

Abortion and the “Woman Question”: Forty Years of Debate

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Today we equate constitutional democracy with the basic principle that every adult citizen is entitled to vote, but this was not true at the founding. At the founding voting was a privilege possessed by the few, not the many. And it was a privilege possessed by men, not women. It took seventy-five years of debate for women to secure the right to vote¹ during which time the question of woman suffrage was referred to simply as the “woman question.”² The debate over woman suffrage was referred to as the woman question because the debate over woman suffrage raised fundamental questions about women’s roles, nature, and place in the constitutional order.

Voting is no longer the site of struggle over the woman question. Yet this society has not settled the woman question. Instead, it has continued to debate the woman question in new contexts. For the last four decades, abortion has been the site of struggles over the woman question, just as, for decades, schools were the site of struggles over the race question, or today the institution of marriage is the site of struggles over the standing of gays and lesbians.

This lecture commemorates *Roe*’s fortieth anniversary by reconstructing how the woman question became entangled in the abortion debate in the twentieth century. The abortion debate is commonly thought to concern the question of when life begins. But the question of when life begins is not the only question that makes the abortion debate explosive. I will show how the entrance of women’s rights claims into the abortion debate fatefully changed it, and led opponents of abortion to engage the woman question in terms that have changed shape over the last several decades, from the frames of “pro-family” to the more contemporary discourse associated with claims that “abortion hurts women.” Tracing the four-decade arc of this conversation allows us to see more clearly the many forms in

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1. U.S. CONST. amend. XIX. See generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

2. See, e.g., ELIZABETH K. HELSINGER, ROBIN LAUTERBACH SHEETS & WILLIAM VEEDER, *THE WOMAN QUESTION—SOCIAL ISSUES, 1837–1883* (1983); Francis Parkman, *The Woman Question*, 129 N. AM. REV. 303 (1879); Julia Ward Howe, Lucy Stone, Thomas Wentworth Higginson, Elizabeth Cady Stanton & Wendell Phillips, *The Other Side of the Woman Question*, 129 N. AM. REV. 413 (1879); Charles Nordhoff, *A Tilt at the Woman’s Question*, HARPER’S NEW MONTHLY MAG., Feb. 1863, at 350.

which the “woman question” can be expressed in cases that will reach the Roberts Court in the coming decade.

I. BEFORE *ROE*

Abortion and contraception were lawful at the time of this country’s founding, and then criminalized, state by state, in the mid- to late-nineteenth century.³ For the century thereafter, no woman could have an abortion unless a doctor declared that it was necessary to save her “life”—a term sometimes construed generously to include physical and mental health, for those women who had money and connections to the “right” doctor.⁴

A campaign to reform the laws criminalizing abortion began in the 1960s, well before mobilization of the second-wave feminist movement. The campaign was not conducted in the name of women’s rights. Instead, the drive to reform abortion law was led by doctors advancing concerns of public health. Public health advocates emphasized that laws criminalizing abortion subjected women to risk of death and infertility, pointing out that these risks disproportionately harmed poor women and women of color, who could not afford to pay the “right” doctor or to travel to a jurisdiction where abortion was legal.⁵ If the public health case for abortion reform raised questions of equality, it was to argue that abortion laws ought to be the same for wealthy women and poor women, white women and women of color. The public health case also focused on dilemmas faced by pregnant women who contracted measles or accidentally ingested toxins such as thalidomide, known to induce severe fetal malformation.⁶

Initially, at least, public health advocates did not challenge the criminalization of abortion. Rather they offered paternalist justifications for expanding and codifying exceptions to the criminal ban. Public health advocates helped enact laws allowing women to obtain an abortion if women could persuade a committee of doctors that certain excusing “indications” were present: that abortion was necessary for the pregnant woman’s physical or mental health, or that the pregnancy was the result of rape, or that the fetus was severely impaired.⁷

3. See JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900*, at 29–30 (1978). The nineteenth century campaign to criminalize abortion was advanced in the interest of protecting unborn life, enforcing gender roles in marriage, and preserving the racial character of the nation. See Reva B. Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 280–323 (1992).

4. See LESLIE REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973*, at 16, 193 (1997).

5. See *id.* at 138; Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *YALE L.J.* 2028, 2036–38 (2011).

6. See LESLIE J. REAGAN, *DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA* 60–63 (2010); Greenhouse & Siegel, *supra* note 5, at 2037.

7. Greenhouse & Siegel, *supra* note 5, at 2037–38. By the 1960s, the American Law Institute had adopted a model statute that would permit abortion—with a doctor’s certification—in such cases. MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962), *reprinted in* BEFORE *ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING* 24, 24–25 (Linda Greenhouse & Reva B. Siegel eds., 2d ed.

Over the course of the 1960s, a number of states, many in the South, enacted "indications" laws liberalizing exceptions to criminal bans on abortion.⁸ By 1970, four states, most prominently New York, enacted "periodic" legislation that allowed abortion in early pregnancy, without restriction as to reason or justification.⁹

But by 1970, the range of arguments for decriminalizing abortion had multiplied. Advocates in a nascent environmental movement concerned about scarce resources and an overpopulated planet were advocating separating sex and procreation as a public-regarding practice,¹⁰ while, on other fronts, a "sexual revolution" was transforming norms concerning extramarital intimacy.¹¹ Advocates in each of these movements supported liberalizing access to abortion.

A. Feminist Arguments for Abortion Rights

In this period, a newly mobilizing women's movement, growing from the ranks of the civil rights movement, from the antiwar movement, and from the labor movement, also began to make arguments for decriminalizing abortion, of a wholly new kind. As women argued about the gender justice of the market, the family, and the political sphere, they came to understand the criminalization of abortion in new ways. In this new feminist framing, abortion was a symptom and symbol of an unjust and unequal society, a society that enforced a double standard for women in sex, in family roles, in the work place, and in politics.

2012) [hereinafter *BEFORE ROE V. WADE*].

A majority of Americans supported such reforms. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 302–03 (1994); Austin C. Wehrwein, *Abortion Reform Supported in Poll: Most Catholics Are Found to Favor Liberalization*, N.Y. TIMES, Apr. 24, 1966, at 83 (finding support for decriminalizing abortion for ALI-type justifications, including "[h]ealth, 71 per cent; rape, 56 per cent; deformed baby, 55 per cent; low income, 21 per cent; unmarried, 18 per cent; birth control, 15 per cent").

8. Twelve states, most of them in the South, enacted laws along the ALI ("therapeutic") model. See Greenhouse & Siegel, *supra* note 5, at 2047.

9. *Id.*

10. See, e.g., Brochure, *Zero Population Growth*, reprinted in *BEFORE ROE V. WADE*, *supra* note 7, at 55, 55–57 (declaring that, to protect the Earth from the ecological strain of overpopulation, "no responsible family should have more than two children" and that "[a]ll methods of birth control, including legalized abortion, should be freely available—and at no cost in poverty cases"); PAUL R. EHRLICH, *THE POPULATION BOMB* 148 (1968) (warning of the threat that an overpopulated planet posed to the environment, and arguing for policies that would separate sex and reproduction for the public good).

11. See generally Greenhouse & Siegel, *supra* note 5, at 2039–41; DAVID ALLYN, *MAKE LOVE, NOT WAR: THE SEXUAL REVOLUTION* (2000); JANE F. GERHARD, *DESIRING REVOLUTION: SECOND-WAVE FEMINISM AND THE REWRITING OF AMERICAN SEXUAL THOUGHT, 1920 TO 1982* (2001); Laurie Ouellette, *Inventing the Cosmo Girl: Class Identity and Girl-Style American Dreams*, 21 MEDIA, CULTURE & SOC'Y 359, 361 (1999) (noting that Helen Gurley Brown's *Sex and the Single Girl*, which advised unmarried women how to have fulfilling sex lives, sold over two million copies after it came out in 1962); Judy Klemesrud, *An Arrangement: Living Together for Convenience, Security, Sex*, N.Y. TIMES, Mar. 4, 1968, at 40 (discussing the increasing prevalence of the "arrangement"—nonmarried, college-student couples living together).

When Betty Friedan addressed a convention called to found the National Abortion Rights Action League in 1969, she titled her remarks *Abortion: A New Civil Right*:

Women are denigrated in this country, because women are not deciding the conditions of their own society and their own lives. Women are not taken seriously as people. Women are not seen seriously as people. So this is the new name of the game on the question of abortion: that women's voices are heard.

. . . [W]omen are the ones who therefore must decide, and what we are in the process of doing, it seems to me, is realizing that there are certain rights that have never been defined as rights, that are essential to equality for women, and they were not defined in the Constitution of this, or any country, when that Constitution was written only by men. The right of woman to control her reproductive process must be established as a basic and valuable human civil right not to be denied or abridged by the state.¹²

Feminists saw laws criminalizing abortion as denying women's "dignity"¹³: depriving women of control over their sexual and family lives, and denying women the ability to combine sex and family with education, work, and public life—as men do. They sought a voice for women—in the decision whether and when to bear a child, and in the making of laws that would control such decisions. Women had the ethical capacity to wrestle with conflicting dimensions of the abortion decision: they could weigh concerns of the unborn, of existing children, of their partners, as well as their own claims and needs. "[T]his is the new name of the game on the question of abortion," Friedan argued. "[T]hat women's voices are heard."¹⁴ To ensure this, feminists claimed, for the first time, a constitutional right for women—not a doctor or the state—to control the decision whether a woman would carry a pregnancy to term.

The claim that women were entitled to control decisions concerning their reproductive lives was an integral part of a larger claim for gender justice. In 1970, the women's movement held a nationwide "Strike for Equality"¹⁵ on the half-century anniversary of the Nineteenth Amendment's ratification in which the movement sought ratification of the Equal Rights Amendment (ERA)¹⁶ alongside

12. Betty Friedan, Founding President, Nat'l Org. for Women, Address Before the First National Conference on Abortion Laws: *Abortion: A Woman's Civil Right* (Feb. 1969), as reprinted in *BEFORE ROE V. WADE*, *supra* note 7, at 38, 38–39 (omission in original).

13. *Id.* at 39.

14. *Id.*

15. See Betty Friedan, Call to Women's Strike for Equality (Aug. 26, 1970) (previously unpublished manuscript), as reprinted in *BEFORE ROE V. WADE*, *supra* note 7, at 41, 42.

16. The Equal Rights Amendment was a proposed constitutional amendment that would have provided, in relevant part, that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong. (1971). It passed both houses of Congress in 1972, but was not ratified by the required number of states before the deadline mandated by Congress, largely as a result of conservative opposition.

three other claims: (1) equal employment opportunity, (2) publicly supported child care, and (3) abortion "on demand,"¹⁷ by which feminists meant, not access to abortion on a whim, but rather access to abortion without having to give reasons or seek the permission of a committee of doctors. On the half-century anniversary of woman suffrage, the movement imagined equal citizenship for women as requiring transformation in the conditions in which women conceive and rear children.

B. Opposition

The entrance of feminists into the abortion debate both increased support for liberalization of abortion laws *and* energized opposition. Over time, the antiabortion position was articulated in ways that became progressively more engaged with the feminist case for abortion rights, with many in the right to life movement initially opposing feminist arguments and then increasingly seeming to incorporate feminist argument into the case against abortion.

In the 1960s, before entrance of feminists into the debate, abortion reform was most often opposed by Catholics.¹⁸ (In the 1960s, most Protestant denominations—including evangelicals such as the Southern Baptists—accepted the case for therapeutic abortion, and distanced themselves from the abortion issue, which they viewed as a "Catholic issue."¹⁹) Catholic convictions about abortion rested on views about unborn life and about sex. The Church emphasized that sex was for the sacred purpose of creating life, and did not support women's interest in engaging in sexual relations and retaining control of decisions whether and when to parent.²⁰ But Catholics opposing abortion in the public arena did not focus on the procreative ends of sex. In the public arena, Catholics mobilized to oppose any exception to criminal bans on abortion—for maternal health or rape—on the ground that abortion is the taking of a human life.²¹ They endeavored to translate that view—

17. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1372–76 (2006); see also *BEFORE ROE V. WADE*, *supra* note 7, at 249–50.

18. See generally Greenhouse & Siegel, *supra* note 5, at 2048–49, 2063–64.

19. *Id.* at 2063.

20. For example, *Humanae Vitae*, an encyclical promulgated in 1968, condemned contraception and abortion together as contrary to a Catholic understanding of marriage. Encyclical Letter of the Supreme Paul VI on the Regulation of Birth (July 25, 1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html. The encyclical declared that the human "sexual faculties" are "concerned by their very nature with the generation of life, of which God is the source," and reaffirmed a doctrine of marriage in which the purpose of sex between husband and wife was procreation, writing that "the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the number of children." *Id.* "Similarly excluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation—whether as an end or as means." *Id.*

21. For example, Robert Byrn, a law professor at Fordham University who would soon join the National Right to Life Committee, appealed to science and civil rights in attacking ALI indications legislation expanding abortion exceptions for rape and health of the mother. He attacked the legislation on the grounds that "an abortion kills an innocent human being,"

which in the 1960s other Christian denominations did not fully share²²—into secular terms. For example, Jack Willke, the first leader of the National Right to Life Committee, began his career as a sex education counselor teaching chastity before marriage.²³ But in his role as head of the National Right to Life Committee, Willke expressed the argument against abortion in terms that seemingly had little to do with sexual abstinence before marriage. Willke helped pioneer the use of photographs of fetuses in antiabortion argument,²⁴ and appealed to scientific and ethical arguments to argue in his bestselling *Handbook on Abortion* that if the fetus is “human, he (or she) must be granted the same dignity and protection of his life, health, and well being that our western civilization has always granted to every other human person.”²⁵ The *Handbook* largely avoided discussion of evolving views about sex,²⁶ and did not directly engage with the feminist case for abortion rights, which was audible by the time of the *Handbook*’s publication.

By the early 1970s, new voices began to join the National Right to Life Committee in opposing abortion, and these newcomers to the abortion debate began more openly to attack feminist arguments for the abortion right. In the 1972 Presidential election, President Richard Nixon, who initially took policy positions supportive of liberalization, reversed course and called for restrictions on abortion in terms directed at Catholic audiences and in language sounding in “the sanctity of human life.”²⁷ The strategy was designed to attract and realign Catholics, who

and in terms evoking science and civil rights law, argued that “the minority, whose rights are at stake, is both voiceless and voteless.” For one such attack, see Robert M. Byrn, *Abortion in Perspective*, 5 DUQ. L. REV. 125, 132, 141 (1967).

22. See, e.g., Southern Baptist Convention, Resolution on Abortion (June 1971), reprinted in *BEFORE ROE V. WADE*, *supra* note 7, at 71, 71–72 (adopting statement calling on Southern Baptists to work for legislation to permit abortion “under such conditions as rape, incest, clear evidence of fetal deformity, and carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother”).

23. On Willke’s early career as a sex educator counseling abstinence outside of marriage, see Cynthia Gorney, *The Dispassion of John C. Willke*, WASH. POST MAG., Apr. 22, 1990, at 20, 25.

24. In the 1970s, Jack Willke first drew on new photographic technologies to pioneer antiabortion argument through pictures of the embryo/fetus in utero—a technique that he and others perfected in ensuing decades. *Id.* at 24.

25. J.C. WILLKE & BARBARA WILLKE, *HANDBOOK ON ABORTION* (1971), as reprinted in *BEFORE ROE V. WADE*, *supra* note 7, at 99, 101–02.

26. The *Handbook* discusses sex in a passage arguing against rape exceptions in laws criminalizing abortion. It suggests that pregnancy resulting from rape is “extremely rare” and can be prevented by medical douche, if the victim immediately seeks medical attention. *Id.* at 104. The *Handbook* goes on to suggest that women fabricate many rape claims. “As everyone knows, there are many degrees of resistance or consent on the part of a woman to the act of intercourse. It is easy for a woman rejected by a lover to then accuse him of raping her.” *Id.* at 105. Willke has continued to maintain that raped women are not likely to conceive, observing in 2012 that rape “is a traumatic thing—she’s, shall we say, she’s uptight. She is frightened, tight, and so on. And sperm, if deposited in her vagina, are less likely to be able to fertilize. The tubes are spastic.” Pam Belluck, *Health Experts Dismiss Assertions on Rape*, N.Y. TIMES, Aug. 21, 2012, at A13.

27. Statement About Policy on Abortions at Military Base Hospitals in the United States, 3 PUB. PAPERS 500 (Apr. 3, 1971).

historically voted with the Democratic Party.²⁸ As the campaign progressed, however, Nixon widened his attack on abortion, expressing it in terms designed to appeal not only to Catholics, but to a more broad-based "silent majority," voters the Nixon campaign believed were concerned about the threat that young people in the antiwar, sexual liberation, and women's movements posed to traditional family values.²⁹

This reframing advanced a new kind of objection to abortion. In August of 1972, Kevin Phillips, author of *The Emerging Republican Majority*³⁰ and a key architect of the Republican Party's "Southern Strategy,"³¹ published a *New York Times Magazine* article entitled "How Nixon Will Win."³² In it, Phillips promised that Republicans would "aggressively" attack "social morality," warning that in the fall campaign Republicans would be "tagging McGovern as 'the triple A candidate— Acid, Amnesty and Abortion,'" and observing that "tactics like this will help link McGovern to a culture and morality that is anathema to Middle America."³³

The "triple A" objection to abortion did not concern the question of when life begins. The "triple A" objection to abortion was *not* that abortion was murder, but instead was that "abortion rights (like the demand for amnesty) validated a breakdown of traditional roles that required men to be prepared to kill and die in war and women to save themselves for marriage and . . . motherhood."³⁴ In the "triple A" framing, abortion stands for gender trouble.

28. See Kevin Phillips, *How Nixon Will Win*, N.Y. TIMES MAG., Aug. 6, 1972, § 6, at 8 (predicting a Republican victory in 1972 premised on the strategy of "wooing conservative Catholics," among other socially conservative demographic groups).

29. The Nixon campaign saw the strategic benefit in invoking abortion for its power in signaling social conservatism; staking out a position on abortion itself appeared to offer little benefit. See generally Greenhouse & Siegel, *supra* note 5, at 2056–59. On August 28, 1972, campaign strategists sent John Ehrlichman "data showing 'a sizeable majority of Americans, including Roman Catholics, now favoring liberal abortion laws,'" and "[t]he president decided to leave [the] matter to the states, . . . privately affirm[ing] that 'abortion reform' was 'not proper gr[oun]d for Fed[eral] action'" and that he "[wou]ld never take action as P[resident]." DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 251 & n.222 (2001).

30. KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1969).

31. James Boyd, *Nixon's Southern Strategy: 'It's All in the Charts'*, N.Y. TIMES MAG., May 17, 1970, at 25 (profiling Phillips and detailing his role in crafting the Republican demographic strategy of the early 1970s).

32. Phillips, *supra* note 28, at 8.

33. *Id.* Pursuing such themes, Buchanan spearheaded letter-writing campaigns, such as one in Michigan in September of 1972, targeting every newspaper in the state of Michigan, "especially . . . every Catholic newspaper in the State," urging Michigan voters, who would vote on an abortion reform referendum on election day, to reject "abortion-on-demand" and reject McGovern, the candidate who supported "unrestricted abortion policies." Memorandum from Pat Buchanan to Betty Nolan (Sept. 11, 1972), in *Hearings Before the S. Select Comm. on Presidential Campaign Activities*, 93d Cong. 4256, 4256–57 (1973). For an account of the campaign in Michigan in 1972, see Robert N. Karrer, *The Formation of Michigan's Anti-Abortion Movement 1967-1974*, MICH. HIST. REV., Spring 1996, at 67, 76–85.

34. BEFORE ROE V. WADE, *supra* note 7, at 257; see also KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 193 (1984) (demonstrating through interviews of movement leaders that "this round of the abortion debate is so passionate and hard-fought because it is a

Drawing on the same sets of associations—between abortion and feminism—Phyllis Schlafly drew abortion into the campaign against the Equal Rights Amendment. Schlafly's first published attack on the ERA in February of 1972 complained:

Women's lib is a total assault on the role of the American woman as wife and mother and on the family as the basic unit of society. Women's libbers are trying to make wives and mothers unhappy with their career, make them feel that they are "second-class citizens" and "abject slaves." Women's libbers are promoting free sex instead of the "slavery" of marriage. They are promoting Federal "day-care centers" for babies instead of homes. They are promoting abortions instead of families.³⁵

II. ABORTION AND THE WOMAN QUESTION AFTER *ROE*: PRO-LIFE? PRO-FAMILY? PRO-WOMAN?

The entrance of feminists into the abortion debate changed its shape. Some opponents of abortion embraced tenets of feminism,³⁶ but many opponents of abortion also opposed feminism, expressing their views in multi-issue organizations and from inside the Republican Party. These alliances soon resulted in the formation of a "pro-family" movement opposed to abortion *and* to many goals of second-wave feminism. Over decades of conflict, however, antiabortion groups began to integrate "pro-woman" arguments into their case against abortion, often infusing "pro-woman" or "women's rights" talk with traditional, stereotypical modes of reasoning about women.

A. The Association of Antiabortion and Antifeminist Argument

The Republican Party's "triple A" argument and Schlafly's anti-ERA argument sounded themes that flowered in the post-*Roe* period. Schlafly played an important role in forging a new form of "pro-family" argument that fused antiabortion and antifeminist frames. In 1977, in Houston, Schlafly organized a national convention to oppose the Equal Rights Amendment at which an emergent pro-family movement protested the abortion and gay rights planks of feminists who came out to support the ERA.³⁷ As Rosemary Thomson, one of Schlafly's organizers, warned

referendum on the place and meaning of motherhood" (emphasis omitted)); Robert Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 418–20 (2007).

35. Phyllis Schlafly, *Women's Libbers Do NOT Speak for Us*, PHYLLIS SCHLAFLY REP., Feb. 1972, reprinted in *BEFORE ROE V. WADE*, *supra* note 7, at 218, 219.

36. Of those who mobilized to oppose abortion, there were some who were active in feminist circles and others who adapted feminist frames to antiabortion ends. For an account that explores the views of those who presented themselves as pro-life feminists, see Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232 (2013).

37. See Siegel, *supra* note 17, at 1401; Marjorie J. Spruill, *Gender and America's Right Turn*, in *RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S* 71, 71 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) (making the case that the International Women's

the following year in *The Price of Liberty*, "The national leaders of the women's movement, who were working so hard to ratify ERA, were the same clique promoting homosexual rights, abortion, and government child rearing."³⁸ (Here, as in the "triple A" argument, the wrong of abortion is gender trouble, not murder.) In 1979, Beverly LaHaye consolidated these associations by founding Concerned Women for America, which organized large numbers of evangelical Protestants against abortion and the ERA.³⁹ The pro-family frame explosively connected opposition to abortion and to the ERA. The pro-family case against abortion rights was advanced by multi-issue groups such as Schlafly's Eagle Forum and Beverly LaHaye's Concerned Women for America.⁴⁰

The pro-family argument against abortion reached even wider audiences as Richard Viguerie and Paul Weyrich honed pro-family frames as an organizing tool for the Republican Party. In the late 1970s, Viguerie and Weyrich led the New Right to mobilize around "social issues"—including race, religion, and the family—with the aim of recruiting traditional Democratic voters and realigning them in the ranks of the Republican Party.⁴¹ Reagan's 1980 election was a result

Year (IWY) "contribut[ed] significantly to the rightward turn in American politics as social conservatives began rallying around gender issues"); Judy Klemesrud, *Equal Rights Plan and Abortion Are Opposed by 15,000 at Rally*, N.Y. TIMES, Nov. 20, 1977, at 32 (describing, on the occasion of the 1977 Houston Convention marking IWY, a counter-rally sponsored by the Pro-Family Coalition that "unanimously passed resolutions against abortion, the proposed equal rights amendment and lesbian rights, three issues that will also be debated at the women's conference"); Allen Hunter, *Virtue with a Vengeance: The Pro-Family Politics of the New Right* 159–68 (1985) (unpublished Ph.D. Dissertation, Brandeis University) (on file with author) (analyzing the "pro-family" rhetoric and practices of the New Right, including the antifeminist mobilization around the IWY). Afterward, Phyllis Schlafly recalled:

At the IWY event in Houston, the ERAers, the abortionists, and the lesbians made the decision to march in unison for their common goals. The conference enthusiastically passed what the media called the "hot button" issues: ERA, abortion and abortion funding, and lesbian and gay rights. The IWY Conference doomed ERA because it showed the television audience that ERA and the feminist movement were outside the mainstream of America. ERA never passed anywhere in the post-IWY period.

Phyllis Schlafly, *A Short History of E.R.A.*, EAGLE FORUM, <http://www.eagleforum.org/psr/1986/sept86/psrsep86.html>.

38. ROSEMARY THOMSON, *THE PRICE OF LIBERTY* 15 (1978). For more on Thomson's role, see DONALD T. CRITCHLOW, *PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE* 245 (2005).

39. See SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 133–37 (2010) (describing what the author calls Beverly LaHaye's "holy war" against, in LaHaye's words, "Bella Abzug, Gloria Steinem, and Betty Friedan" and quoting one LaHaye follower as declaring that "[i]t's time now to pick up my skillet and my rolling pin and charge"); BEVERLY LAHAYE, *WHO BUT A WOMAN?* 25, 27 (1984) (connecting the ERA with abortion, child care, and gay rights).

40. See generally Mark J. Rozell & Clyde Wilcox, *Second Coming: The Strategies of the New Christian Right*, 111 POL. SCI. Q. 271 (1996).

41. Greenhouse & Siegel, *supra* note 5, at 2083 (citing *The New Right: A Special Report*, CONSERVATIVE DIG., Jun. 1979, at 10); see also Daniel K. Williams, *The GOP's Abortion Strategy: Why Pro-Choice Republicans Became Pro-Life in the 1970s*, 23 J. POL'Y HIST. 513, 532–34 (2011).

not only of the “Southern Strategy,” but of an argument tying abortion to the woman question, through pro-family frames forged by the New Right.⁴² The Republican Party platform of 1980 provided, “We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”⁴³ The platform plank associated and equated pro-life and pro-family causes—and was repeated verbatim for years thereafter.⁴⁴

B. “Pro-Woman”: The Emergence of Woman-Protective Antiabortion Argument

To this point, we have seen how the appearance of feminist arguments for the liberalization of abortion law led to the emergence of new forms of antiabortion argument. Increasingly, the fetus-centered pro-life argument of the kind that Jack Willke pioneered was coupled with pro-family argument, so that protecting unborn life became a way of talking about opposing the Equal Rights Amendment and the feminist vision of the family. The Republican Party platform of 1980 illustrated this increasingly common conjunction of antiabortion and antifeminist argument when it called for judges who would vindicate “traditional family values and the sanctity of innocent human life.”⁴⁵ In the ensuing years, there was fierce conflict between the feminist movement and those mobilized under the pro-life and pro-family banners.

This conflict itself was ultimately to shape antiabortion argument. Despite the insurgency of the New Right, three Republican administrations, and associated Supreme Court appointments, “traditional family values and the sanctity of innocent human life”⁴⁶ did *not* trump claims of women’s equal citizenship. In 1992, by all appearances close to overturning *Roe*, the Supreme Court instead reaffirmed and narrowed *Roe* in *Planned Parenthood v. Casey*.⁴⁷ Several months later the nation elected Bill Clinton, its first strongly pro-choice president.⁴⁸

42. See Greenhouse & Siegel, *supra* note 5, at 2061–71; see also Williams, *supra* note 41, at 532–34.

43. REPUBLICAN NAT’L COMM., REPUBLICAN PARTY PLATFORM OF 1980 (1980), available at <http://www.presidency.ucsb.edu/ws/?pid=25844>.

44. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1750 n.159 (2008).

45. *Id.*

46. REPUBLICAN NAT’L COMM., *supra* note 43.

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

48. See Gerald N. Rosenberg, *The Real World of Constitutional Rights: The Supreme Court and the Implementation of the Abortion Decisions*, in PRINCIPLES AND PRACTICE OF AMERICAN POLITICS: CLASSIC AND CONTEMPORARY READINGS 174, 185 (Samuel Kernell & Steven S. Smith eds., 5th ed. 2013) (describing President Clinton as “the first pro-choice president since *Roe*,” recounting the numerous policies he implemented immediately after his election; and contrasting his positions on abortion to his predecessors’); see also Robin Toner, *Political Memo; Clinton’s Support of Abortion Rights Has Catholic Leaders on a Tightrope*, N.Y. TIMES. (Feb. 3, 1993), <http://www.nytimes.com/1993/02/03/us/political-memo-clinton-s-support-abortion-rights-has-catholic-leaders-tightrope.html> (stating that President Clinton “chose, as one of his first acts, to begin to roll back 12 years of Republican abortion restrictions, and he has promised to do more”).

In the face of these setbacks, growing numbers of abortion opponents changed course. Instead of opposing feminist initiatives, opponents of abortion began instead to assert themselves as true defenders of women's rights. In the process, they incorporated feminist frames into antiabortion argument, taking these claims deep inside the case against abortion itself. During the 1990s, antiabortion advocates began to argue that *in order to protect women's health and freedom*, it was necessary to criminalize abortion.⁴⁹ Those who opposed abortion increasingly coupled fetal-protective arguments with claims that abortion hurt women and that women who chose abortions did so because they were coerced. Antiabortion advocates began to make arguments for criminalizing abortion *to protect women*.⁵⁰

We can see this decision to supplement fetal-protective arguments with appeals to woman-protective justifications for restricting abortion in the career of Jack Willke, head of the National Right to Life Committee. Willke pioneered fetal-focused arguments in the 1970s⁵¹ and honed this mode of advocacy throughout the 1980s, but embraced woman-protective antiabortion arguments in the early 1990s after opinion polling persuaded him that advancing claims about women's rights and welfare would help him win the uncommitted ambivalent middle. Here is Willke, writing in 2001, recalling his conversion:

We had been making steady progress . . . [in] educating the nation, beyond reasonable doubt, that human life, in its complete form, began at the first cell stage.

...

Then pro-abortion activists . . . changed the question. No longer was our nation arguing about killing babies. The focus, through their efforts, had shifted off the humanity of the unborn child to one of women's rights. They developed the effective phrase of "Who Decides?"

...

Pro-lifers were still teaching in the traditional method that they had brought such astounding and continuing success until that time. They were still proving that this was a baby and telling how abortion killed the baby. However, increasingly, these facts fell on deaf ears, for this did not address the new argument of women's rights. This had to be answered, but we did not know what the effective answer was.

...

After considerable research, we found out that the answer to their "choice" argument was a relatively simple straightforward one. We had to convince the public that we were compassionate to women. Accordingly, we test marketed variations of this theme. Thus was born the slogan "Love Them Both," and, in fact, the third edition of our Question and Answer book has been so titled, specifically for that reason.⁵²

49. Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Anti-Abortion Argument*, 57 DUKE L.J. 1641, 1667–73 (2008).

50. *Id.*

51. *Id.* at 1669–70.

52. J.C. Willke, *Life Issues Institute Is Celebrating Ten Years With a New Home*, LIFE ISSUES CONNECTOR, Feb. 2001, at 1, 1, 4, available at <http://www.lifeissues.org/connector>

During this same period, David Reardon developed the new woman-protective argument in ways self-consciously designed to align antiabortion argument with feminist frames, in a new “pro-woman” strategy: “[W]e must insist that the proper frame for the abortion issue is not women’s rights versus the unborn’s rights, but rather women’s and children’s rights versus the schemes of exploiters and the profits of the abortion industry.”⁵³ Reardon squarely addressed the reservations of advocates who opposed abortion out of concern for the unborn:

While committed pro-lifers may be more comfortable with traditional “defend the baby” arguments, we must recognize that many in our society are too morally immature to understand this argument. They must be led to it. And the best way to lead them to it is by first helping them to see that abortion does not help women, but only makes their lives worse.⁵⁴

Of course, to make this claim about women’s interests persuasive, Reardon needed some explanation for the large numbers of women seeking abortions. How would using the criminal law to control women *help* women? Reardon’s response was to insist that women who have abortions do not in fact want them; they are coerced into the procedure or do not grasp its implications—a claim he made persuasive by invoking paternalist imagery of women. Reardon explained, “Candidates must learn to project themselves as both pro-woman and pro-life. This is done by emphasizing one’s knowledge of the dangers of abortion and the threat of women being coerced into unwanted abortions by others.”⁵⁵

In the 1970s and 1980s, pro-life advocates often associated opposition to abortion with opposition to feminism. But by the 1990s, the antiabortion movement increasingly began to appropriate feminist frames and to integrate them into the

/01feb.html (narrating how the Life Issues Institute “became a launching pad, nationally and internationally, for a new dynamic in pro-life education . . . [that] showcase[d] just how compassionate the movement is to women”); see also JOHN C. WILLKE & BARBARA H. WILLKE, WHY NOT LOVE THEM BOTH? QUESTIONS AND ANSWERS ABOUT ABORTION (1997); John & Barbara Willke, *Why Can’t We Love Them Both?*, in LIFE AND LEARNING VII: PROCEEDINGS OF THE SEVENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE, JUNE 1997 AT LOYOLA COLLEGE 10, 10 (Joseph W. Koterski, ed., 1998) (“My message tonight is not what I said five or ten years ago. Five or ten years ago my emphasis would have been on the right to life and on saving babies. But now I want to tell those who are involved in women’s helping centers that they are doing what I believe is the most important single thing that the pro-life movement is doing in our time. The big problem is that we have not publicized it enough—it’s a light hidden under a bushel—and so my message will be very direct. We’ve got to go out and sing from the housetops about what we’re doing—how compassionate we are to women, how we are helping women—not just babies, but also women.”).

53. David Reardon, *Politically Correct vs. Politically Smart: Why Politicians Should be Both Pro-Woman and Pro-Life*, POST-ABORTION REV., Fall 1994 (emphasis omitted), available at <http://www.afterabortion.info/PAR/V2/n3/PROWOMAN.htm>.

54. *Id.* at 3.

55. David C. Reardon, *Pro-Woman/Pro-Life Campaign*, POST-ABORTION REV., Winter 1993, available at <http://www.afterabortion.info/PAR/V1/n1/prowoman.htm>; see also Siegel, *supra* note 49, at 1672–76 (providing background on David Reardon). For an illustration of woman protective arguments, see, for example, Siegel, *supra* note 44, at 1731, 1781–82.

very substance of antiabortion argument itself, fusing feminist and gender-conventional claims about women. These new synthetic woman-protective arguments raise deep questions about who women are. Drawing on highly controverted science,⁵⁶ antiabortion advocates have argued that a woman who decides to end a pregnancy will suffer trauma or breast cancer or commit suicide, and that her choice is likely the product of coercion.⁵⁷ They argue that only criminalizing abortion can protect women's health and freedom. Pro-choicers respond by arguing that these claims persuade—if they do—because they trade in junk science and stereotypes about women's nature. The criminal law offers little support for the genuinely difficult circumstances in which women make family decisions; there must be other and better ways of protecting women's health and freedom than the criminalization of abortion.⁵⁸

III. CONSTITUTIONAL LAW AND POLITICS:

THE WOMAN QUESTION IN THE CASE LAW, *ROE* TO *CARHART* AND BEYOND

Our constitutional case law reflects the contours of this several-decades-long struggle over the woman question. In 1973, when the Court decided *Roe*,⁵⁹ feminists had only recently joined the abortion debate. In fact, the Court that decided *Roe* understood the abortion question as a question of public health and doctors' professional autonomy, scarcely grasping the women's rights claim.⁶⁰ The Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶¹ reaffirming and significantly limiting *Roe*, reflects much more clearly than *Roe* the views of feminist and antiabortion antagonists in the abortion debate. In reaffirming and narrowing *Roe*, *Casey* enlarges *Roe*'s normative basis. The portion of the *Casey* decision attributed to Justice Kennedy identifies the equality values that freedom to decide about family roles secures for women:

Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.⁶²

56. For studies challenging the empirical basis of claims that abortion causes clinically significant psychological harms and breast cancer, see Siegel, *supra* note 44, at 1719 n.81.

57. See, e.g., Siegel, *supra* note 44, at 1732 n.106 (quoting SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 43–52 (2005) (asserting that a woman who chooses abortion is likely to “suffer[] significant psychological trauma and distress,” including bipolar disorder, post-traumatic stress disorder, and breast cancer)).

58. See, e.g., Siegel, *supra* note 44, at 1793–98.

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

60. See Reva B. Siegel, *Roe's Roots: The Women's Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1896–900 (2010).

61. 505 U.S. 833 (1992).

62. *Id.* at 852.

Casey ties constitutional protection for women's abortion decision to the understanding, forged in the Court's sex discrimination cases, that government cannot use law to enforce traditional sex roles on women.⁶³ This is an understanding of the abortion right absent in *Roe*.

At the same time, *Casey* adopts an undue burden test that sanctions regulation of the abortion right throughout pregnancy to promote the state's interest in protecting potential life, so long as such regulation informs without hindering a woman's choice whether to continue a pregnancy.⁶⁴ The Court's aim seems to be to allow citizens who oppose abortion opportunities to express that view to women throughout pregnancy that *Roe* did not accommodate.⁶⁵

The Court's 2007 *Carhart*⁶⁶ decision upholding the Partial-Birth Abortion Ban Act⁶⁷ reflects the emergence of debate over the woman-protective antiabortion argument. The Partial-Birth Abortion Ban Act was plainly designed with concerns about unborn life in view—although the legislation was incremental rather than absolute in protecting unborn life—regulating *how* abortion could be performed, not *whether*.⁶⁸

In the course of upholding the statute, Justice Kennedy included language in the opinion suggesting he might be open to woman-protective arguments expressed in some amicus briefs.⁶⁹ This in turn prompted Justice Ginsburg and the three other dissenting Justices to challenge Justice Kennedy's reasoning, with an express appeal to the Court's equal protection/sex discrimination cases. While *Casey* interpreted the Due Process Clause with attention to equality values, in *Carhart* four Justices appealed to the Court's equal protection decisions as a basis for constitutional protections for the abortion right.⁷⁰ Justice Ginsburg and the dissenters challenged woman-protective antiabortion arguments, in an express appeal to sex equality:

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny. . . . Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus,

63. See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 831 (2007).

64. *Casey*, 505 U.S. at 876.

65. Post & Siegel, *supra* note 34, at 428–29.

66. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

67. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

68. Siegel, *supra* note 44, at 1707–09 (discussing the genesis of the Partial-Birth Abortion Ban Act).

69. *Carhart*, 550 U.S. at 159 ("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."); see, e.g., Brief of Sandra Cano, The Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amicus Curiae in Support of Petitioner at 22–24, *Carhart*, 550 U.S. 124 (No. 05-380).

70. For discussion, see Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISC. 160 (2013).

legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.⁷¹

As more and more legislation is enacted on the woman-protective model, the question the Court took up glancingly in *Carhart* appears headed for judicial resolution in the near future.

IV. CODA

The Court's liberal Justices have now begun to reason about abortion by appeal to the authority of the Equal Protection Clause. The question is whether Justice Kennedy might ever be moved to do so. James Bopp, Jr., longtime lawyer for the National Right to Life Committee (and architect of *Citizens United*⁷²), has urged antiabortion advocates to challenge *Roe* incrementally and cautioned against pressing personhood amendments or other absolute restrictions on abortion; in Bopp's view, a constitutional challenge to a personhood amendment might provide the occasion for Justice Kennedy to endorse Justice Ginsburg's understanding of the abortion right.⁷³ In a strategy memo to the antiabortion movement, Bopp warned:

But if the U.S. Supreme Court, as presently constituted, were to actually accept a case challenging the declared constitutional right to abortion, there is the potential danger that the Court might actually make things worse than they presently are. The majority might abandon its current "substantive due process" analysis (i.e., reading "fundamental" rights into the "liberty" guaranteed by the Fourteenth Amendment against infringement without due process) in favor of what Justice Ginsberg [sic] has long advocated—an "equal protection" analysis under the Fourteenth Amendment. In *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the dissent, written by Justice Ginsberg [sic], in fact did so. *See id.* at 1641 (Ginsberg [sic], J., joined by Stevens, Souter, and Breyer, JJ.) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). . . . A law prohibiting abortion would force Justice Kennedy to vote to strike

71. *Carhart*, 550 U.S. at 171–72 (Ginsburg, J., dissenting) (citations omitted).

72. *Citizens United v. FEC*, 558 U.S. 310 (2010). James Bopp, Jr., has served as general counsel for the National Right to Life Committee since 1978. *NRLC General Counsel James Bopp Named Republican Lawyer of the Year*, NAT'L RIGHT TO LIFE NEWS, Sept. 2009, at 8. Bopp represented Citizens United as the initial lawyer in their campaign finance law challenge, initiating—but ultimately not arguing—the 2010 Supreme Court case. *See* David D. Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 25, 2010, at A11.

73. *See* Siegel, *supra* note 44, at 1734–35, 1779–80 (discussing the liberal Justices' understanding of the abortion right as grounded in autonomy and equality values, Justice Kennedy's potential adoption of this understanding, and Bopp's strategic caution).

down the law, giving Justice Ginsberg [sic] the opportunity to rewrite the justification for the right to abortion for the Court. *This is highly unlikely* in a case that decides the constitutionality of such things as PBA bans, parental involvement laws, women's right-to-know laws, waiting periods, and other legislative acts that do not prohibit abortion in any way, since Justice Kennedy is likely to approve such laws.⁷⁴

Like Justice Ginsburg, James Bopp believes that an abortion right expressly and textually anchored in the Equal Protection Clause would be much harder to disentrench.

On the eve of *Roe*'s fortieth anniversary we do not yet know the decision's fate. However the Court decides the question, it is not likely to settle the abortion question for this generation.

And should the abortion question one day find settlement, even *that* would not be likely to settle the woman question, for generations to come.

74. Legal Memorandum from James Bopp, Jr. & Richard E. Coleson, Attorneys at Law, on Pro-life Strategy Issues 3–4 (Aug. 7, 2007) (emphasis added), available at <http://operationrescue.org/pdfs/Bopp%20Memo%20re%20State%20HLA.pdf>.