

Introduction

Something about the 2019 March for Life was different. Each year, the antiabortion event brought hundreds of thousands of protesters to Washington, DC. In 2019, busloads of high school and college students again joined grassroots activists, clergy members, and ordinary voters on the National Mall. The signs, speeches, and wintry temperatures were nothing new, but those present expressed a new sense of optimism. For the first time in decades, the pro-life movement stood on the cusp of seeing the Supreme Court overturn *Roe v. Wade*, the 1973 decision holding that the Constitution protects a woman's right to choose abortion. But although victory seemed within reach, speakers at the event did not focus on the Constitution. Instead, insisting that "pro-life is pro-science," marchers shared arguments about the costs of abortion for women and the communities in which they lived. Jeanne Mancini, the leader of March for Life, wrote that "the abortion debate isn't settled, but the underlying science certainly is." Months later, nine states banned abortion early in pregnancy. Lawmakers backing such laws in Alabama and Georgia claimed that "modern medical science" justified their sweeping legislation. Abortion-rights supporters hardly agreed that pro-lifers had a monopoly on scientific expertise. Sarah Horvath, a pro-choice fellow of the American College of Obstetricians and Gynecologists, labeled pro-life arguments about the costs of abortion for women "a misuse and manipulation of the facts."¹

The arguments made during the 2019 March for Life offer just one example of how much the terms of the American abortion debate have changed. We often think that the claims made in the American abortion struggle reflect the clash of absolutes famously described by legal scholar Laurence Tribe. Supporters of legal abortion fight for a right to choose, and abortion foes defend a right to life for the unborn child. These arguments seem to reflect what legal theorist Ronald Dworkin called "rights as trumps" – constitutional protections that prevail over other policy considerations or even the preference of voters. The abortion debate seems to be at

an impasse because those on each side believe that they defend a right that outweighs any competing concern.²

To be sure, such rights-based arguments remain an important part of the discussion. But as this book shows, in recent decades, the core terms of the legal debate about abortion in America have changed in ways we have rarely appreciated. Between 1973 and 2019, the conflict has centered not so much on laws criminalizing abortion outright as on the quest for incremental restrictions designed to undermine *Roe v. Wade*. And with this change in emphasis, the struggle has increasingly turned not only on rights-based trumps but also on claims about the policy costs and benefits of abortion for women, families, and the larger society.³

This change was never straightforward or absolute. Indeed, before abortion was legal, those backing abortion rights often pointed to what they saw as the desirable consequences of legalization, such as fewer deaths from botched illegal abortions. *Roe v. Wade* itself spoke not only about a constitutional privacy right that encompassed a woman's abortion decision but also about the harms that could follow if women had to carry undesired pregnancies to term. Nor, in later decades, did those in opposing social movements uniformly stress claims about the costs and benefits of abortion. At times, groups instead played up contentions about constitutional rights or religious faith. Some activists, like clinic blockaders, consistently rejected claims about the costs and benefits of abortion.

And it is not always easy to draw a clear line between rights-based arguments and claims about the policy consequences of legal abortion. Legal philosophers such as T. M. Scanlon have argued that civil or human rights cannot be justified without reference to their consequences. Those who focus on costs and benefits have incorporated what appear to be trumps, like equality or liberty, into policy-driven calculations.⁴

Nevertheless, the distinction between rights- and policy- based arguments is conceptually valuable, especially when we seek to understand the modern American abortion conflict. When stressing constitutional rights, those on either side suggested that a particular right was priceless, grounded in the constitutional order, and deserving of protection irrespective of its costs and benefits. Abortion opponents often argued that the right to life protected a fetus or unborn child no matter how a woman came to be pregnant – and regardless of what would happen after a child was born. The idea of a right to choose suggested not only that women should have the liberty to decide for themselves when to have a child but also that women should get the final say about why a decision is the right one.

By contrast, when making arguments about the costs and benefits of abortion, activists on either side primarily discussed not what the Constitution allowed but whether legal abortion was socially, culturally, personally, and medically desirable or justified. Consequence-based arguments put greater emphasis on the reasons that individuals might choose or oppose abortion rather than on individual liberty from the state.

The Court did not drive many of the changes studied here. Between 1977 and the present, Supreme Court decisions did shape strategy in important and sometimes unpredictable ways. But many sincerely believed that the costs and benefits of abortion mattered as much as the rights at stake. Even when those on opposing sides made calculated strategic decisions, their arguments are worthy of study. By taking seriously claims about the consequences of abortion, we can gain perspective on how legal and political conversations have changed in the decades since 1973. We can better understand why clashing activists believe that women need (or should not have) a right to end a pregnancy. We can gain a fuller perspective on the state-by-state battles that would begin if the Court overturned *Roe* and the cases following it. And we can recognize that the abortion debate reflects a larger set of often unnoticed social and cultural transformations.

How and when did the terms of the abortion debate change, and what has it meant for the larger abortion conflict? As soon as the Court handed down its decision in *Roe*, American pro-lifers championed a constitutional amendment that would ban abortion outright. But when the campaign stalled in the mid-1970s, lawyers working with organizations like the National Right to Life Committee (NRLC) and Americans United for Life (AUL) proposed a temporary solution – incremental restrictions that made abortions harder to get. Lawyers like James Bopp Jr., a conservative Indiana attorney, and Victor Rosenblum, a liberal Jewish law professor from Illinois, worked to draft model laws, statutes intended to serve as a blueprint for other states and cities. These regulations required a different defense than the absolute prohibitions pro-lifers had long defended. After all, many of these statutes, such as abortion-funding bans, did not clearly advance a right to life since they did not outlaw a single abortion. Instead, these laws created various obstacles that women had to overcome. Rather than invoking fetal rights, members of AUL and NRLC began justifying these laws by highlighting their supposed benefits for women, parents, taxpayers, and the country.

At first, in the late 1970s, despite the objections of some nonwhite and socialist feminists, the leaders of groups like the National Abortion Rights Action League (NARAL) and the Planned Parenthood Federation of America primarily argued that the new abortion restrictions violated the Constitution. Activists like Karen Mulhauser, a former biology teacher, believed that her movement needed to focus on making sure that women who wanted legal abortions could get them. By contrast, abortion-rights attorneys working with the recently founded American Civil Liberties Union Reproductive Freedom Project urged the Court to look below the surface of abortion regulations to identify their real-world costs – restrictions traumatized women or forced them to put their health at risk.

When Ronald Reagan won the 1980 election and Republicans swept into power, antiabortion activists hoped that they could finally change the text of the Constitution. But the competing proposals available to Congress exposed fractures in the pro-life movement. While pragmatists like Bopp and Rosenblum warned their allies

not to back a solution that the Supreme Court would strike down, absolutists like Judie Brown, a former NRLC executive director who denounced birth control, refused to endorse anything short of a national abortion ban. By 1983, these internal divisions forced pro-lifers to give up on a constitutional amendment.

The leaders of AUL and NRLC believed that they had already identified an alternative mission. Lawyers like Bopp and Rosenblum argued that abortion foes could pass and defend restrictions that chipped away at abortion rights, and by aligning with the GOP, could change the membership of the Supreme Court. AUL and NRLC leaders promised that in this way, abortion foes could ensure that the Court overturned *Roe v. Wade*. In defending incremental restrictions, pro-lifers often emphasized the costs of abortion – and the benefits of certain laws restricting it.

In the mid-1980s, groups like NARAL and Planned Parenthood responded by stressing claims about the benefits of legal abortion, especially for low-income, nonwhite, or disabled women. Later in the decade, abortion-rights groups rethought their strategies when new Supreme Court nominations – and adverse decisions – created an existential threat to *Roe*. The leaders of organizations like NARAL believed that voters would decide the fate of abortion rights. Convinced that many did not value the opportunities women might gain by virtue of legal abortion, groups like Planned Parenthood and NARAL instead emphasized rights-based claims thought to appeal to ambivalent voters. This strategy alienated some nonwhite feminists, like veteran activist Loretta Ross, who wanted the pro-choice movement to adopt an agenda that involved support for contraception, sex education, child-bearing, and childrearing – and who believed that their colleagues had not explained why women needed legal abortion in the first place. At the same time, newly mobilized clinic blockaders, many of them working with Operation Rescue, an antiabortion group committed to illegal protests, rejected a strategy based on claims about the costs of abortion. Stressing religious arguments, grassroots activists like Randall Terry, a veteran clinic protester and devout evangelical Protestant, believed that by breaking the law, they could clog the legal system and pressure godless judges and politicians to take action.

Despite a challenge from blockaders, attorneys in groups like NRLC and AUL still sometimes played up the costs of abortion, this time focusing on harms said to affect the family. When the opposition promoted laws mandating the involvement of parents or husbands, abortion-rights attorneys like Janet Benshoof, a Minnesota native deeply interested in human rights, countered that abortion restrictions took away emerging opportunities for women to pursue an education or a career.

In the early 1990s, after the Supreme Court agreed to hear its next abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ACLU attorneys made claims about the benefits of legal abortion for women a crucial part of the case for preserving legal abortion. These arguments spotlighted the relationship between abortion and equality between the sexes. This plan seemed to pay off in 1992 when

the Court retained what it called the essential holding of *Roe*. The Court's decision in *Casey* increased the importance of arguments about the costs and benefits of both abortion and laws restricting it.

In the mid-1990s, with a sympathetic president, Bill Clinton, in office, groups like NARAL and Planned Parenthood finally took control of the agenda by emphasizing claims about the health benefits of abortion and lobbying for its inclusion in national health care reform. By spotlighting claims about the health benefits of legal abortion, abortion-rights supporters like Planned Parenthood leader Pam Maraldo, a former nurse with extensive health care experience, could better explain how even incremental restrictions affected women's interest in equal treatment. In the mid-1990s, some nonwhite feminists called for a different approach to the relationship between abortion and health care, demanding reproductive justice, rather than simply a right to choose, for all women. Rather than focusing on freedom from government interference, a reproductive-justice approach demanded for women the power and resources to have children, not have children, or to parent the children they already had.

A focus on health, however, ultimately helped groups like AUL and NRLC regain influence in the pro-life movement. In the mid-1990s, grassroots pro-lifers believed that neither courts nor legislatures would ever deliver meaningful change. Some instead worked in crisis pregnancy centers to prevent individual women from ending their pregnancies. Conservative Christian lawyers in organizations like Liberty Counsel and the American Center for Law and Justice invested more in cases involving the freedom of speech and religion than in any effort to convince the Court to overturn *Roe*. AUL and NRLC attorneys, however, used claims about the costs of abortion to outline a new plan of attack on *Roe*. Antiabortion attorneys insisted that far from preserving women's health, abortion caused psychological and physical damage.

As both sides disputed the costs and benefits of abortion, areas of disagreement multiplied. By the later 1990s, as part of a long struggle over a specific procedure, dilation and extraction, that pro-lifers called "partial-birth abortion," the two movements not only contested the effects of the procedure but also asked who had the authority to measure them. These disputes shaped *Gonzales v. Carhart*, the Court's 2007 decision to uphold a federal ban on partial-birth abortion. *Gonzales* reflected how the abortion divide continued to grow. Those on opposing sides could not agree even on the basic facts about abortion. *Gonzales* had given legislators more latitude to regulate when a scientific question appeared uncertain, and after the Court's 2007 decision, pro-lifers tried to generate scientific uncertainty. After Republicans' impressive results in the 2010 midterm election, state legislatures passed a stunning number of regulations. Both sides responded by increasingly questioning the integrity and motivations of those with whom they disagreed. By 2018, when Republican Donald Trump replaced the Court's longtime swing justice, Anthony Kennedy, it seemed inevitable that one of these restrictions would be the one the

justices used to overturn *Roe*. For decades, the abortion debate had turned partly on the kind of policy-driven, cost-benefit analysis that *Roe* had supposedly put off limits. But focusing on claims about the costs and benefits of abortion had not tempered the conflict. The abortion divide was deeper than ever.

This history offers new perspective on the reasons for the polarization of the abortion conflict. Critics have long argued that by making abortion a constitutional issue, the Court made any common-sense compromise on abortion impossible. By extension, some scholars suggest that if the Court removed itself from the abortion wars, sensible, middle-ground solutions might come into view, and polarizing rights-based arguments would fade into the background. These arguments have high stakes at a time when the Court seems likely to reverse *Roe*. Indeed, some conservatives cite the dysfunction supposedly produced by *Roe* as a reason to overturn the 1973 decision.⁵

However, between 1973 and the present, those on both sides have often turned to questions about the policy costs and benefits of abortion that theoretically lent themselves to compromise. Battles about the costs and benefits of abortion were intense partly because these conflicts served as a proxy for ongoing disagreements about the right to life and the right to choose. And to be sure, any consensus on abortion seemed all but impossible, regardless of which arguments took center stage. But a focus on the real-world effects of abortion only intensified the conflict.

As early as the late 1970s, supporters and opponents of abortion rights disagreed about what counted as a cost or benefit. Activists' disagreements reached beyond abortion and even gender roles. Opposing movements sometimes held strikingly different views about everything from the welfare state to the nature of scientific authority. And in measuring the costs and benefits of abortion, those on opposing sides did not consult the same experts and evidence. Over time, pro-life and pro-choice activists gave radically different descriptions of the basic facts about the procedure. The conflict about abortion goes far deeper than the idea of two irreconcilable rights that became prominent in constitutional litigation.

The recent history of the abortion debate also shows that the struggle is far more unpredictable than many have concluded. By emphasizing the constitutional rights at stake in the conflict, we often see the abortion wars as a stalemate, marked by a familiar set of arguments and strategies. Commentators contend that both abortion opponents and abortion-rights supporters have a stable set of convictions about motherhood and gender. But the battle has reflected beliefs about much more. We can expect today's debate to move in equally unforeseen directions.

Ultimately, by grasping how much the abortion debate has changed, we can better understand the history of late twentieth-century America. The abortion debate touched on many of the questions that most deeply divided the country. Struggles over abortion funding mirrored shifting ideas about the role of the government and responsibility for the poor. Campaigns to require women to get the consent of their husbands or parents exposed disagreements about how the family should function or

what defined maturity. The abortion struggle exposed disagreements about the need for health care reform and the dividing line between science and politics. The abortion fight both mirrored and changed larger arguments about the difference between fact and opinion, “fake news” and truth. The battle over abortion access reflected broader debates about the country’s present and future.

Chapter 1 provides the background for the story told in the book. Arguments about the costs and benefits of abortion have a long history. In the nineteenth century, when mobilizing to ban abortion, physicians insisted that outlawing the procedure would strengthen the traditional family and improve the nation’s genetic stock by forcing Anglo-Saxon women to have more children. While abortion was illegal for decades, physicians still performed the procedure, justifying it as necessary to save women’s lives. But in the 1940s and 1950s, obstetric care improved, making it harder to invoke this justification. Doctors organized to change abortion laws, initially arguing that reform would improve women’s mental and physical health. In the 1960s, however, when a major movement for reform got underway, grassroots activists emphasized several claims about the benefits of legalization. Reformers argued that legal abortion would prevent the birth of severely disabled children and preserve scarce environmental resources. In the 1960s, as groups formed to defend criminal abortion laws, pro-lifers stressed arguments about a constitutional right to life as a way to expand their movement beyond its existing Catholic membership. As more feminists joined the abortion-rights movement in the late 1960s and early 1970s, grassroots activists demanded the outright repeal of all abortion restrictions, and reformers highlighted rights-based claims of their own. *Roe v. Wade* made rights-based claims even more important to the discussion.

In studying the success of abortion-funding bans, Chapter 2 evaluates the rise of a strategy based on claims about the costs of abortion. In the mid-1970s, the antiabortion movement included self-described liberals and conservatives, absolutists and pragmatists, professionals and homemakers. All of these activists focused on a constitutional amendment that would have criminalized abortion, and groups like NRLC and AUL looked for laws that could reduce the abortion rate in the short term. In justifying laws like abortion-funding restrictions, pro-lifers highlighted what they described as the societal costs of paying for abortion. While groups like NARAL and Planned Parenthood reluctantly discussed the impact of abortion-funding bans on poor women, lawyers in the ACLU invited courts to look at the real-world effects of funding prohibitions on taxpayers and low-income women. Resulting in decisions like *Maher v. Roe* (1977) and *Harris v. McRae* (1980), this dialogue reflected broader changes in public attitudes about poverty and the social safety net.

Exploring the period between 1980 and 1986, Chapter 3 studies how groups like NRLC and AUL refocused on overturning *Roe*. After 1978, when Akron, Ohio, passed a law designed to serve as a model nationwide, NRLC and AUL lawyers contended that because abortion sometimes harmed women, incremental restrictions should be

unconstitutional only if they unduly burdened women rather than helped them. The Supreme Court rejected abortion foes' arguments in *City of Akron v. Akron Center for Reproductive Health* (1983), but writing in dissent, Justice Sandra Day O'Connor adopted a version of the undue burden standard that pro-lifers championed. O'Connor's dissent solidified mainstream pro-life groups' commitment to a new strategy. Rather than prioritizing a constitutional amendment, abortion foes would gradually chip away at *Roe*, narrowing its protections and setting the stage for its overruling. By aligning with the GOP, pro-lifers would help to determine who sat on the Supreme Court. And in defending access restrictions, abortion foes would highlight their benefits – and what they saw as the costs of abortion.

Centered on the period between 1987 and 1992, Chapter 4 evaluates how the relationship between abortion and sex equality became central to both the fate of *Roe* and debate about the American family. As the Court's new majority appeared ready to overturn *Roe*, pro-lifers worried that GOP leaders feared a backlash on election day. To reassure Republican leaders that pro-life positions had a political payoff, abortion foes emphasized family involvement laws that seemed to enjoy popular support, including laws requiring women to notify their husbands or get their consent. In defending these laws, antiabortion activists insisted that abortion had serious costs for the family, disenfranchising men and dooming teenagers to a bleak and uncertain future.

Many on both sides resisted a focus on the costs and benefits of abortion. A new and predominantly evangelical clinic-blockade movement rejected consequence-based arguments in favor of religious ones. Believing that the Court would reverse *Roe*, larger abortion-rights groups like NARAL played up rights-based claims. In court, however, abortion-rights attorneys had to find a way to defend legal abortion and challenge family involvement laws. In the context of parental involvement, abortion-rights attorneys contended that if forced to carry their pregnancies to term, young women would lose out on emerging financial, political, or educational opportunities. Soon, these arguments played a key role in the discussion of *Roe*'s fate. Lawyers highlighted the benefits of keeping abortion legal in arguments linking access to the procedure to equality for women. Shaping the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), this debate offered a window into how Americans understood the family.

Chronicling the mid-1990s, Chapter 5 traces a debate about the relationship between abortion and health care that evolved in the aftermath of *Casey*. After the election of Bill Clinton, the abortion-rights movement went on the offensive. In explaining how incremental restrictions affected women's equal citizenship, abortion-rights groups emphasized that regulations denied women crucial health benefits. In the political arena, abortion-rights advocates worked to guarantee coverage of the procedure in national health care reform, to repeal bans on Medicaid funding for abortion, to introduce legislation protecting access to clinic entrances, and to ensure access to medical abortion pills. In court, abortion-rights attorneys also

described clinic blockaders – and all abortion foes – as sexists opposed to health care for women. This strategy played a part in the litigation of cases such as *Bray v. Alexandria Women's Health Clinic* (1993), *National Organization for Women v. Scheidler* (1994), and *Madsen v. Women's Health Center, Inc.* (1994). In the same period, building on the work of earlier activists, women of color offered a new framing of the relationship between health care and abortion, calling not for reproductive rights but for reproductive justice, shorthand for an agenda that addressed everything from abortion and contraception to adequate housing and quality childcare. Notwithstanding political and legal advances, however, abortion-rights supporters faced daunting new obstacles, including a shortage of abortion doctors and an effort to target abortion providers with medical malpractice lawsuits.

Although the abortion-rights movement had struggles of its own, *Casey* and the health-based offensive led by the abortion-rights movement caused some abortion opponents to lose faith in a strategy centered on the costs of abortion. To regain prominence in the movement, attorneys in groups like AUL and NRLC developed a new way of undermining *Roe*: If the Court saved abortion rights because women relied on it, the pro-life movement would demonstrate that the procedure damaged their health.

Examining the years from 1995 to 2007, Chapter 6 studies how those on opposing sides fought about ways to measure the costs and benefits of abortion when experts disagreed. In this period, larger pro-life groups sponsored a ban on the procedure they labeled partial-birth abortion. At the start, NRLC mostly urged voters to rely on their own moral compass to see that the procedure should be illegal. Drawing on support from medical experts, abortion-rights supporters responded that dilation and extraction sometimes best protected women's health. Abortion foes responded that both the mainstream media and organizations like the American College of Obstetricians and Gynecologists were biased. Since the debate turned partly on the costs of abortion (and abortion restrictions) for women, those on opposing sides increasingly fought about what should happen when experts disagreed. Should voters, experts, or individual patients have the final say when a scientific matter was in dispute? How should courts even define scientific uncertainty? Discussion of these questions reflected a larger national conversation about the line between politics and science.

Bringing the story up to the present, Chapter 7 considers how the breach between the two sides widened during battles about religious liberty and health care reform. In 2008, Barack Obama, the first pro-choice president since the 1990s, made the introduction of a federal health care bill his priority. In 2010, a backlash to Obama's Affordable Care Act (ACA), helped to give Republican lawmakers control of most state legislatures. These members of the so-called Tea Party passed an unprecedented number of abortion restrictions. Pro-lifers also joined an attack on the contraceptive mandate of the ACA, arguing that the government had denied believers their religious liberty. Working with new organizations, AUL and NRLC also sought to prove that Planned Parenthood, then the nation's largest abortion

provider, harmed women by putting profit ahead of their health. While pro-lifers accused Planned Parenthood of illegal and immoral actions, abortion-rights supporters described pro-lifers as misogynist opponents of health care and birth control. Rather than just disagreeing about how to measure the costs and benefits of abortion, those in both movements more often questioned the integrity of their opponents.

The Court's most recent intervention also widened the gulf between the sides. In 2016, in *Whole Woman's Health v. Hellerstedt*, the Court made claims about the costs and benefits of abortion yet more central to constitutional doctrine. Striking down two parts of a Texas law, the Court held that courts had to consider both the benefits and burdens imposed by a statute. *Whole Woman's Health* intensified efforts to gather evidence about the effects of specific laws and of abortion itself.

When Anthony Kennedy announced his retirement, many expected the Court to overturn *Roe*. But rather than seeking to appeal to undecided justices or ambivalent voters, antiabortion absolutists pushed strict abortion bans. For their part, abortion-rights supporters tried to introduce state constitutional amendments and statutes that would protect abortion once *Roe* was gone. But these laws also struck some as extreme insofar as they extended protections for virtually all later abortions. Decades of debate about the policy costs and benefits of abortion had certainly not helped to repair the breach between those contesting the abortion wars; if anything, the two sides were even further apart.

The Conclusion considers what the book teaches us about the intractability of the abortion conflict and the predictability of future discussion of reproductive health. At the time of this writing, because of the possible overturning of *Roe*, those on both sides expect the arguments that define the abortion wars to evolve. But the terms of the debate have already changed in consequential ways. Lawyers, activists, politicians, and commentators all bemoan the never-ending polarization of the American abortion conflict. But the battle will never be any less intense if we do not understand how and why the two sides in the abortion wars have grown so distant. The idea of clashing rights has long defined the history of the American abortion debate. A parallel but profoundly important fight about the effects of legal abortion demands our attention now.