June Med. Servs. v. Kliebert* (*June Med. Servs. I*), 250 F. Supp. 3d 27, 85–87 (M.D. La. 2017).

372. LA. REV. STAT. ANN. § 40:1061.10(A)(2) (West 2020); LA. ADMIN CODE tit. 48, pt. I, § 4423(B)(3)(e) (2020).

373. See *June Med. Servs. I*, 250 F. Supp. 3d at 87–89.

374. *June Med. Servs. v. Gee* (*June Med. Servs. II*), 905 F.3d 787, 805–10 (5th Cir. 2018).

375. *Id.* at 805–08.

376. See *id.*

377. See *id.* at 807–12.

378. See *id.*

privilege law was unconstitutional.³⁷⁹ Writing for himself and three colleagues, Justice Breyer emphasized that the disputed Louisiana law was “word-for-word identical” to the one the Court had invalidated just four years ago.³⁸⁰

The plurality next tackled the question of standing.³⁸¹ The Fifth Circuit had not addressed this issue, but Louisiana had asserted that abortion providers should not be able to assert third-party standing on behalf of their patients.³⁸² Louisiana reasoned that abortion doctors’ interests conflicted with those of women, especially when a health restriction was at issue.³⁸³

In his dissent, Justice Gorsuch agreed that abortion providers could not reasonably represent women’s interests when they “do not even know who [their patients are].”³⁸⁴ In Justice Gorsuch’s view, there was also a potential conflict of interest because Louisiana had sought “to protect women from the unsafe conditions maintained by at least some abortion providers who . . . are either unwilling or unable to obtain admitting privileges.”³⁸⁵ In the principle dissent, Justice Alito emphasized what he described as “a blatant conflict of interest between an abortion provider and its patients.”³⁸⁶ The majority was unmoved by this argument.³⁸⁷ Both the plurality³⁸⁸ and Chief Justice Roberts agreed that Louisiana had not provided a good enough reason to upend decades of standing jurisprudence.³⁸⁹

Louisiana failed to convince the Court that an admitting-privilege requirement was necessary to protect women.³⁹⁰ The plurality relied on trial evidence and amicus briefs to conclude that abortion providers had tried in good faith to obtain admitting privileges and failed for reasons unrelated to their ability to perform abortions safely.³⁹¹ The Fifth Circuit reasoned that the plaintiffs had not tried to get admitting privileges.³⁹² The

379. *June Med. Servs. III*, 140 S. Ct. 2103, 2112–13 (2020).

380. *See id.*

381. *See id.* at 2117–20.

382. *See id.*

383. *See id.*

384. *Id.* at 2174 (Gorsuch, J., dissenting).

385. *Id.*

386. *See id.* at 2166 (Alito, J., dissenting).

387. *See id.* at 2117–20.

388. *See id.*

389. *See id.* at 2133–42 (Roberts, C.J., concurring in the judgment).

390. *See id.* at 2121–30.

391. *See id.*

392. *See id.*

plurality disagreed: hostility toward abortion providers, combined with the fact that “hospital admissions for abortion are vanishingly rare,” made it impossible for providers to obtain or retain privileges.³⁹³ The plurality rejected the idea that the admitting-privileges requirement protected women’s health.³⁹⁴ Instead, the plurality reasoned that the requirement would lead to the closure of all but one clinic in the state.³⁹⁵ These closures would make it impossible for women to seek abortions after eighteen weeks, force women to delay procedures (and thereby increase their likelihood of facing increased medical risks), and lower the quality of care available to those who still could access abortion.³⁹⁶

In a separate concurrence, Chief Justice Roberts reluctantly agreed that *Whole Woman’s Health* controlled the case and required the Justices to invalidate the law.³⁹⁷ Chief Justice Roberts highlighted the similarities between the statutes in *June Medical* and *Whole Woman’s Health* and the findings of fact made by the district court about how those laws operated in the real world.³⁹⁸ Those findings bound the Court, Chief Justice Roberts reasoned, and required the invalidation of the Louisiana law.³⁹⁹ But his concurrence—the controlling opinion in *June Medical*—upended the rules that applied to woman-protective laws by eliminating the balancing test required under *Whole Woman’s Health*.⁴⁰⁰ The Chief Justice wrote an ode to precedent, all while fundamentally transforming what *Whole Woman’s Health* stood for.⁴⁰¹

Whole Woman’s Health was significant partly because it gave the undue-burden test, the guiding rule in abortion cases, real bite.⁴⁰² Ever since the Supreme Court had decided *Casey* in 1992, clashing social movements battled about whether the undue-burden test more closely resembled rational basis (and thus required almost total deference to legislators) or whether it more closely approximated intermediate scrutiny.⁴⁰³ By creating a

393. See *id.* at 2123.

394. See *id.* at 2121–30.

395. See *id.*

396. See *id.*

397. See *id.* at 2134–39 (Roberts, C.J., concurring in the judgment).

398. See *id.*

399. See *id.* at 2134–41.

400. See *id.*

401. See *id.*

402. See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–11 (2016).

403. See Ziegler, *supra* note 340, at 448–53.

balancing test—and requiring real proof that laws served their stated ends—*Whole Woman's Health* had made the undue-burden test far more protective of women's rights.⁴⁰⁴ *Whole Woman's Health* also required concrete proof that abortion undermined women's health or equality when lawmakers passed woman-protective restrictions.⁴⁰⁵

But Chief Justice Roberts changed this outcome in *June Medical*, making it much easier for antiabortion lawmakers to argue that abortion undermined equality for women. The concurrence noted the clash of constitutional principles, interests in protecting life on the one hand and preserving dignity, equality, and autonomy on the other, that defined abortion battles.⁴⁰⁶ "There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were," Chief Justice Roberts wrote.⁴⁰⁷ In his view, *Casey* never required such balancing and, in fact, left lawmakers "wide discretion to pass legislation in areas where there is medical and scientific uncertainty."⁴⁰⁸ For Chief Justice Roberts, the only question was whether a law created a substantial obstacle for women seeking abortion⁴⁰⁹: the trial court had made extensive factual findings suggesting that the law did create such a burden, thus the Justices were bound by them.⁴¹⁰

June Medical might have been a pyrrhic victory for abortion rights. Chief Justice Roberts emerged as the Court's new swing Justice and rewrote the undue-burden test.⁴¹¹ Under the new standard, it would be much easier for lawmakers to pass laws claimed to protect women, especially "in areas where there is medical and scientific uncertainty."⁴¹² Many of the restrictions circulating in the states might satisfy this definition. Consider, for example, laws banning abortion at twenty weeks on the theories that (1) fetal pain became possible at that time and (2) banning abortion protected women against the risks that

404. See *Whole Woman's Health*, 136 S. Ct. at 2309–11.

405. See *id.*

406. See *June Med. Servs. III*, 140 S. Ct. at 2135–36.

407. *Id.*

408. *Id.*

409. See *id.* at 2135–38.

410. See *id.*

411. See *id.*

412. See *id.*

accompanied later procedures.⁴¹³ Most medical authorities do not support either conclusion (most research, for example, does not suggest that fetal pain is possible until later in pregnancy),⁴¹⁴ but the law might yet pass the Chief Justice's version of the undue-burden test.

June Medical will likely fuel a new wave of antiabortion arguments about equality for women. The Court now requires considerable deference to lawmakers who rely on contested science in claiming to protect women from abortion.⁴¹⁵ Under *June Medical*, antiabortion laws claiming to advance women's equality do not have to serve any purpose at all.⁴¹⁶ The equality wars over the abortion debate are just beginning.

CONCLUSION

June Medical will not put an end to wars about whether a right to abortion undermines or advances the kind of equality for which suffragettes fought. The decision might encourage abortion foes to focus on fetal-protective rather than woman-protective laws. The precedential value of *Whole Woman's Health* would carry less weight with a law designed to protect fetal life. So too would district courts' findings of fact on matters of public health. As some states have already moved beyond woman-protective laws, emphasizing either bans on abortion (such as so-called heartbeat laws) or statutes that seemingly insult women (such as laws banning abortions for discriminatory or trivial reasons, such as for race, sex, or disability), the equality wars will likely rage on. Abortion foes have long believed that the key to overturning *Roe* is convincing the Justices that women have never needed a right to abortion. Until that conviction changes, the fight about the legacy of the Nineteenth Amendment—and its connection to abortion—will continue.

413. See Pam Belluck, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES (Sept. 16, 2013), <https://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html> [<https://perma.cc/7WRJ-9HJJ>].

414. See *id.*

415. See *June Med. Servs. III*, 140 S. Ct. at 2135–38 (Roberts, C.J., concurring in the judgment).

416. See *id.*

