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Before (and After) *Roe v. Wade*: New Questions About Backlash

ABSTRACT. Today, many Americans blame polarizing conflict over abortion on the Supreme Court. If only the Court had stayed its hand or decided *Roe v. Wade* on narrower grounds, they argue, the nation would have reached a political settlement and avoided backlash. We question this court-centered backlash narrative. Where others have deplored the abortion conflict as resulting from courts “shutting down” politics, we approach the abortion conflict as an expression of politics – a conflict in which the Supreme Court was not the only or even the most important actor.

In this essay, we ask what escalation of the abortion conflict in the decade before the Supreme Court decided *Roe* might teach about the logic of conflict in the decades after *Roe*. To do so, we draw on sources we collected for our recently published documentary history, *Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court’s Ruling* (2010). We begin our story at a time when more Republicans than Democrats supported abortion’s decriminalization, when Catholics mobilized against abortion reform but evangelical Protestants did not, when feminists were only beginning to claim access to abortion as a right. We show how Republicans campaigning for Richard Nixon in 1972 took new positions on abortion to draw Catholics and social conservatives away from the Democratic Party. Evidence from the post-*Roe* period suggests that it was party realignment that helped escalate and shape conflict over *Roe* in the ensuing decades.

The backlash narrative suggests that turning to courts to vindicate rights is too often counter-productive, and that adjudication is to be avoided at all costs. We are not ready to accept this grim diagnosis at face value, and we urge further research into the dynamics of conflict in the decades after *Roe*. The stakes in understanding this history are high.

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When asked to name a case that the Supreme Court has decided, most Americans who can name one point to *Roe v. Wade*¹—a case that they are eight times more likely to name than *Brown v. Board of Education*.² *Roe* has become nearly synonymous with political conflict. Hearing closing arguments in California's same-sex marriage case, the presiding judge, Vaughn Walker, worried about provoking backlash and pointed to the Court's abortion decision, which he suggested had engendered conflict that had "plagued our politics for 30 years."³ Like many, Judge Walker attributed political polarization over abortion to the Supreme Court's decision in *Roe*. David Brooks charges: "Justice Harry Blackmun did more inadvertent damage to our democracy than any other 20th-century American. When he and his Supreme Court colleagues issued the *Roe v. Wade* decision, they set off a cycle of political viciousness and counter-viciousness that has poisoned public life ever since."⁴ Yet few who invoke "*Roe* rage"⁵ have actually examined its roots. What might the conflict over abortion *before Roe* reveal about the conflict that escalated *after* the Court ruled?

We have recently published a documentary history, *Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling*,⁶ that offers a fresh perspective on the genesis of the abortion conflict. This paper draws on pre-*Roe* sources that we collected for our book, as well as some

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1. 410 U.S. 113 (1973).
 2. 347 U.S. 483 (1954); see PENN, SCHOEN & BERLAND ASSOCS., C-SPAN SUPREME COURT SURVEY 4 (June 21, 2010), http://www.c-span.org/pdf/2010SCOTUS_poll.pdf. The survey, conducted in June and September 2009, asked respondents whether they could "name any case heard by the U.S. Supreme Court." In September 2009, those who answered yes (forty-nine percent) were then invited to name a case. Eighty-four percent named *Roe v. Wade*. The next most frequently named case was *Brown v. Board of Education*, with nine percent.
 3. Transcript of Record at 3095, *Perry v. Schwarzenegger*, No. C 09-2292-VRW (N.D. Cal. June 16, 2010). *Roe* has acquired such notoriety that the case was invoked in British debates over whether to adopt judicial review and establish a supreme court. See *Select Comm. on Constitutional Reform Bill: Minutes of Evidence* (Apr. 6, 2004), available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/4040608.htm> (remarks of Lord Rees-Mogg) ("[*Roe*'s] effects, apart from the effect, obviously, of allowing abortion, were to make abortion an unfinished issue, an issue that has not been closed in American political life from that day to this. It also strongly politicised further the Supreme Court itself.").
 4. David Brooks, Op-Ed., *Roe's Birth, and Death*, N.Y. TIMES, Apr. 21, 2005, at A23.
 5. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).
 6. BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (Linda Greenhouse & Reva Siegel eds., 2010) [hereinafter BEFORE ROE V. WADE].

evidence from the decade immediately after the decision, to raise questions about the conventional assumption that the Court's decision in *Roe* is responsible for political polarization over abortion.⁷ By examining the conflict in the period before the Court ruled, we can see how the abortion conflict changed in meaning, structure, and intensity as it was joined by a successive array of advocates—not only social movements⁸ and the Catholic Church⁹ but also strategists for the Republican Party seeking to attract traditionally Democratic voters in the 1972 presidential campaign.¹⁰ The evidence that we uncover of abortion's entanglement in party realignment before the Supreme Court handed down its decision in *Roe* demonstrates that the competition of political parties for voters supplies an independent institutional basis for conflict over abortion. Where proponents of a Court-centered account of backlash offer reasons that adjudication distinctively causes political conflict, the history that we analyze identifies forms of political conflict that could engulf adjudication.

In the summer before *Roe*, a newspaper column about a new Gallup poll preserved in Justice Blackmun's case file reported that sixty-four percent of Americans (and fifty-six percent of Catholics) agreed “with the statement that ‘the decision to have an abortion should be made solely by a woman and her physician’”—with “a greater proportion of Republicans (68 per cent) . . . than Democrats (59 per cent) holding the belief that abortion should be a decision between a woman and her physician.”¹¹ Consistent with these findings, *Roe* was an opinion written and supported by Justices whom a Republican president had recently appointed.¹² Indeed, it was at the urging of one of Richard Nixon's most recent appointees, Justice Lewis F. Powell, Jr., that the seven-Justice majority in *Roe* extended constitutional protection from the first to the second trimester of

7. For expressions of this view in the media and the academy, see *infra* Part III.

8. See *infra* Part I.

9. See *infra* Section II.A.

10. See *infra* Section II.B.

11. George Gallup, *Abortion Seen Up to Woman, Doctor*, WASH. POST, Aug. 25, 1972, at A2, as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 207, 208–09 (emphasis added). The column noted that “[m]ajority support for legal abortion has increased sharply” since the previous survey, five months earlier. *Id.* at 208; see also LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 91 (2005) (noting that Justice Blackmun had the George Gallup article, clipped from the *Washington Post*, in his *Roe* case file).

12. See George Will, ‘Strict Construction’: *An Interpretation*, WASH. POST, Mar. 2, 1973, at A18.

pregnancy, until the point of fetal viability.¹³ To say the least, these legal-political alignments invert contemporary expectations, in *Alice-in-Wonderland* fashion.

How have we moved from a world in which Republicans led the way in the decriminalization of abortion to one in which Republicans call for the recriminalization of abortion? The backlash narrative conventionally identifies the Supreme Court's decision as the cause of polarizing conflict and imagines backlash as arising in response to the Court repressing politics.¹⁴ In contrast to this Court-centered account of backlash, the history that we examine shows how conflict over abortion escalated through the interaction of other institutions before the Court ruled.

There is now a small but growing body of scholarship questioning whether abortion backlash has been provoked primarily by adjudication. Gene Burns, David Garrow, Scott Lemieux, and Laurence Tribe show that, in the decade before *Roe*, the enactment of laws liberalizing access to abortion provoked energetic opposition by the Catholic Church.¹⁵ We offer fresh evidence to substantiate these claims, as well as new evidence about conflict before *Roe* that points to an alternative institutional basis for the political polarization around abortion—the national party system.

Through sources in our book and in this paper, we demonstrate that the abortion issue was entangled in a struggle over political party alignment before

13. On Justice Powell's role, see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 346 (2001). See generally Andrew D. Hurwitz, *Jon O. Newman and the Abortion Decisions: A Remarkable First Year*, 46 N.Y.L. SCH. L. REV. 231, 244-47 (2003) (tracing discussion of viability in deliberations over a draft of the *Roe* opinion).

14. See *infra* Section III.A.

15. See, e.g., GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES 227-28 (2005) ("The state-level reform process had exhausted itself. . . . Given how often claims about the need for 'judicial restraint' have *Roe* in mind, it is striking how incorrect are the empirical assertions that often form the basis of such a critique of *Roe*."); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 50-51 (1990) (questioning whether liberalization of abortion law through politics was feasible once countermobilization began; observing that between 1971 and 1973 no states voted to repeal criminal abortion statutes; and observing that a referendum liberalizing access to abortion was defeated in Michigan by antiabortion activists despite broad public support); see also David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 840-41 (1999) (noting that during the months before *Roe*, the outlook for legislative change "looked very bleak indeed"); Scott Lemieux, *Constitutional Politics and the Political Impact of Abortion Litigation: Judicial Power and Judicial Independence in Comparative Perspective* 226 (Aug. 18, 2004) (unpublished Ph.D. dissertation, University of Washington) (on file with authors) (noting that "the brief trend at the state level toward liberalizing abortion laws had almost completely stalled" before the Court ruled).

the Supreme Court decided *Roe*. As repeal of abortion laws became an issue that Catholics opposed and feminists supported, strategists for the Republican Party began to employ arguments about abortion in the campaign for the 1972 presidential election. We show how, in the several years before *Roe*, strategists for the Republican Party encouraged President Nixon to begin attacking abortion as a way (1) to attract Catholic voters from their historic alignment with the Democratic Party and (2) to attract social conservatives, by tarring George McGovern, Nixon's opponent in the 1972 presidential election, as a radical for his associations with youth movements, including feminists seeking ratification of the Equal Rights Amendment (ERA) and "abortion on demand."¹⁶ In reconstructing this episode, we show how strategists for the national political parties had interests in the abortion issue that diverged from single-issue movement actors, and we document some of the bridging narratives that party strategists used to connect the abortion conflict to other controversies.

The material that we present contributes to the history of the abortion debate in the decade before *Roe*. At the same time, it sheds light on the conflict over abortion that grew in the decades after the Court ruled. We do *not* contend that conflict before *Roe* caused conflict after *Roe*. Rather, the pre-*Roe* history that we chronicle is significant, among other reasons, because it demonstrates the motivations that different actors had for engaging in conflict over abortion at a time when their engagement cannot be construed as a reaction to the Court. As different groups joined and changed the stakes of the abortion conflict, conflict escalated without the intermediation of judicial review.

Understanding the dynamics of conflict before *Roe* changes the questions that we might ask of the record after *Roe*. The dynamics of conflict before the Court ruled suggest many reasons to explore the role played by nonjudicial actors and institutions in helping make the Supreme Court's decision notorious as a source of polarization. In particular, it raises the question of how the competition of the national political parties for voters might have shaped reception of the decision. "*Roe*" is now a shorthand reference for positions staked out in long-running debates over gender, religion, and politics. But is the decision a cause or a symbol of these conflicts? We conclude the paper with a call for scholarly inquiry, in the hope that this history of the abortion conflict before *Roe* demonstrates why facts matter in any conversation about *Roe* as an exemplar of the possibilities and limits of judicial review.

16. See *infra* Section II.B.

Part I of the paper offers a brief account of the genesis of the abortion controversy in the decade before *Roe*, in which we show how abortion's meaning shifted continuously as new participants joined the conflict in the 1960s, moving the argument from public health frames to environmental and population concerns and finally to feminist claims for outright repeal of laws criminalizing abortion. Part II examines how, in the years before *Roe*, these successive waves of arguments prompted growing public support for liberalizing access to abortion—and, in turn, provoked political reaction, first by the Catholic Church and then by strategists for the Republican Party seeking to persuade Democratic Catholic voters and social conservatives to vote for Richard Nixon in the 1972 presidential election. Even so, as Part II demonstrates, with the interruption of Watergate it was not until the late 1970s that Republican strategists resumed their focus on the abortion issue as a strategy for recruiting Democratic voters and it was not until the late 1980s that partisan conflict over abortion assumed its now-familiar shape, with more Republicans than Democrats opposing abortion.

It is now widely taken for granted that *Roe* caused escalating conflict over abortion. Part III surveys expressions of this “common-sense” understanding in the popular media and the academy, where *Roe* is regularly invoked as the sole and sufficient cause of political polarization around abortion. The history of abortion conflict in the years before *Roe* offers a rich counterpoint as it illustrates motives for conflict emanating from institutions other than the Court. Attuned to these alternative institutional bases for conflict over abortion, we can pick out features of the post-*Roe* landscape that raise deep questions about the sufficiency of Court-centered accounts of backlash and confront a series of puzzles about the institutions and actors that have helped make *Roe* matter as it has.

Of course, no history of the pre-*Roe* period can settle the story of *Roe*'s reception. But it can *unsettle* that story, as our history does. If we are to better understand *Roe*'s role in causing political polarization, we need a history that attends to the different institutions that distinctively contributed to the abortion conflict—including the national political parties in a realignment contest. Only with such history can we look to *Roe* to teach us about the prospects and limits of judicial review.

I. ABORTION'S MANY MEANINGS: CLAIMS AND FRAMES BEFORE *ROE*

At the Founding and until 1821, when Connecticut passed a law criminalizing abortion, abortion was legal throughout the United States if performed before quickening. In the mid-nineteenth century, however, doctors

establishing the American Medical Association (AMA) led a campaign to criminalize abortion, except when necessary to save a pregnant woman's life, and by the century's end, all states banned abortion and subjected contraception to a variety of criminal sanctions.¹⁷ By the mid-twentieth century, the tide began to shift again. In the late 1950s, a group of professionals—primarily lawyers, doctors, and clergy—began to question whether abortion ought to be prohibited in all cases.

Just as nineteenth-century advocates for criminalizing access to abortion had appealed to medical authority, so, too, did twentieth-century advocates for liberalizing access to abortion. Soon others joined the cause of reform—and by the 1960s, Americans were debating abortion as a problem concerning poverty,

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17. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 280-322 (1992); see also JANET FARRELL BRODIE, *CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA* 268-72 (1994) (examining the role of the AMA); JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900*, at 147, 163 (1978) (situating the antiabortion movement in the movement for medical professionalization in the latter nineteenth century); LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973*, at 57, 80-83 (1997) (discussing the motivation of the AMA to control the public image of the medical field and the process by which “[s]pecialists in obstetrics and gynecology claimed the moral authority of religious leaders and the right and duty to make reproductive decisions”).

The trend toward criminalization began in the decades before the Civil War and accelerated after the war. At the time of the Fourteenth Amendment's ratification, not all states criminally prohibited abortion throughout pregnancy, despite Justice Scalia's recent assertions to the contrary. See Jim Nolan, *Scalia Criticizes Court's Expansion of 'Due Process'*, *RICHMOND TIMES-DISPATCH*, Nov. 20, 2010, <http://www2.timesdispatch.com/news/2010/nov/20/scal20-ar-665714/> (reporting that Justice Scalia, speaking on November 19, 2010, at the University of Richmond School of Law, asserted that the Fourteenth Amendment's due process guarantee cannot be understood to encompass a right to abortion because abortion “was criminal in all the states” at the time of ratification). Justice Scalia's claim is incorrect; even scholars who oppose abortion acknowledge variance across states at the time of the Fourteenth Amendment's ratification. See, e.g., James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 *ST. MARY'S L.J.* 29, 33 (1985) (counting, without defining, the number of “antiabortion” statutes that state legislatures had enacted and concluding that “[a]t the end of 1868, the year in which the fourteenth amendment was ratified, thirty of the thirty-seven states had such statutes”). At the time of the Fourteenth Amendment's ratification, the AMA was still encountering public resistance to its campaign to criminalize abortion; the campaign was led by Dr. Horatio Storer, who attempted to address women directly with an antiabortion tract written for the AMA in 1866. HORATIO ROBINSON STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* (Boston, Lee & Shepard 1866). This campaign was successful. In the period between 1860 and 1880, “[a]t least forty antiabortion statutes were enacted, with thirteen jurisdictions formally outlawing abortion for the first time, and at least twenty-one states revising existing legislation.” Siegel, *supra*, at 314. See generally MOHR, *supra*, at 200-45 (surveying achievements of the AMA campaign to criminalize abortion).

population control, sexual freedom, and women's equal citizenship. These new ways of talking about abortion were of sufficient persuasive power that states haltingly began to enact legislation that allowed women lawful access to the procedure in certain tightly prescribed circumstances. With the meaning and justifications for liberalizing access to abortion in flux, public support for reform rapidly grew.

A. *Public Health*

Public health arguments reasoned from powerful forms of authority—the authority of medical science—and played an important role in building the first waves of public support for liberalizing access to abortion. In a 1960 medical journal article, Mary Steichen Calderone, a public health doctor who was the medical director of Planned Parenthood, estimated the annual incidence of illegal abortion in the United States at 200,000 to 1.2 million and argued that a profession committed to fighting disease had an obligation to concern itself with “this disease of society, illegal abortion.”¹⁸ In part, what made illegal abortion a social disease were the health harms that illegal abortion inflicted on women; and in part, it was the disproportionate burden of that harm that poor women had to endure. Calderone noted that the near-ubiquitous prohibitions on abortion, except to save a pregnant woman's life, were then being evaded by women wealthy and well-connected enough to find a psychiatrist who might vouch for the patient's likely suicide unless the unintended pregnancy was terminated. She quoted a public health official's observation that the difference between a “therapeutic” abortion of this kind and an illegal one appeared artificial: “Actually, according to my definition, in many circumstances the difference between the one and the other is \$300 and knowing the right person.”¹⁹ Implicitly—and over time explicitly—the public health argument invoked the equality claim that there should be one law, for wealthy women and for poor.²⁰

18. Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH 948, 951 (1960).

19. *Id.* at 959. Studies from the time period demonstrate that most therapeutic abortions performed by hospitals were for white patients with private health insurance; low-income patients whose health care was publicly funded were almost entirely unable to receive therapeutic abortions. See, e.g., REAGAN, *supra* note 17, at 205.

20. This theme was an express part of New York's decision to repeal its nineteenth-century criminal abortion statute. See, e.g., Memorandum of Assemblywoman Constance E. Cook (1970), as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 147, 147-48 (noting, as a leading advocate for the repeal legislation, that “[o]nly repeal would bring equality” of access to safe, legal abortions for both rich and poor women); Governor Nelson A. Rockefeller's Veto

While early public health arguments addressed harms suffered by poor women seeking to end a pregnancy, they also prominently featured middle-class women seeking to become mothers who learned that they would bear a child with severe developmental problems.²¹

A group of mostly male doctors, lawyers, and clergy increasingly argued that medicine, not law, should regulate the practice of abortion to provide access to women facing exceptionally difficult pregnancies. In 1962, the American Law Institute (ALI) adopted a model statute that allowed abortion to protect a woman's life or physical or mental health, in cases of rape, and in cases where a child would be born with "grave physical or mental defect"; the model statute required two doctors to "certif[y] in writing the circumstances which they believe to justify the abortion."²² And the public responded. By 1966, a majority of Americans supported reforming the law to allow abortion when carrying a pregnancy to term would threaten a woman's health, when

Message (May 13, 1972), reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 158, 160 (declaring, as New York's governor, that if he permitted the legislature to recriminalize abortion, "[t]he truth is that a safe abortion would remain the optional choice of the well-to-do woman, while the poor would again be seeking abortions at a grave risk to life in back-room abortion mills").

21. Two highly publicized episodes in the early 1960s sparked public concern about access to abortion. One was Sherri Chessen Finkbine's flight to Sweden in 1962 to obtain an abortion after learning too late that she had taken a drug containing thalidomide, a substance that prevented the development of fetal arms and legs; she had been unable to obtain a legal abortion anywhere in the United States. Sherri Chessen Finkbine, *The Lesser of Two Evils*, SOC'Y FOR HUMANE ABORTION, INC. NEWSL., Sept. 1968, reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 11. The other was Dr. Jane E. Hodgson's decision to perform an illegal abortion for a patient who had contracted German measles, a disease widely known to cause serious defects in babies born to mothers who contract it in early pregnancy. See Jane E. Hodgson, *Abortion: The Law and the Reality in 1970*, MAYO ALUMNUS, Oct. 1970, at 11, as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 19.
22. MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962), as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 24, 25. The ALI code listed these as acceptable justifications for abortion: a "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect" and a pregnancy "result[ing] from rape, incest, or other felonious intercourse," including "illicit intercourse with a girl below the age of 16." *Id.* These proposed exceptions to blanket criminalization did little to make legal abortions available to most women who sought them and were understood as such by the drafters of the Code. Professor Louis B. Schwartz, the Model Penal Code's co-reporter, observed with evident dismay in a 1963 article that "the Code's inhibitions on abortion still amount to a very substantial restriction of freedom. It is difficult to formulate a secular justification for this restriction, at least as applied to interruptions of pregnancy at an early stage for reasons that are persuasive to a large proportion of the population." Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 686 (1963).

there was a high possibility of birth defects, or when the pregnancy was a result of rape.²³ In 1967, three states passed bills reforming their abortion laws.²⁴

B. *Environment and Population*

But even as public support for reform on the medical model began to surge, new advocates entered the debate seeking more far-reaching change, for new reasons. By the late 1960s, these new advocates sought to repeal, and not merely reform, laws banning abortion. And they offered a wholly new set of arguments for decriminalizing abortion.

A new environmental movement raised alarms about the impact of a growing population on the earth's finite resources. The organization Zero Population Growth (ZPG) was founded in 1968 in response to environmental concerns. Within a few years, it had 300,000 members in three hundred chapters. Environmentalists took "population control," which initially developed as a way of talking about birth control for the poor,²⁵ and transformed it into a universal prescription—a goal that all families needed to embrace in order to protect the resources of the planet from the blight of overpopulation. Now, ecological arguments about overpopulation supported demands for abortion repeal. An early ZPG recruiting brochure declared that "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."²⁶ Paul R. Ehrlich's *The Population Bomb* became a bestseller in 1968 with its dire warnings of imminent famine unless the world's population was brought under control, by drastic measures if necessary. Written by a biologist at the suggestion of the head of the Sierra

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23. 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").
24. See GARROW, *supra* note 23, at 332; *infra* notes 66-67 and accompanying text.
25. See BEFORE ROE V. WADE, *supra* note 6, at 54 (describing one strain of early public dialogue about overpopulation that worried about poor Americans having more children than they were able to support). On the history of birth control as a prescription for the poor, see MATTHEW CONNELLY, *FATAL MIS-CONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION*, at xii (2008) (presenting a history of "the most ambitious population control schemes" that "aimed to remake humanity by controlling the population of the world, typically by reducing the fertility of poor people and poor countries").
26. Brochure, Zero Population Growth, *reprinted in* BEFORE ROE V. WADE, *supra* note 6, at 55, 57.

Club, the book sold two million copies. Its author argued that while contraception was more desirable than abortion, “in many cases abortion is much more desirable than childbirth.”²⁷

The Population Bomb warned of the threat that an overpopulated planet posed to the environment. But there were other aspects of its argument that may have promoted its spectacular sales. The book attacked the core assumption justifying the criminalization of contraception and abortion—that sex was legitimately practiced only for the sake of procreation—and argued for policies that would separate sex and reproduction for the public good. In his book, Ehrlich maintained that while childbearing needed to be regulated for the good of society, sex separated from procreation existed to be enjoyed by each individual “as an important and extremely pleasurable aspect of being human.”²⁸

C. *Sexual Freedom*

While the environmental movement offered the public a new way of talking about nonprocreative sex as a public good, even as a social obligation, new ways of thinking about sex were already in the air.²⁹ In the three weeks after Helen Gurley Brown published *Sex and the Single Girl* in 1962, advising unmarried women how to have fulfilling sex lives,³⁰ the book sold over two million copies.³¹ In 1964, Mary Calderone left her job as medical director of Planned Parenthood to found the Sex Information and Education Council of the United States, Inc. (SIECUS), which would play a pioneering and controversial role in establishing sex-education programs for youth and adults.³²

Politicians, lawyers, and academics in both England and the United States had begun to debate the law’s role in regulating adult consensual sexual relations; increasingly, prominent authorities questioned whether the criminal law was the proper means of enforcing the marital and procreative purposes of

27. PAUL R. EHRLICH, *THE POPULATION BOMB* 148 (1968).

28. *Id.* at 140.

29. See, e.g., 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).

30. HELEN GURLEY BROWN, *SEX AND THE SINGLE GIRL* (1962).

31. See Laurie Ouellette, *Inventing the Cosmo Girl: Class Identity and Girl-Style American Dreams*, 21 *MEDIA, CULTURE & SOC’Y* 359, 361 (1999).

32. See Jane E. Brody, *Mary S. Calderone, Advocate of Sexual Education, Dies at 94*, *N.Y. TIMES*, Oct. 25, 1998, § 1, at 52.

sex.³³ These great debates about the proper reach of the criminal law plainly had constitutional dimensions³⁴—in 1965, the Supreme Court held that a state law criminalizing the use of contraception even in marriage violated the right to privacy³⁵—but the debates initially played out as policy debates in the legislative arena. In 1967, the British Parliament enacted two pathbreaking

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33. In the years after World War II, social scientists challenged traditional understandings of sex. See ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, *HUMAN SEXUAL RESPONSE* (1966). New scientific accounts of human sexual practice helped clear the way for proposals to reform the criminal law. See WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003*, at 114-17 (2008); David Allyn, *Private Acts/Public Policy: Alfred Kinsey, the American Law Institute and the Privatization of American Sexual Morality*, 30 J. AM. STUD. 405, 405, 410-13, 417 (1996). In 1957, Britain's Wolfenden Commission, formally known as the Committee on Homosexual Offences and Prostitution, recommended the decriminalization of consensual homosexual activity between adults in private and also proposed changing the prosecution of prostitution. The report's proposal to decriminalize traditionally criminalized morals offenses involving sex in private between consenting adults prompted the famous Hart-Devlin debates. See, e.g., Peter Cane, *Taking Law Seriously: Starting Points of the Hart/Devlin Debate*, 10 J. ETHICS 21, 22 (2006) (noting that the Wolfenden committee report "provoked a famous reaction from Lord Patrick Devlin," who argued on principle that the criminal law should not "be limited to regulating conduct that has direct adverse effects on identifiable individuals" and noting that H.L.A. Hart's response, and Devlin's counter-response, "formed the basis of one of the most important jurisprudential debates of the second half of the 20th-century"); Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 988 (1966) (describing how Devlin originally agreed with the central tenet of the Wolfenden report—that public and private morality should be separate—but how, after careful study, he "ended in the conviction that these ideals were not only questionable, but wrong"). In this same period, in the United States, Herbert Wechsler led the American Law Institute in preparing a draft Model Penal Code that reformed regulation of sodomy and abortion. See Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WIS. L. REV. 1017, 1029-51.
34. See Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 232 (1965) ("It is conceivable that sometime in the future, as mores change and knowledge of the problem grows, all sexual activities of two consenting adults in private will be brought within the right of privacy."); Harriet F. Pilpel, *Sex vs. the Law: A Study in Hypocrisy*, HARPER'S MAG., Jan. 1965, at 35, 36-37 (quoting a Catholic scholar, Father John Courtney Murray, criticizing Connecticut's prohibition against contraception as "unenforceable without police invasion of the bedroom" and "therefore indefensible").
35. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Connecticut was an outlier, having retained on the books its 1879 law that made the use of contraception a crime subject to fine and imprisonment. The state courts had upheld the law, and the legislature had rejected repeated efforts to amend or repeal it. See *Poe v. Ullman*, 367 U.S. 497, 501 (1961) (recounting the statute's history).

reform statutes liberalizing the regulation of sodomy and abortion,³⁶ and across the United States legislatures began to engage with Model Penal Code recommendations to decriminalize, at least in part, sodomy³⁷ and abortion.³⁸

As lawyers and doctors debated government regulation of nonprocreative sex, growing numbers of young people openly and unrepentantly began to live together outside of marriage, mobilizing for the removal of restrictions that colleges had imposed on their ability to do so.³⁹ At a time when it was difficult, if not forbidden, for women to remain in school while pregnant, young people's ability to partake in this newfound sexual freedom often depended upon the availability of contraception and abortion. A guide for college students about sex, contraception, and abortion, published at Yale in 1970 exemplified the era's increasing candor about sex and its consequences. The project originated with a student group at Yale shortly after the college opened its doors to female undergraduates in 1969. Abortion in Connecticut at the time was illegal except to save a woman's life. But the student-published pamphlet, *Sex and the Yale Student*, which in later, generic editions was distributed nationally, spoke frankly about abortion and made it clear that the university's health service would help a student make arrangements for a safe abortion if that was her desire.⁴⁰

In other words, abortion was no longer a topic to be discussed solely in a medicalized frame, as a solution to a compromised pregnancy or a preferable alternative to the back alley. It was now presented with increasing openness as an affirmative aspect of social policy – not necessarily to be welcomed but to be recognized as an inevitable piece of the full picture of human sexuality, as one of the facts of life.

36. Abortion Act, 1967, c. 87, § 1 (Eng.); Sexual Offenses Act, 1967, c. 60, § 1 (Eng.).

37. See ESKRIDGE, *supra* note 33, at 124-27, 144.

38. See *infra* notes 65-67 and accompanying text; see also BEFORE *ROE V. WADE*, *supra* note 6, at 24 (noting that shortly after the ALI published recommendations for abortion reform, twelve states adopted them, at least in part).

39. See ALLYN, *supra* note 29, at 98; BETH BAILEY, *SEX IN THE HEARTLAND 200-11* (2002); 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).

40. STUDENT COMM. ON HUMAN SEXUALITY, *SEX AND THE YALE STUDENT* (1970), as reprinted in BEFORE *ROE V. WADE*, *supra* note 6, at 63-67.

D. Feminist Voices

Absent from our narrative so far is any mention of a feminist claim for reform of abortion laws. Perhaps surprisingly, nearly a decade passed between early calls for abortion reform and the entry of the women's movement into the debate about abortion. The women who organized during the 1960s to press for equal access to higher education, opportunity in the workplace, and social policies, including childcare, that would enable women to combine motherhood and career, did not initially understand abortion to be a central part of their project. Indeed, not all of the women who advocated for an end to sex discrimination supported the inclusion of abortion liberalization on the agenda.⁴¹ However, in the late 1960s, many feminists began to view challenging policies concerning childbearing as essential to women's equality and to advocate for the decriminalization of abortion.⁴² They changed the face of a movement initially led by male doctors.⁴³

Betty Friedan, founding president of the National Organization for Women (NOW), was one of the first leaders of the women's movement to make an explicitly feminist claim for the right to abortion and to embrace the abortion-rights cause as a feminist cause. In February 1969, she traveled to

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41. One group of women split off from the National Organization for Women (NOW) in 1967 to form the Women's Equity Action League (WEAL), which lobbied and litigated for educational and workplace equality but did not make abortion liberalization a part of its platform. See *BEFORE ROE V. WADE*, *supra* note 6, at 36; see also NINIA BAEHR, *ABORTION WITHOUT APOLOGY: A RADICAL HISTORY FOR THE 1990'S*, at 38 (1990) (noting that the more conservative women who left NOW to form WEAL considered abortion reform "a 'women's liberation' issue more than a 'women's rights' issue"). But see NOW, *NATIONAL ORGANIZATION FOR WOMEN BILL OF RIGHTS* (1967), reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 36, 36-38.
 42. For an account tracing the evolution of constitutional claims for repeal of abortion laws from the medical model to the women's rights model and showing the social understandings informing early feminist arguments for control over childbearing decisions, see generally Reva B. Siegel, *Roe's Roots: The Women's Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875 (2010). See also *id.* at 1883-84 ("Framed as part of a challenge to the social organization of sex and motherhood, the abortion rights claim was an incendiary cocktail of gender justice claims.").
 43. For example, the Association for the Study of Abortion was founded in 1965 by two obstetrician-gynecologists, Alan F. Guttmacher and Robert E. Hall. See *BEFORE ROE V. WADE*, *supra* note 6, at 31. As Christine Stansell vividly describes it: "The male professionals who led the repeal movement had always framed it as altruistic, coming to the aid of needy women and their families. Radical feminists changed the tenor of popular action from a battle to rescue somebody else (the pregnant woman) to one led by women fighting for themselves." CHRISTINE STANSELL, *THE FEMINIST PROMISE: 1792 TO THE PRESENT* 323 (2010).

Chicago to address the First National Conference on Abortion Laws, sponsored by a group called the Illinois Citizens for the Medical Control of Abortion. There she called for a “new stage in your movement, which is now mine.”⁴⁴ This new stage would no longer seek reform of existing abortion laws— “[r]eform is something dreamed up by men”—but outright repeal.⁴⁵ Friedan told the delegates:

[M]y only claim to be here, is our belated recognition, if you will, that there 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. . . .

. . . .
 . . . 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.⁴⁶

Repeal of laws criminalizing abortion was now becoming a powerful symbol of self-governance and equal standing for women. To these citizenship claims, feminists added another that resonated in structural and very practical terms. Feminists argued that, because society had organized most of its basic institutions on the supposition that caregivers were nonparticipants, women needed control over the timing of childbearing in order to participate as equals in work, politics, and other spheres of citizenship. In this emergent feminist understanding, women were entitled to participate equally with men in all

44. Betty Friedan, *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 6, at 38, 39.

45. *Id.*

46. *Id.* An article in the *Washington Post* in the same year as Friedan’s speech illustrates how feminists began to identify statutes criminalizing abortion as evidence of women’s social subordination. The story reported that about a dozen young women had burst into a hearing room in which a New York legislative committee was holding a hearing on abortion. The women, evidently impatient with the pace of reform, shouted, “No more male legislators,” “Why are you refusing to admit we exist?” and “Every woman resents having our bodies controlled by men,” before the chairman moved the hearing to another room and closed it to the public. *The Right to Life*, *WASH. POST*, Feb. 14, 1969, at D2. On the role of storytelling in feminist abortion-rights advocacy, see STANSELL, *supra* note 43, at 325 (recounting the “shift from she-who-was-described to she-who-speaks”). On the role of storytelling in feminist abortion-rights litigation, see Siegel, *supra* note 42, at 1880, 1885, 1892 (describing use of women’s testimony in New York and Connecticut litigation).

spheres of citizenship, without having to abstain from sexual relations to do so.⁴⁷

In contrast to the early medical reformers or even the population-control advocates who followed, the women's movement made claims about abortion that challenged the fundamental norms, institutions, and arrangements of American social life. The right to abortion figured prominently in the "Strike for Equality" that Friedan organized the following year to mark the fiftieth anniversary of women's suffrage, August 26, 1970. The message of the marches and demonstrations that took place around the country was that the right to vote had not led to true equality for women. What was needed, Friedan declared, was a "revolution" to "restructure the institutions and conditions that oppress all women now."⁴⁸

The "strike" was designed to be a "day of abstention from so-called women's work," a day that women would spend "analyzing the conditions which keep us from being all we might be."⁴⁹ In cities across the nation, tens of thousands marched under banners that sought equal employment opportunities for women and proclaimed a right to "abortion on demand" and "free 24-hour child care."⁵⁰ The event received substantial news coverage.⁵¹ The feminist embrace of the abortion-rights cause was now increasingly visible. Significantly, the feminists' rhetoric linked abortion not only to the interests and desires of women but also to the call for a revolution in the organization of work and family life—far from the public health model that had dominated discussion of abortion only a few years earlier. It is in this context that the feminists' call for abortion's legalization should be understood: not as a free-standing demand, but as part of a much broader challenge to the role that society prescribed for women in the home, in the workplace, and across the life

47. See, e.g., Brief for New Women Lawyers et al. as Amici Curiae Supporting Petitioners, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 273, 276-77 (arguing that laws depriving women of control over their reproductive lives disabled women from full participation in the economy and society at large); Siegel, *supra* note 42, at 1887-92.

48. Betty Friedan, Call to Women's Strike for Equality (Aug. 26, 1970), as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 41, 42.

49. *Id.* at 43.

50. For the image of a flyer distributed after the Women's Strike for Equality and reprinting its slogans, see *BEFORE ROE V. WADE*, *supra* note 6, at 44.

51. See, e.g., Linda Charlton, *Women March Down Fifth in Equality Drive*, N.Y. TIMES, Aug. 27, 1970, at A1. For sources offering media history and other accounts of the strike, see *BEFORE ROE V. WADE*, *supra* note 6, at 312-13.

course.⁵² And it was in this broader context that the feminist engagement with the abortion issue was understood by those who responded with alarm and with growing determination to stem the tide of change. Within the space of a few short years, abortion had evolved from a subject that doctors discussed with paternalist concern to a subject that sparked passionate argument about women's roles and rights.

Feminists began to speak not only to the public but also to the courts in a new manner. The earliest challenges to criminal abortion statutes attacked the laws on vagueness grounds; doctors who faced legal jeopardy if they interpreted a prohibition too narrowly or an exception too broadly invoked the Constitution defensively.⁵³ Feminist lawyers now began to assert claims affirmatively, in lawsuits sounding in a very different register, as litigation challenging nineteenth-century abortion bans in New York⁵⁴ and in Connecticut illustrated.⁵⁵ Feminist suits expressed constitutional objections to abortion bans on grounds of liberty and equality,⁵⁶ and openly asserted claims of sexual freedom. As Nancy Stearns, representing the plaintiffs in the challenge against New York's abortion ban, observed in her brief, "It is impossible to separate the fact of pregnancy from the sexual relations that precede it. Just as the inability to obtain contraceptives cannot but affect the sexual relations of a couple, the inability to terminate an accidental pregnancy has the same destructive effects."⁵⁷ Enactment of a statute repealing New York's abortion ban in 1970 rendered the New York suit moot, but the movement then filed suit in Connecticut, where the state legislature had refused repeatedly to modify its nineteenth-century statute.⁵⁸

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52. See 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) (locating strike demands in the feminist movement's larger aims).
53. E.g., *United States v. Vuitch*, 402 U.S. 62 (1971).
54. *Abramowicz v. Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969).
55. *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972) (frequently referred to as "Women v. Connecticut"); see Siegel, *supra* note 42, at 1884-85 (tracing the shift from litigation on the medical model to litigation on the women's rights model). For documents from all sides of the conflict in New York and Connecticut, see *BEFORE ROE V. WADE*, *supra* note 6, at 119-96.
56. See Siegel, *supra* note 42, at 1885-92.
57. Plaintiffs' Brief, *Abramowicz*, 305 F. Supp. 1030 (No. 69 Civ. 4469), as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 140, 147.
58. See Amy Kesselman, *Women Versus Connecticut: Conducting a Statewide Hearing on Abortion*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000*, at 42 (Rickie Solinger ed., 1998).

The pamphlet that the Connecticut lawyers designed to recruit plaintiffs—whose numbers climbed, over the course of the litigation, from 858 to 2000⁵⁹—offers a window into how the new feminist claim was emerging. “We believe that women must unite to free themselves from a culture that defines them only as daughters, wives, and mothers,” the organizers declared, adding: “The abortion suit is just a beginning.”⁶⁰ The lawyers emphasized to their potential clients that women should be free to have children, or, not to have children. “We want control over our own bodies,” the organizers asserted, adding: “It’s our decision.”⁶¹ The suit persuaded a federal court to strike down Connecticut’s abortion ban, but the governor called a special session of the legislature, which promptly reenacted the law, raising the penalties; the federal court responded by invalidating the law once again.⁶²

II. CONFLICT BEFORE *ROE*

To this point we have examined some of the very different arguments advanced in support of liberalizing abortion laws by successive waves of advocates in the period before *Roe*. In what follows we consider opposition to abortion in the pre-*Roe* period.

A number of historians have observed that conflict over abortion reform began in the 1960s as state legislators considered whether to liberalize laws banning abortion—an issue of special salience to Catholics.⁶³ We add fresh evidence to the historical record, showing that legislators began to enact laws allowing doctors to provide abortions to women under narrowly defined circumstances and, as popular support for liberalizing access to abortion steadily continued to grow,⁶⁴ Catholics began to mobilize state by state and on a national basis.

To this account of the abortion conflict before *Roe*, we add another dimension of the conflict that historians have largely overlooked: abortion was entangled in the competition of national political parties for voters in the years before the Court ruled. As Catholics began to show single-issue interest in abortion, strategists for the Republican Party urged Richard Nixon to include

59. See *id.* at 59.

60. WOMEN VS. CONNECTICUT ORGANIZING PAMPHLET (1970), reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 167, 169.

61. *Id.*

62. See *BEFORE ROE V. WADE*, *supra* note 6, at 177–96.

63. See *supra* note 15 and accompanying text.

64. See *infra* notes 119–120 and accompanying text (discussing polling data).

attacks on “abortion on demand” in his quest for the White House in 1972 in order to recruit Catholics from their historic alignment with the Democratic Party.

Over the course of the 1972 presidential campaign, the strategy widened to target social conservatives as well as Catholic voters, and the attack on abortion was reframed to express not only religious convictions about respect for life but also social convictions about respect for traditional forms of authority. Supporters of President Nixon tarred his Democratic opponent, Senator George McGovern, as the “triple-A” candidate associated with amnesty (the antiwar movement), abortion, and acid (drugs). Attacking “abortion on demand” became a new way to signal distance from feminism and a “permissive” youth culture run amok.

The dynamics of conflict over abortion in the pre-*Roe* period raise a variety of questions about the logic of conflict in the decades after the Court ruled.

A. *The Catholic Church’s Opposition to Legislative Reform*

Arguments for abortion reform on the public health model struck a responsive chord with Americans in diverse regions of the country. By 1967, states were beginning to enact abortion reform laws on the medical or “therapeutic” model recommended by the ALI, authorizing medical committees to review women’s petitions for abortion and allow the procedure if needed for reasons of health, sexual assault, or concern about birth defects.⁶⁵ Colorado, North Carolina, and California passed ALI statutes in 1967; Maryland and Georgia followed in 1968; Arkansas, Delaware, New Mexico, Kansas, and Oregon joined in 1969; and South Carolina and Virginia followed in 1970.⁶⁶ In 1970, four states (Alaska, Hawaii, New York, and Washington) took a yet bigger step and enacted “repeal” statutes that allowed abortion without restriction “early” in pregnancy.⁶⁷ Then, with public support for reform growing,⁶⁸ a well-organized minority mobilized in opposition and the march toward legislative reform stalled.⁶⁹

65. MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962), as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 24, 25.

66. See BURNS, *supra* note 15, at 177 tbl.5.1; Ruth Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 AM. J. PUB. HEALTH 500 (1971), as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 121, 121.

67. BURNS, *supra* note 15, at 178 tbl.5.3; Roemer, *supra* note 66, at 122.

68. See *infra* note 119 and accompanying text (discussing polling data).

69. See BURNS, *supra* note 15, at 215 (“[L]egislatively initiated reform laws stopped in 1970.”). In 1971 and 1972, liberalization efforts failed in twelve states: Georgia, Illinois, Indiana, Maine,

From the outset, the movement for legislative reform roused the opposition of the Catholic Church.⁷⁰ The Church battled legislative reform state by state,⁷¹ and its role in opposing abortion reform in this period was public, prominent, and distinctive.⁷² By contrast, Protestant clergy in the 1960s who assumed active public roles in the abortion debates tended to be supportive of reform. For example, Protestant clergy organized the Clergy Consultation Service, which helped women find safe abortions,⁷³ while more conservative members of the faith, such as the Southern Baptist Convention, tended to avoid politics and, to varying degrees, to sanction abortion reform on the therapeutic model.⁷⁴ The Catholic Church, however, not only opposed abortion reform; it

Massachusetts, Michigan, Missouri, North Dakota, Ohio, Oklahoma, South Dakota, and Texas. See Lemieux, *supra* note 15, at 226. In addition, the New York legislature, its members under heavy pressure from the Church, voted in 1972 to repeal the 1970 decriminalization measure, and only Governor Nelson A. Rockefeller's veto prevented a return to New York's nineteenth-century statute. See Governor Nelson A. Rockefeller's Veto Message, *supra* note 20, at 159 (objecting in his veto message that "the extremes of personal vilification and political coercion brought to bear on members of the Legislature raise serious doubts that the vote to repeal the reform represented the will of a majority of the people of New York"); Lemieux, *supra* note 15, at 226-27 (describing the stalled efforts at legislative reform after 1970).

70. For an attack on the ALI statute authored by Robert Byrn, one of the early lawyers of the National Right to Life Committee, see Robert M. Byrn, *Abortion in Perspective*, 5 DUQ. L. REV. 125 (1966), as reprinted in BEFORE ROE V. WADE, *supra* note 6, at 86. For one account of the activities of the Catholic Church in opposing abortion reform in the years before and immediately after *Roe*, see CONNIE PAIGE, *THE RIGHT TO LIFERS: WHO THEY ARE, HOW THEY OPERATE, WHERE THEY GET THEIR MONEY* 55-63 (1983).
71. For accounts of Catholic opposition to ALI reform bills in Connecticut (1967), Arizona (1967), Georgia (1967), and New York (1967), see GARROW, *supra* note 23, at 316-19. For accounts of Catholic opposition to reform in California (1967) and New York (1970), see PAIGE, *supra* note 70, at 55-57. See also sources cited *infra* notes 75 & 79 (discussing Catholic opposition to reform in New York and Michigan).
72. See *infra* notes 75-79, 90.
73. See Clergy Statement on Abortion Law Reform and Consultation Service on Abortion (1967), as reprinted in BEFORE ROE V. WADE, *supra* note 6, at 29.
74. See Southern Baptist Convention Resolution on Abortion (June 1971), reprinted in BEFORE ROE V. WADE, *supra* note 6, at 71. The Southern Baptist Convention promised "to work for legislation that will allow the possibility of abortion under such conditions as rape, incest, clear evidence of severe fetal deformity, and carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother," *id.*, and the National Association of Evangelicals "recognize[d] the necessity for therapeutic abortions to safeguard the health or the life of the mother" and possibly in case of rape or incest, Nat'l Ass'n of Evangelicals, Statement on Abortion (1971), reprinted in BEFORE ROE V. WADE, *supra* note 6, at 72, 73. However, the evangelical publication *Christianity Today* expressed deep skepticism toward the therapeutic model as early as 1970. Editorial, *The War on the Womb*,

was prepared to enter the political arena to ensure that the law continued to reflect Church teachings. In 1967, when the New York legislature considered an ALI bill, the Church countered with a pastoral letter read in most of the state's 1700 churches warning that the "right of innocent human beings to life is sacred" and "comes from God Himself";⁷⁵ the intervention prompted a rejoinder from the Protestant Council of the City of New York and three Jewish organizations insisting that their support for reform "was based on the same 'concern for human life' as Catholic opposition" and questioning whether "the cause of ecumenism is best served by attributing to us the advocacy of murder and genocide."⁷⁶

In April 1967, the National Conference of Catholic Bishops (NCCB) decided that the accelerating pace of abortion reform warranted intervention at the national, as well as local, level. The spike in public support for liberalization prompted the Church to fund a national counterinitiative. Worrying "that the number of states in which there are campaigns to liberalize laws against abortion has grown from 12 last September to 31 at the present time,"⁷⁷ the NCCB instructed its Family Life Bureau to build a network of persons who could provide information supporting the antiabortion cause and voted to provide the initiative a budget for the first year of operations of \$50,000 (over \$300,000 in today's dollars) to direct and coordinate mobilization and expenditures at the local level.⁷⁸ With this investment in 1967, the Family Life Bureau of the NCCB began funding the organization of the National Right to Life Committee.⁷⁹

CHRISTIANITY TODAY, June 5, 1970, at 24. For additional sources on the differences in response of Catholic and Protestant churches, see *infra* note 132.

75. George Dugan, *State's 8 Catholic Bishops Ask Fight on Abortion Bill: Pastoral Letter Read*, N.Y. TIMES, Feb. 13, 1967, at 1. On Catholic mobilization against abortion in New York in 1972, see Fred C. Shapiro, 'Right to Life' Has a Message for New York State Legislators, N.Y. TIMES, Aug. 20, 1972, § 6 (Magazine), at 10, recounting the Church's support for the growth of the New York right-to-life movement and estimating Catholic membership at eighty-five percent.

76. Edward B. Fiske, *Catholics Scored on 'Harsh' Stand on Abortion Bill: Protestant Unit and Jewish Groups Assert They, Too, Care About 'Human Life'*, N.Y. TIMES, Feb. 25, 1967, at A1.

77. Edward B. Fiske, *Bishops To Press Abortion Battle: Plan a Campaign To Defeat New Liberal State Laws*, N.Y. TIMES, Apr. 14, 1967, at 35.

78. See *id.*

79. See Michael W. Cuneo, *Life Battles: The Rise of Catholic Militancy Within the American Pro-Life Movement*, in BEING RIGHT: CONSERVATIVE CATHOLICS IN AMERICA 270, 273 (Mary Jo Weaver & R. Scott Appleby eds., 1995). This was the first national organization of groups that had been isolated in local conflict:

Throughout the 1960s, anti-abortion (or pro-life) groups had been cropping up across the country to battle abortion liberalization at the state level. Most of these

In the years after publication of the papal encyclical *Humanae Vitae* in 1968, Catholic bishops began to emphasize opposition to abortion as a ground of Catholic identity. *Humanae Vitae* reasserted the Church's longstanding prohibition on the use of contraception, to the shock and dismay of many Catholics.⁸⁰ The encyclical addressed abortion only incidentally, in the course of reasserting the Church's prohibition on contraception in a section of the document labeled "Unlawful Birth Control Methods":

[Man has no] dominion over his specifically sexual faculties, for these are concerned by their very nature with the generation of life, of which God is the source. . . .

. . . [T]he 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."⁸¹

groups were heavily Catholic in composition, and they generally held meetings at their local parish church or school. For the most part, however, there was very little contact between groups, and very little sense of shared purpose. In 1967 [Father James McHugh of the Catholic Family Life Bureau] sought to remedy this situation by creating a national network of pro-life leaders which he called the National Right to Life Committee (NRLC). It was not until three years later in Chicago, however, that the NRLC actually met formally for the first time.

Id. At the same time as the Church was beginning to fund opposition to abortion reform at the national level, it was fighting reform battles state by state. See JAMES RISEN & JUDY L. THOMAS, *WRATH OF ANGELS: THE AMERICAN ABORTION WAR 19-22* (1998). For the Church's efforts to oppose a 1967 reform bill in Virginia, see *id.* at 19. For the Church's efforts to block reform legislation in New York, see Dugan, *supra* note 75; and Fiske, *supra* note 77. For an account of the Church's effort to block passage of New York's repeal statute, see Shapiro, *supra* note 75. Ed Golden, founder of New York's Right to Life group, estimated the Catholic membership of New York Right to Life at eighty-five percent in 1972, see *id.* at 38, and historian Michael Cuneo estimates the percentage nationally at "[p]robably upward of 75 per cent," Cuneo, *supra*, at 274. For an account of Catholic opposition to reform in Michigan in 1972, which explores local organization, as well as the support, network, and organization supplied by the NRLC, see Robert N. Karrer, *The Formation of Michigan's Anti-Abortion Movement 1967-1974*, MICH. HIST. REV., Spring 1996, at 67.

80. See *BEFORE ROE V. WADE*, *supra* note 6, at 77 (describing "swift, fierce, and public opposition" to *Humanae Vitae* from Catholic "clergy and laity alike").
81. *Id.* at 76. *Humanae Vitae* addresses together contraception, sterilization, and abortion as contrary to the sacred life-giving ends of human sexuality. *Id.* ("Equally to be condemned . . . is direct sterilization Similarly excluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation.").

With protest over the renewed prohibition of contraception wracking the Church, bishops increasingly emphasized opposition to abortion as a defining aspect of Catholic identity,⁸² preaching against newly proposed abortion reform statutes in state-by-state battles across the nation.⁸³

As the Church accelerated its campaign against the liberalization of abortion laws, it sought to translate religious objections into secular claims. While Catholics formed a powerful voting bloc in many states,⁸⁴ in most jurisdictions the Church needed to cultivate allies in other religious traditions if it was to prevail. Testifying against reform in 1970, New Jersey's Catholic bishops appealed to the U.N. Declaration on the Rights of the Child and the Declaration of Independence and quoted opponents of abortion of other religious denominations.⁸⁵ When Jack and Barbara Willke published their bestselling *Handbook on Abortion* in 1971, the Willkes, as Catholics, went out of their way to dismiss the idea that "[t]hose whose deep-felt convictions are pro-life" were "either Roman Catholic or influenced by that church's teaching" and insisted that the purpose of *Handbook on Abortion* was to provide "factual knowledge" that was not "religiously sectarian."⁸⁶ The focus "must be on the scientific, medical and social aspects of this issue . . . to present the facts in a way that can influence our pluralistic society."⁸⁷

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82. See Nat'l Conference of Catholic Bishops, *Human Life in Our Day* (1968), as reprinted in BEFORE ROE V. WADE, *supra* note 6, at 77, 78-79 (acknowledging that the "position taken by the Holy Father in his encyclical troubled many," and conceding that the emotions the encyclical provoked were "hardly surprising," but concluding by urging Catholics to reaffirm "the sanctity of human life" and observing that "[s]tepped-up pressures for moral and legal acceptance of directly procured abortion make necessary pointed reference to this threat to the right to life"); see also STANSELL, *supra* note 43, at 320-21 ("Retreating from a battle over contraception they clearly could not win, American prelates shifted their efforts to upholding the ban on abortion. They were extremely successful, at first pulling in Catholic conservatives but also liberals who ignored the prohibition on contraception yet accepted the teaching that abortion was the destruction of innocent life.").
83. Cuneo, *supra* note 79, at 273 ("In addition to modest funding, the church provided local chapters with meeting facilities, office equipment, and, most important of all, a seemingly endless supply of recruits. Moreover, with their access to both the diocesan press and the Sunday pulpit, local chapters were almost guaranteed a constant flow of free publicity.").
84. See TIMOTHY A. BYRNES, *CATHOLIC BISHOPS IN AMERICAN POLITICS* 4, 32-33 (1991).
85. See, e.g., New Jersey Catholic Bishops' Letter, reprinted in BEFORE ROE V. WADE, *supra* note 6, at 81, 82-85 ("We speak today as religious leaders, not to our Catholic community of faith and worship alone but to all of our fellow citizens. The question of abortion is a moral problem transcending a particular theological approach.").
86. J.C. WILLKE & BARBARA WILLKE, *HANDBOOK ON ABORTION* (1971), as reprinted in BEFORE ROE V. WADE, *supra* note 6, at 99, 100-01.
87. *Id.*; see also Cynthia Gorney, *The Dispassion of John C. Willke*, WASH. POST MAG., Apr. 22, 1990, at 20 (discussing the trajectory of the Willkes' antiabortion advocacy, beginning in

Despite these efforts at secularization, in the years before *Roe* opposition to abortion was seen as Catholic.⁸⁸ Indeed, it was *because* the abortion issue was perceived to be of distinctive concern to Catholics that the Republican Party began to shift its position on abortion, in order to attract Catholics to its fold.

B. Party Realignment: Republican Efforts To Recruit Catholic Votes in the 1972 Presidential Campaign

In 1969, Nixon strategist Kevin Phillips published a blueprint for a political realignment that would solidify Republican political dominance. His book, entitled *The Emerging Republican Majority*, predicted the disintegration of the New Deal coalition that had long empowered the Democratic Party.⁸⁹ Phillips famously advised the Republican Party to recruit blocs of voters traditionally affiliated with the Democratic Party, including Southerners who were estranged from the party's civil rights agenda; he also observed that, in the North, Catholics—long staunch Democrats—were increasingly open to affiliating with the Republican Party.⁹⁰ *The Emerging Republican Majority* does not identify the abortion issue as a means to cultivating the Catholic vote. But soon after the book's publication, strategists for the Republican Party began to experiment with just this plan.

1970, and their increasing involvement in the “mission” that “gradually consumed” them “until both of them had assumed nearly full time duties,” including Jack Willke's election to the presidency of the NRLC in 1980). For an account of Jack Willke's efforts to block passage of Michigan's reform statute in 1972, see Karrer, *supra* note 79, at 76 (“Increasingly, [antiabortion advocates] relied on material from Cincinnati activist, Dr. Jack Willke. His *Handbook on Abortion*, published in the spring of 1971, became the bible for the antiabortion movement for years. Willke's four-page color pamphlet, *Life or Death*, showing photographs of fetal remains, also became the most widely used tract.”). The NCCB also took pains to express opposition to abortion as grounded in secular as well as denominational authority, invoking “Judaean-Christian traditions inspired by love for life, and Anglo-Saxon legal traditions protective of life and the person.” Nat'l Conference of Catholic Bishops, *supra* note 82, at 79.

88. See *infra* note 132 and accompanying text; cf. LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 208 (1992) (discussing public perception of the Catholic character of the pro-life movement after *Roe*); *infra* notes 135-137 and accompanying text (same).
89. See KEVIN P. PHILLIPS, THE EMERGING REPUBLICAN MAJORITY 81-82, 464-65, 471 (1969); see also James Boyd, *Nixon's Southern Strategy: 'It's All in the Charts,'* N.Y. TIMES, May 17, 1970, § 6 (Magazine), at 25 (profiling Phillips).
90. PHILLIPS, *supra* note 89, at 81-82; see also *infra* text accompanying notes 110-116 (quoting Phillips's description of his 1972 campaign strategy in his article, *How Nixon Will Win*).

In September 1970, after the California Democratic Party included a plank in its platform supporting the decriminalization of abortion, Reverend Michael Collins decided to protest by changing his voter registration from Democratic to Republican and invited the entire parish in Santa Ana (Orange County), California to follow his lead; the priest arranged for Republican Party registrars to come to the church after mass, where they reregistered over five hundred parishioners.⁹¹ Fourteen other churches followed suit, reregistering a total of approximately two thousand California residents.⁹² California Democrats investigated and declared that the incident was not a spontaneous movement, as it had been represented, but the start of a political experiment engineered by the Republican State Central Committee to see if the abortion issue could be used to cause a mass defection of Catholics from the Democratic Party. The Democratic candidates said that national Republican leaders were watching the experiment closely and that if it proved successful it would be used as part of a nationwide campaign to attract Catholic votes.⁹³

In the spring of 1971, the Republican Party took the strategy national in anticipation of the 1972 election. President Richard Nixon began to shift his position on abortion. His first such declaration came on April 3, 1971, in a statement directing the Department of Defense to rescind abortion regulations that his own administration had implemented the year before, which permitted any military hospital to perform a therapeutic abortion, regardless of the law of the state in which the hospital was located; instead, Nixon stated, abortion policy on military bases would be dictated by the laws of the states in which they were located.⁹⁴ Echoing the language of the Church, Nixon asserted that “unrestricted abortion policies, or abortion on demand” was incompatible with his “personal belief in the sanctity of human life—including the life of the yet unborn.”⁹⁵ The rights of the unborn, he said, are “surely . . . recognized in law,” as well as in “principles expounded by the United Nations.”⁹⁶

91. Lawrence T. King, *Abortion Makes Strange Bedfellows: GOP and GOD*, COMMONWEAL, Oct. 9, 1970, at 37-38, reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 113, 113; see also Howard Seelye, *Reregistration Push: Protest Packs Wallop*, L.A. TIMES, Sept. 20, 1970, at OC1 (describing the role of the Rev. Michael Collins, “a conservative Catholic fundamentalist,” and other priests in organizing the reregistration effort).

92. Seelye, *supra* note 91.

93. King, *supra* note 91, at 114.

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

95. *Id.*

96. *Id.*

Nixon's change of policy was part of a coordinated effort to use abortion as a way of dividing the Democrats and garnering the support of Catholics and social conservatives more generally. Just a week before Nixon's order changing his administration's policy regarding abortion on military bases, his advisor Patrick Buchanan sent Nixon a memorandum advising the President on strategies to ensure that George McGovern—in their view the weakest candidate—would defeat Edmund Muskie for the 1972 Democratic presidential nomination.⁹⁷ One such strategy was for Nixon to “publicly reverse DOD”—that is, publicly to countermand the Department of Defense's decision to permit abortions on military bases.⁹⁸ Abortion, Buchanan explained, was “a rising issue and a gut issue with Catholics.”⁹⁹ Thus, even though Democrats like Muskie or Edward M. Kennedy were actually opposed to abortion reform,¹⁰⁰ while Republicans like Richard Nixon were loosely associated with it, Republican strategists saw the issue as useful for “Dividing the Democrats.” Republican solicitude for issues of “single-issue” concern to Catholics might court Catholics away from their historic affiliation with the Democratic Party: “[F]avoritism toward things Catholic is good politics; there is a trade-off, but it leaves us with the larger share of the pie.”¹⁰¹

Once McGovern was the Democratic Party nominee, the Republican Party used this same strategy in the general election. In May 1972, the President rejected the recommendations of a report on population growth that he himself had commissioned just two years previously,¹⁰² explaining that “unrestricted

97. See Memorandum from Patrick J. Buchanan to the President (Mar. 24, 1971), in *Hearings Before the S. Select Comm. on Presidential Campaign Activities*, 93d Cong. 4146, 4146-53 (1973).

98. *Id.* at 4150.

99. *Id.* Buchanan advised: “If the President should publicly take his stand against abortion, as offensive to his own moral principles, . . . then we can force Muskie to make the choice between his tens of millions of Catholic supporters and his liberal friends at the New York Times and the Washington Post.” *Id.*

100. *Id.*

101. See Memorandum from “Research” to the Attorney General H.R. Haldeman (Oct. 5, 1971), in *Hearings Before the S. Select Comm. on Presidential Campaign Activities*, 93d Cong. 4197, 4201 (1973) (emphasis omitted).

102. During his first term, President Nixon, influenced by Patrick Moynihan, “became concerned with the social effects of population growth. In 1969 he vowed to expand family planning services for 5 million poor mothers, ordered studies of new birth control methods, and named a Commission on Population Growth and the American Future.” DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 250-51 (2001). “Nixon's stance on abortion paralleled his thinking on child care: he backed family planning for poor women but opposed abortion as a basic right of females.” *Id.* at 250. For the story of Nixon's shifting position on child care, see Kimberly J. Morgan, *A Child of the Sixties: The Great Society, the New Right, and the Politics of Federal Child Care*, 13 J. POL'Y HIST. 215, 231-35

abortion policies would demean human life”;¹⁰³ then, at the height of a campaign to reenact the state’s abortion ban, Nixon sent a letter to New York Archbishop Terence Cardinal Cooke, stating his support for the Church’s campaign to restore the state’s criminal prohibition of abortion.¹⁰⁴

But if the Republican Party first used the abortion issue in the 1972 campaign to appeal to Catholics as a group likely to vote for distinctive religious or ethnic-identity reasons on a single-issue basis, Republicans increasingly reframed abortion arguments in an effort to present Nixon to all Americans as a cultural conservative who stood for the preservation of traditional roles and values—unlike McGovern. By 1972, the two candidates’ positions on abortion were in fact quite similar,¹⁰⁵ but Republicans began using allegations about abortion to impugn McGovern for his associations with the student antiwar movement and the feminist movement: “[T]he ammunition which will be our stock in the campaign—the extremist, radical labels; the pro-amnesty and pro-abortion positions; the radical chic; the gut-the-military attitude; etc.—should be held in abeyance until we are reasonably sure McGovern has the nomination,”¹⁰⁶ Buchanan advised.

(2001), which recounts how conservatives prevailed in late 1971 in persuading Nixon to veto a bill providing federal assistance to child care on a cross-class basis and arranging for Patrick Buchanan to draft the veto message which “portrayed the [child care bill] as a family-weakening measure contrary to fundamental American values. Government policy, Nixon said, should instead ‘cement the family in its rightful position as the keystone of our civilization.’”

103. Richard M. Nixon, Statement About the Report of the Commission on Population Growth and the American Future, May 5, 1972, as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 210, 211.
104. Letter from President Richard Nixon to Terence Cardinal Cooke (May 16, 1972), reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 157, 158. The Cardinal’s office released the ostensibly private letter to the media, likely with Nixon’s consent, though his staff later claimed otherwise. See GARROW, *supra* note 23, at 546; *The Abortion Issue*, TIME, May 22, 1972, at 23; Robert D. McFadden, *President Supports Repeal of State Law on Abortion*, N.Y. TIMES, May 7, 1972, at A1. On Catholic mobilization against abortion in New York in 1972, see Shapiro, *supra* note 75.
105. *BEFORE ROE V. WADE*, *supra* note 6, at 216.
106. Memorandum from Pat Buchanan to John Mitchell & H.R. Haldeman (Apr. 27, 1972), in *Hearings Before the S. Select Comm. on Presidential Campaign Activities*, 93d Cong. 4235, 4235 (1973) (annotated “I agree with this—Pass along to our staff—RNC etc.” and signed JM [Jeb Magruder]). The Buchanan memo is dated the same day on which Rowland Evans and Robert Novak published a famous column suggesting that Democrats were apprehensive that McGovern would get the nomination and estrange Catholics, once they discovered that “McGovern is for amnesty, abortion, and legalization of pot. . . . Once middle America—Catholic middle America, in particular—finds this out, he’s dead.” *BEFORE ROE V. WADE*, *supra* note 6, at 215-16 (quoting an anonymous “liberal senator”).

Like Phyllis Schlafly, who by early 1972 had begun to invoke abortion as a symbol of all that was wrong with feminism and the Equal Rights Amendment,¹⁰⁷ Pat Buchanan appreciated that attacking abortion was now a way of expressing disapproval of “permissive” youth who challenged traditional role morality in the making of war and family. In this period, when the feminist movement was just gaining political visibility, Buchanan was only too happy to frame Nixon’s abortion position in such a way as to dissociate the President from the feminist movement. When a New York Republican complained about the President’s position on abortion, “Pat Buchanan replied, ‘he will cost himself Catholic support and gain what, Betty Friedan?’”¹⁰⁸

The reframing of abortion played a key role in the 1972 campaign. A strategy guide for the 1972 presidential election that Pat Buchanan dubbed “The Assault Book” ranked abortion and contraception first on a list of “SOCIAL ISSUES—Catholic/Ethnic concerns,” grouped along with amnesty for draft evasion in the Vietnam war, marijuana use, and aid to nonpublic schools.¹⁰⁹ On this framing, abortion was significant as a practice of particular concern to Catholics (like aid to nonpublic schools) and as a symbol of “social issues” of concern to conservatives (like the sexual revolution, feminism, draft evasion, and drugs).

As the campaign progressed, Republican strategists increasingly deployed abortion as a symbol of cultural trends of concern to social conservatives distressed about loss of respect for tradition. In an August 1972 essay for the *New York Times* entitled *How Nixon Will Win*,¹¹⁰ realignment strategist Kevin

107. Phyllis 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.

Phyllis Schlafly, *Women’s Libbers Do NOT Speak for Us*, PHYLLIS SCHLAFLY REP., Feb. 1972, reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 218, 219.

108. ROBERT MASON, *RICHARD NIXON AND THE QUEST FOR A NEW MAJORITY* 155 (2004).

109. Memorandum from Patrick Buchanan (1972), as reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 215, 216. The accompanying memorandum discussed strategies for targeting Catholic audiences with Nixon’s message on abortion and other issues of concern to a Catholic demographic. Memorandum from Patrick Buchanan & Ken Khachigian, (June 8, 1972), in *Hearings Before the S. Select Comm. on Presidential Campaign Activities*, 93d Cong. 4240, 4240-46 (1973).

110. Kevin Phillips, *How Nixon Will Win*, N.Y. TIMES, Aug. 6, 1972, § 6 (Magazine), at 8.

Phillips boasted of imminent Republican victory premised on the strategy of courting Southerners who supported Wallace in 1968 and “wooing conservative Catholics, senior citizens and other traditionalists”¹¹¹—the same strategy that Phillips had advocated in *The Emerging Republican Majority*.¹¹² McGovern, Phillips argued, had badly misdiagnosed what kinds of “alienation” would move the American electorate: “The people who are alienated are the ones who don’t want pot, who don’t want abortion, who don’t want to pay one more cent in taxes.”¹¹³ Phillips predicted that “the Democratic party is going to pay heavily for having become the party of affluent professionals, knowledgeable industry executives, social cause activists and minorities of various sexual, racial, chronological and other hues.”¹¹⁴ He added that “if the real frustration is with the trampling of traditional values, and if major chunks of the old Democratic coalition are angry at the cultural upheaval represented by McGovern, then Richard Nixon will come out on top.”¹¹⁵ Phillips promised that a theme that the Republicans would “attack aggressively is 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.”¹¹⁶ In this usage, attacks on abortion were about more than abortion:

Triple-A attacks on McGovern condemned abortion rights as part of a permissive youth culture that was corrosive of traditional forms of authority. The objection to abortion rights was not that abortion was murder, but 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 devote themselves to motherhood. Phyllis Schlafly’s

111. *Id.*

112. See *supra* text at notes 89-90.

113. Phillips, *supra* note 110 (quoting Don Muchmore).

114. *Id.*

115. *Id.*

116. *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 Karrer, *supra* note 79.

attack on abortion never mentioned murder; she condemned abortion by associating it with the Equal Rights Amendment . . . and child care.¹¹⁷

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. 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].”¹¹⁸ Only three days before, the mid-1972 Gallup poll published in newspapers around the country showed that “a record high of 64 percent support full liberalization of abortion laws,” a sharp increase from the preceding January. In contrast to the doctrinal message being preached with increasing vigor by the Church hierarchy, the new poll showed that substantial numbers of Catholics in fact supported liberalizing access to abortion: “Fifty-six per cent of Catholics believe that abortion should be decided by a woman and her doctor.”¹¹⁹ (Justice Blackmun included a copy of this *Washington Post* article in his *Roe v. Wade* file.¹²⁰)

In November 1972, two months before the Supreme Court handed down *Roe v. Wade*, Nixon won reelection with the support of a majority of the Catholic voters,¹²¹ although abortion was not a significant determinant in

117. BEFORE *ROE V. WADE*, *supra* note 6, at 257. For Phyllis Schlafly’s first published attack on the ERA in February of 1972, see *supra* note 107 and accompanying text.

118. KOTLOWSKI, *supra* note 102, at 251 & n.222. The memo likely adverted to the Gallup poll released in August of 1972, which Justice Blackmun had in his *Roe v. Wade* files. See sources cited *supra* note 11.

119. Gallup, *supra* note 11. The poll was disseminated widely. See *Abortion, Birth Control Reforms Backed in Poll*, L.A. TIMES, Aug. 25, 1972, at 22; George Gallup, *Abortion Support Increases Sharply*, HARTFORD COURANT, Aug. 25, 1972, at 25; *Liberal Abortion Laws Gain Favor*, BALTIMORE SUN, Aug. 26, 1972, at A5. For an overview of polling showing increasing popular and professional support for liberalizing access to abortion in the years before *Roe*, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 260-62 (2d ed. 2008).

120. GREENHOUSE, *supra* note 11; Jack Rosenthal, *Survey Finds Majority, in Shift, Now Favors Liberalized Laws*, N.Y. TIMES, Aug. 25, 1972, at 1.

121. See CTR. FOR APPLIED RESEARCH IN THE APOSTOLATE (CARA), GEORGETOWN UNIV., *PRESIDENTIAL VOTE OF CATHOLICS: ESTIMATES FROM VARIOUS SOURCES* (2010), available at <http://cara.georgetown.edu/Presidential%20Vote%20Only.pdf>.

attracting votes.¹²² Soon after, when the Court handed down *Roe*, Nixon “directed his aides to ‘keep out’ of the case.”¹²³

* * *

In fact, it appears to have been some years after the *Roe* decision before conservative strategists again began to focus on the opportunity the abortion debate presented to recruit new voters for the Republican Party. The Republicans who assumed office after Nixon’s Watergate resignation were not interested in the Buchanan-Phillips strategy on abortion: Gerald Ford initially opposed *Roe* but as president much of the time avoided taking a stance on abortion (his wife, First Lady Betty Ford, was a strong abortion-rights supporter), while Vice President Nelson Rockefeller was known for his leadership in repealing abortion laws while governor of New York.¹²⁴

122. See, e.g., David S. Broder, *Study Finds Major Democratic Schism*, WASH. POST, Sept. 6, 1973, at A2 (citing research by scholars at the University of Michigan finding that “the 1972 election was the first in two decades . . . where issues cut more deeply than traditional party loyalties” and that Vietnam and social issues (race, not abortion, which “played a relatively small part”) were the dividing lines); Timothy A. Byrnes, *Issues, Elections, and Political Change: The Case of Abortion*, in *DO ELECTIONS MATTER?* 101, 112-13 (Benjamin Ginsberg & Alan Stone eds., 3d ed. 1996) (finding that Nixon’s 1968 and 1972 campaigns both aimed for broader party realignment and that “[a]bortion was tailor-made for use by political operatives seeking to” exploit white racial and anti-elitist anger “and to use the Republican party as a vehicle for conservative political change”); *id.* at 114 (“Abortion was not particularly powerful as a direct determinant of individual votes. But it was indispensable as a symbolic, rhetorical tool in the Republican party effort to redefine the agenda of U.S. politics and realign the U.S. party system.”).

123. KOTLOWSKI, *supra* note 102, at 252.

124. In Gerald Ford’s White House, constructing a political strategy around opposition to abortion was far from a priority. The new president’s wife, Betty Ford, was an open supporter of abortion rights, as she declared during her first news conference as first lady, on September 4, 1974. Donnie Radcliffe, *Pro-Abortion Stand Taken by Mrs. Ford*, WASH. POST, Sept. 5, 1974, at A1. Gerald Ford had opposed *Roe* in Congress but as president was largely silent, speaking out only when pressed by antiabortion groups during the 1976 campaign; as the conservative columnists Rowland Evans and Robert Novak reported from the Republican National Convention in 1976, “a proposed platform plank advocating a constitutional amendment against abortion was whole-heartedly supported by the Ford campaign organization but not by President Ford.” Rowland Evans & Robert Novak, *Dodging a Fight over Abortion*, WASH. POST, Aug. 13, 1976, at A25; see DANIEL K. WILLIAMS, *GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 129-32 (2010) (discussing the abortion issue in the Presidential election of 1976). Nelson A. Rockefeller, Ford’s choice to fill the vice presidential vacancy, was reviled on the Right for a number of reasons, of which his support for abortion as governor of New York was one. See *BEFORE ROE V. WADE*, *supra* note 6, at 158-60; *supra* notes 20, 71; see also WILLIAMS, *supra*, at 129 (“At a time when the

In this interim period, Phyllis Schlafly's campaign against the Equal Rights Amendment demonstrated how feminist support for abortion rights had imbued the abortion issue with associations that could be tapped to mobilize a wide array of cultural conservatives in politics, much as triple-A arguments had. At the 1977 International Year of the Woman conference in support of the ERA—a conference that First Lady Rosalind Carter and former first lady Betty Ford attended¹²⁵—Schlafly organized a counter-convention at which a new “Pro-Family” movement protested the abortion- and gay-rights planks of the feminists supporting the ERA.¹²⁶ The following year, Rosemary Thomson, an organizer for Schlafly, warned 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.”¹²⁷ In 1979, Beverly LaHaye consolidated these connections by

First Lady, the vice president, and the chair of the Republican National Committee were advocates of abortion rights, many people assumed that the president was as well.”).

125. See Allen Hunter, *Virtue with a Vengeance: The Pro-Family Politics of the New Right* 161 (1985) (unpublished Ph.D. Dissertation, Brandeis University) (on file with authors).
126. See, e.g., Siegel, *supra* note 52, 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 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 counterrally 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”); Hunter, *supra* note 125, at 159-68 (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 the E.R.A.*, PHYLLIS SCHLAFLY REP., <http://www.eagleforum.org/psr/1986/sept86/psrsep86.html> (last visited Dec. 13, 2010).

127. 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).

founding Concerned Women for America, which organized large numbers of evangelical Protestants against the ERA.¹²⁸

By the late 1970s, Richard Viguerie and other Republican architects of the New Right had begun to focus on abortion as an issue around which to build party discipline in Congress.¹²⁹ Viguerie and Paul Weyrich (of the Heritage Foundation) created a “pro-life” political action committee (PAC) designed to capture congressional seats for conservatives in the 1980 general election.¹³⁰

128. 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 LeHaye follower as declaring, “It’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).

129. Richard Viguerie’s increasing effort to make abortion a central part of the New Right agenda is visible in the growing attention devoted to the subject throughout the 1970s by *Conservative Digest*, a magazine that he founded in 1975. See Richard A. Viguerie, *From the Publisher*, *CONSERVATIVE DIG.*, May 1975, at 1 (inaugural issue). Initially, the magazine all but ignored abortion, with only three explicit references in the first volume, which spanned May to December 1975. In one article, Ronald Reagan praises a family for adopting special-needs children “[a]t a time when some people think you should be able to terminate a pregnancy with . . . ease.” Ronald Reagan, *The Amazing Debolts*, *CONSERVATIVE DIG.*, Sept. 1975, at 7. One article disapprovingly quotes the First Lady’s remarks in support of abortion rights, *Speak for Yourself, Mrs. Ford*, *CONSERVATIVE DIG.*, Oct. 1975, at 18, 18-20, and a writer profiles the Cleveland, Ohio National Right to Life Committee, Sally Lockwood, *Facing Reality on Abortion*, *CONSERVATIVE DIG.*, Sept. 1975, at 39, 39-40. The absence of antiabortion rhetoric is just as revealing, as in *The Best of Ronald Reagan*, a series of quotes categorized by political issues. *The Best of Ronald Reagan*, *CONSERVATIVE DIG.*, Dec. 1975, at 38, 38-39.

By contrast, volume 5 of the magazine, spanning January to December 1979, mentions abortion in almost every issue, usually more than once. The January and February issues alone outstrip the number of references in 1975. See Daniel Dickinson, *Pro-Lifers Shock Political Pundits*, *CONSERVATIVE DIG.*, Jan. 1979, at 48; Connaught Marshner, *HEW Funds Abortions, Promiscuity*, *CONSERVATIVE DIG.*, Jan. 1979, at 28; Nathan J. Muller, *One-Issue Groups Educate Congress*, *CONSERVATIVE DIG.*, Jan. 1979, at 43. For coverage of pro-life politics in the 1979 issues of *Conservative Digest*, see *infra* note 130.

130. For discussion of the new significance of PACs in the aftermath of Watergate-related campaign finance reform and the role that Viguerie and Weyrich played in experimenting with abortion as a theme for fundraising in the 1978 and 1980 elections, see WILLIAMS, *supra* note 124, at 168-69. In February 1979, Richard Viguerie’s *Conservative Digest* magazine profiled Paul Brown, who, with his wife, Judy, split with the National Right to Life Committee to create the Right to Life PAC and, later, the Life Amendment PAC and the American Life League. *The New Right: A Special Report*, *CONSERVATIVE DIG.*, June 1979, at 10, 16 (crediting Paul Brown with “making the pro-life movement a sophisticated political force,” which by 1978 “had become powerful enough to provide the margin of victory” in state and national races, when “[i]n the years immediately after the Supreme Court’s 1973 pro-abortion decision, anti-abortion Americans were, to put it frankly, politically naive”);

At the same time, Viguerie and Weyrich, who were both raised Catholics, began to explore abortion as an issue that might mobilize Protestants of socially conservative commitments,¹³¹ with special attention to the South, a

The Pro-Life Movement, CONSERVATIVE DIG., Feb. 1979, at 6 (interviewing Paul Brown and touching on the importance of single-issue groups to the New Right coalition); *The Right Side*, CONSERVATIVE DIG., July 1979, at 31 (noting the founding of the American Life Lobby); *The Right Side*, CONSERVATIVE DIG., Apr. 1979, at 28, 29 (listing congressmen and senators targeted by the Life Amendment PAC). See generally PAIGE, *supra* note 70, at 146-51 (describing Judy Brown and Paul Brown's collaboration with Viguerie and Paul Weyrich in establishing the Life Amendment PAC and the American Life League); *id.* at 198-217 (describing Paul Weyrich's role in forming Americans for Life, a campaign finance organization with a project called "Stop the Babykillers," whose "purpose . . . was to kick off the New Right's six-year plan to capture as many congressional seats as possible for conservatives by defeating Senators George McGovern, Frank Church, Birch Bayh and John Culver as well as other big-name liberals"). The February 1979 *Conservative Digest* features a cartoon depicting a woman beating "politicians" over the head with a rolling pin labeled "Right-to-Life Movement." Cartoon, CONSERVATIVE DIG., Feb. 1979, at 24. In March, an article notes that "[t]he true litmus test [of loyalty] seems to be abortion" for a coterie of New Right politicians. Sanford J. Ungar, *New Right Senators: They're Getting Results*, CONSERVATIVE DIG., Mar. 1979, at 26, 27.

Viguerie and other movement strategists were frank about using abortion, among other issues of social rather than economic concern, as a way of attracting additional followers for whom the economic issues that motivated other members of the New Right held little appeal: "The New Right is looking for issues that people care about, and social issues, at least for the present, fit the bill." *The New Right: A Special Report*, *supra*, at 10. Paul Weyrich put the strategic tradeoff succinctly: "Yes . . . [social issues are] emotional issues, but that's better than talking about capital formation." *Id.* A cover story on the Moral Majority attributes the politicization of conservative Protestants primarily to the IRS, with President of the National Christian Action Coalition Bob Billings describing the IRS Commissioner as "ha[ving] done more to bring Christians together than any man since the Apostle Paul"; the same story groups abortion in a single paragraph with "attacks on the family." *Mobilizing the Moral Majority*, CONSERVATIVE DIG., Aug. 1979, at 14.

For Viguerie's reports on efforts in 1979 to organize antiabortion advocates into an effective political force, see *A New Conscience of the Pro-Life Movement*, CONSERVATIVE DIG., Dec. 1979, at 18 (profiling a young pro-life activist); *Pro-Lifers Train for 1980 Elections*, CONSERVATIVE DIG., July 1979, at 30 (describing the "first political action conference for anti-abortion activists"); and *The Right Side*, CONSERVATIVE DIG., Oct. 1979, at 16 (describing a star-studded National Pro-Life PAC training session).

There are striking parallels in the ways in which the New Right cultivated ties with the single-issue groups opposing abortion and supporting gun rights in this period, working in each case to encourage more conservative expression of movement politics and to bridge single-issue groups into a politically disciplined conservative coalition capable of influencing electoral outcomes. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 214 n.106 (2008) (discussing parallels between the cases of abortion and guns).

131. Chief strategists of the New Right Paul Weyrich, raised Catholic and a convert to Greek Orthodoxy, and Richard Viguerie, a Catholic, were likely attuned to the abortion issue

region Republicans were targeting for realignment. During the 1960s and 1970s, Protestants—Southern Baptists and other evangelicals included—did not oppose abortion as Catholics did (in part because Southern Baptists viewed abortion as a “Catholic issue”).¹³² Many of the early ALI statutes were enacted

through the Church. See Dan Gilgoff, *How Paul Weyrich Founded the Christian Right*, U.S. NEWS & WORLD REP. (Dec. 18, 2008), <http://politics.usnews.com/news/blogs/god-and-country/2008/12/18/how-paul-weyrich-founded-the-christian-right.html>; Richard A. Viguerie, *Attention, Catholics: Given to ACORN Lately?*, RICHARD VIGUERIE'S CONSERVATIVE HQ, <http://www.conservativehq.com/node/286> (last visited Dec. 9, 2010); see also WILLIAMS, *supra* note 124, at 167 (“Some of the most prominent New Right activists came from the traditionally Democratic working-class Catholic families that Republican strategists had sought to attract through cultural politics.”).

132. For a review of positions on abortion advanced by religious denominations in the period before *Roe*, see BEFORE ROE V. WADE, *supra* note 6, at 69-90. In the period before *Roe*, conservative protestant evangelicals in the South did not take a stand against abortion in the absolute terms that Catholics did, nor did they take such a stance in the immediate aftermath of the decision. In 1974, the Southern Baptist Convention reaffirmed its pre-*Roe* 1971 statement on abortion by staking “a middle ground between the extreme of abortion on demand and the opposite extreme of all abortion as murder.” Southern Baptist Convention, Resolution on Abortion and Sanctity of Human Life (June 1974), available at <http://www.sbc.net/resolutions/amResolution.asp?ID=14>; see Paul L. Sadler, *The Abortion Issue Within the Southern Baptist Convention, 1969-1988*, at iv-v (Aug. 1991) (unpublished Ph.D. dissertation, Baylor University) (on file with authors) (analyzing the rightward shift of the Southern Baptist Convention’s position on abortion during the late 1970s and 1980s and noting that a “fundamentalist faction that gained control of Convention machinery used the abortion issue as one means of galvanizing support for their cause” and contrasting this to the “middle ground” position the denomination took in the mid-1970s); *id.* at v (noting that “[b]y 1988 an extreme anti-abortion position became the ‘official position’ of the Southern Baptist Convention”).

It was in part because the Southern Baptists viewed opposition to abortion as a Catholic position that the group was reticent to oppose abortion categorically or to campaign against the practice:

In the pre-*Roe* period, SBC leaders and clergy shunned discussion of abortion, dismissing it as a “Catholic issue.” Following its legalization, they adopted a moderate pro-life stance. Differentiating itself from the “Roman Catholic bishops’ . . . campaign of heavy institutional involvement to enact their dogma into law,” the SBC endorsed a position throughout the 1970’s that “reflected a middle ground between the extreme of abortion on demand and the opposite extreme of all abortion as murder.” At its 1980 convention, the SBC endorsed a constitutional amendment that would prohibit abortion except in cases where the mother’s life was in danger, but it was not until the late 1980’s, following the ideological shift within the SBC, that it actively began, through its Christian Life Commission (CLC), to pursue this objective as part of a public policy campaign.

Michele Dillon, *Religion and Culture in Tension: The Abortion Discourses of the U.S. Catholic Bishops and the Southern Baptist Convention*, 5 RELIGION & AM. CULTURE: J. INTERPRETATION 159, 161 (1995) (footnotes omitted). Averse to joining forces with the Catholic Church, Southern Baptists did not enter politics against abortion until years after *Roe*, although there

in the South, where there were fewer Catholics,¹³³ and many southern newspapers were in fact tolerant or even welcoming of *Roe* at the time of the ruling.¹³⁴ Newspaper accounts of opposition to the ruling tended to identify the opponents as Catholic, often as clergy.¹³⁵ As the Reverend Jerry Falwell observed in 1979: “The Roman Catholic Church for many years has stood virtually alone against abortion. I think it’s an indictment against the rest of us that we’ve allowed them to stand alone.”¹³⁶

were evangelicals in the North who spoke out in opposition to the decision. See WILLIAMS, *supra* note 124, at 111-20; *id.* at 115 (chronicling the resistance of the Southern Baptist Convention to join the antiabortion cause in part because Southern Baptists “were suspicious of a Catholic cause”); *id.* at 119 (“While Southern Baptists remained on the sidelines, northern evangelicals proved somewhat more willing to view *Roe v. Wade* as an assault on the family and the nation’s Christian identity.”); *cf.* Post & Siegel, *supra* note 5, at 15 (quoting participants who described the inability of early evangelical opponents of abortion to mobilize other evangelicals to enter politics on what was viewed as a Catholic issue).

133. One reason that Gene Burns gives for the success of ALI reform statutes in the South was the relatively low numbers of Catholics in the region. See BURNS, *supra* note 15, at 192 (“In the South, there was neither a strong abortion rights movement nor a strong Catholic pro-life movement: Southern evangelicals would about a decade later be important in the pro-life movement, but at the time they simply were not very involved, taking little note of the issue.”).
134. See, e.g., Bob Fort, *Abortions in Georgia To Rise, but . . .*, ATLANTA CONST., Jan. 23, 1973, at 15A (“The Supreme Court clearly did not go as far as many might have anticipated. Monday’s decision certainly was not that of an ultra-liberal court, and the longstanding traditions of medical ethics, as well as basic human ethics, were clearly underscored and re-emphasized.”); Editorial, *The Court Decision on Abortion*, CHARLOTTE OBSERVER, Jan. 29, 1973, at 12A (“Our own view is that the court has very judiciously attempted to separate the secular from the religious – and that is impossible. The issues involved include the question of when life begins. Even the Church has difficulty answering that one, and the State can be no better arbiter. Still, some constitutional guidelines had to be established. . . . The Supreme Court’s decision will, at least, bring greater uniformity to the states’ approaches.”); Joseph Kraft, Op-Ed., ‘Conservative’ on Abortion, WASH. POST, Jan. 25, 1973, at A15 (“What this means is that the present Supreme Court, in a test between the rights of the individual and the power of the state, comes down in a truly decisive fashion, on the side of the individual. Such a choice is, of course, completely true to the principles of conservatism in this country.”).
135. E.g., John Dart, *Court ‘Out-Herods’ Herod on Abortions, Archbishop Says*, L.A. TIMES, Jan. 26, 1973, at 8A; Marjorie Hyer, *Cardinal O’Boyle Asks Pastors To Preach Against Abortion Rule*, WASH. POST, Jan. 25, 1973, at B1; Lawrence Van Gelder, *Cardinals Shocked – Reaction Mixed*, N.Y. TIMES, Jan. 23, 1973, at A1. One leading southern newspaper made clear in an editorial that religion was not an appropriate basis for evaluating the ruling, which the editorial called “realistic and appropriate”: “[T]he State is not a church. It is the imperfect servant of the imperfect people, not the reflection of the glory of God.” Editorial, *Abortion Ruling*, ATLANTA CONST., Jan. 24, 1973, at 4A.
136. *Opponents of Abortion March in Cincinnati*, HARTFORD COURANT, June 25, 1979, at 2.

In the late 1970s, conservative evangelical Protestant engagement with antiabortion politics grew within the evangelical movement as part of a more broad-based attack on cultural developments evangelical critics termed “secular humanism”: “To understand humanism is to understand women’s liberation, the ERA, gay rights, children’s rights, abortion, sex education, . . . the separation of church and state, the loss of patriotism, and many of the other problems that are tearing America apart today.”¹³⁷ The entrance of Protestant evangelicals into politics under an antiabortion banner was supported and encouraged by leaders of the Republican Party.¹³⁸ It was in the late 1970s that Reverend Jerry Falwell began to preach against abortion.¹³⁹ Strategists for the Republican Party approached Falwell and encouraged him to organize evangelicals as a “Moral Majority” that would promote a “pro-family”

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137. WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA* 196 (1996) (quoting a “Special Report on Secular Humanism vs. Christianity” that appeared in *Christian Harvest Times*, a Christian magazine, in July 1980). Francis Schaeffer helped mobilize conservative Protestant evangelicals with a critique of “secular humanism” in contemporary culture, and his son Frank helped tie the critique of secular humanism to the liberalization of abortion law. The Schaeffers made two films, *How Should We Then Live?* and *Whatever Happened to the Human Race?* (the latter filmed with the financial support of the Catholic Church), which helped popularize the critique of abortion to the Protestant evangelical community. See FRANK SCHAEFFER, *CRAZY FOR GOD: HOW I GREW UP AS ONE OF THE ELECT, HELPED FOUND THE RELIGIOUS RIGHT, AND LIVED TO TAKE ALL (OR ALMOST ALL) OF IT BACK* 265-67, 271-73, 283-84 (2007). Francis Schaeffer was initially reticent to enter politics against abortion because he associated antiabortion politics with the Catholic Church, see *id.* at 266, an association that the Church itself was working to diffuse, see *id.* at 283-84. See also Wyman Richardson, *Francis Schaeffer and the Pro-Life Movement*, <http://www.walkingtogetherministries.org/FullView/tabid/64/ArticleID/32/CBModuleId/401/Default.aspx> (last visited Dec. 13, 2010) (describing Francis Schaeffer’s role in leading the development of antiabortion activism in Protestant evangelical communities). See generally WILLIAMS, *supra* note 124, at 137-56 (describing the Schaeffers’ campaign against secular humanism as it joined opposition to feminism, gay rights, and abortion); *id.* at 156 (observing that “if evangelicals had not connected abortion to the ERA, feminism, and cultural liberalism, they might not have shown much interest in waging a campaign against it”).
138. For an account of the role that Congressman Jack Kemp played in supporting the work of Francis and Frank Schaeffer in the years just before and during the beginning of the Reagan Administration, see SHAEFFER, *supra* note 137, at 284-86 (discussing a meeting of the Republican Club at which the Schaeffers showed *Whatever Happened to the Human Race?* to a meeting of “more than fifty congressmen and about twenty senators . . . from Henry Hyde to Bob Dole”).
139. See Post & Siegel, *supra* note 5, at 421 & n.225 (describing Falwell’s gradual engagement with the abortion question in the late 1970s and early 1980s); see also *supra* note 136 and accompanying text (quoting Falwell).

politics;¹⁴⁰ this alliance between the Republican Party and Protestant evangelicals publicly focused on abortion but also seems to have been motivated by evangelical opposition to IRS rulings requiring the racial integration of Christian private schools as a condition for preserving their tax-exempt status.¹⁴¹ Weyrich “proposed at that first encounter that abortion be

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140. See MICHELE MCKEEGAN, *ABORTION POLITICS: MUTINY IN THE RANKS OF THE RIGHT* 20-21 (1992) (recounting that Republican strategists Richard Viguerie and Paul Weyrich met with Reverend Jerry Falwell in 1979 and encouraged him to join the New Right coalition); WILLIAMS, *supra* note 124, at 171, 174-75 (describing the work of Ed McAteer, Howard Phillips, Paul Weyrich, Robert Billings, and Richard Viguerie in drawing Falwell into electoral politics and in forming the “Moral Majority” organization “to register Christian voters in the hope of capturing Congress and the White House”).
141. In retelling the story of the formation of the Moral Majority, Weyrich has repeatedly emphasized that the principal motivating issue was not abortion but rather the attempt by the IRS in the late 1970s to deny tax-exempt status to Christian schools that failed to comply with racial nondiscrimination mandates. See MARTIN, *supra* note 137, at 173 (“Paul Weyrich emphatically asserted that ‘what galvanized the Christian community was not abortion, school prayer, or the ERA. I am living witness to that because I was trying to get those people interested in those issues and I utterly failed. What changed their mind was Jimmy Carter’s intervention against the Christian schools, trying to deny them tax-exempt status on the basis of so-called de facto segregation.’ . . . [T]he IRS threat ‘enraged the Christian community and they looked upon it as interference from government, and suddenly it dawned on them that they were not going to be able to be left alone to teach their children as they pleased. . . . That was what brought those people into the political process. It was not the other things.”); Paul Weyrich, *Comments, in NO LONGER EXILES: THE RELIGIOUS NEW RIGHT IN AMERICAN POLITICS* 25, 26 (Michael Cromartie ed., 1993) (“Certainly no Christian was going to have an abortion, and they could teach that to their children. What caused the movement to surface was the federal government’s moves against Christian schools. This absolutely shattered the Christian community’s notion that Christians could isolate themselves inside their own institutions and teach what they pleased. The realization that they could not then linked up with the long-held conservative view that government is too powerful and intrusive, and this linkage was what made evangelicals active. It wasn’t the abortion issue; that wasn’t sufficient.”); see also RANDALL BALMER, *THY KINGDOM COME: HOW THE RELIGIOUS RIGHT DISTORTS THE FAITH AND THREATENS AMERICA: AN EVANGELICAL’S LAMENT* 16 (2006) (“Ed Dobson, Falwell’s erstwhile associate, corroborated Weyrich’s account during the ensuing discussion. ‘The Religious New Right did not start because of a concern about abortion,’ Dobson said. ‘I sat in the non-smoke-filled back room with the Moral Majority, and I frankly do not remember abortion ever being mentioned as a reason why we ought to do something.’”). For another account of the role that the IRS ruling conditioning the tax-exempt status of private schools on compliance with antidiscrimination mandates played in the mobilization of the religious right, see Joseph Crespino, *Civil Rights and the Religious Right, in RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S*, at 90, 90-91 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) (recounting Richard Viguerie’s statement that the IRS decision “kicked the sleeping dog [and] was the spark that ignited the religious right’s involvement in real politics”).

made the keystone of their organizing strategy, since this was the issue that could divide the Democratic party.”¹⁴²

As Buchanan and Phillips had appreciated, if properly framed, the abortion issue could be employed to attract traditional Democratic voters and forge new coalitions among them. As governor of California, Ronald Reagan had signed the state’s ALI statute in 1967, but his 1980 campaign for the presidency found him running on a plank in the Republican Party platform that called for the appointment of judges who would respect human life and traditional family values.¹⁴³ Thereafter Viguierie and Weyrich worked to incorporate Protestant evangelicals and the Catholic antiabortion movement into a new coalition that spoke the language of “pro-family” but was motivated by a bundle of “social issues” that also concerned race.¹⁴⁴

C. Abortion and Party Realignment

That the major political parties have decisively changed positions on abortion is clear. On the eve of *Roe*, as we have noted, the Gallup Poll reported that a sizeable majority of all Americans—by 64% to 31%—agreed with the statement that “the decision to have an abortion should be made solely by a woman and her physician”; 68% of Republicans supported that categorical

142. MCKEEGAN, *supra* note 140, at 20-21; see also WILLIAMS, *supra* note 124, at 169 (quoting Weyrich and Viguierie on the potential of the abortion issue to attract Catholic Democratic and politically liberal voters into alliance with conservatives and into commitment to other conservative causes).

143. See *infra* note 146. Ronald Reagan was an architect of this new strategy. See *infra* text accompanying note 198 (addressing Conservative Political Action Conference in 1977).

144. See MCKEEGAN, *supra* note 140, at 21-27. For discussion of the coalition, see Frances Johnson Perry, *Convergence of Support for Issues by the Antiabortion Movement and the Religious New Right: An Examination of Social Movement Newsletters 103-12* (Dec. 1985) (unpublished Ph.D. dissertation, Bowling Green State University) (on file with authors), which examines the interactions and tensions between the NRLC and the Moral Majority and finds that in contrast to the author’s hypothesis, the most important link between the two groups is not abortion but rather support for the same candidates. For ways that the “social issues” agenda linked sex and race, see *supra* note 141, which recounts the role that concern about preserving segregated Christian schools played in motivating leaders of the religious right to enter politics in opposition to abortion, and *infra* notes 189-196 and accompanying text, which discuss how the “social issues” agenda of the New Right related concerns of race and sex. See also Richard J. Meagher, *Backlash: Race, Sexuality, and American Conservatism*, 41 *POLITY* 256 (2009) (reviewing JOSEPH E. LOWNDES, *RACE AND THE SOUTHERN ORIGINS OF MODERN CONSERVATISM: FROM THE NEW DEAL TO THE NEW RIGHT* (2008); *RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S* (Bruce J. Schulman & Julian E. Zelizer eds., 2008)).

statement compared with 58% of Democrats.¹⁴⁵ Today, of course, it is the Republican Party that opposes constitutional protections for abortion, and the Democratic Party that supports them.¹⁴⁶

When did the parties' change of positions on abortion occur? It all depends on the indicia that one considers. But by several measures the partisan polarization on abortion that prevails today developed years after *Roe* was handed down. The parties' exchange of positions on abortion and the timing of the change suggest that the competition of national parties for voters played an important part in polarization around abortion and so likely played an important part in making *Roe* meaningful.

Polarization of the national parties over abortion did not appear at the time of *Roe* but took shape years after. While party platforms began to diverge on abortion in the 1970s,¹⁴⁷ it took years after *Roe* for Republicans to vote more

145. Gallup, *supra* note 11, at 209.

146. See Lydia Saad, *Republicans', Dems' Abortion Views Grow More Polarized*, GALLUP (Mar. 8, 2010), <http://www.gallup.com/poll/126374/republicans-dems-abortion-views-grow-polarized.aspx?version=print>. According to the Gallup Poll discussed by Saad, 12% of Republicans say that abortion should be legal "under any circumstances," compared with 31% of Democrats. When the question is whether abortion should be "illegal in all circumstances," the partisan polarity is almost exactly reversed: 33% of Republicans agree, compared with 12% of Democrats. Note that after 1972, Gallup changed the way in which it posed the question. Whereas in 1972 Gallup asked whether respondents thought that "the decision to have an abortion should be made solely by a woman and her physician," in 1975 Gallup asked whether "abortions should be legal 'under any circumstances,' legal 'only under certain circumstances,' or 'illegal in all circumstances.'" *Id.*

147. In its 1976 platform, the Republican Party's critique of the Supreme Court was mild and appeared to acknowledge that Republicans were not all of the same mind on abortion: "The Republican Party favors a continuance of the public dialogue on abortion and supports the efforts of those who seek enactment of a constitutional amendment to restore protection of the right to life for unborn children." REPUBLICAN NAT'L COMM., REPUBLICAN PARTY PLATFORM OF 1976 (1976), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25843>. The 1980 platform continued to ascribe some value to debate while also endorsing explicitly antiabortion positions:

While we recognize differing views on this question among Americans in general—and in our own Party—we affirm our support of a constitutional amendment to restore protection of the right to life for unborn children. We also support the Congressional efforts to restrict the use of taxpayers' dollars for abortion. . . . 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.

REPUBLICAN NAT'L COMM., REPUBLICAN PARTY PLATFORM OF 1980 (1980) [hereinafter REPUBLICAN PARTY PLATFORM OF 1980], available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25844>. In 1984, the platform proclaimed that "[t]he unborn child has a fundamental individual right to life which cannot be infringed." REPUBLICAN NAT'L COMM.,

consistently against abortion than Democrats, a shift that seems to have begun with party leaders and then spread to its base. Greg Adams, examining abortion-related votes in Congress from 1973 through 1994 as a measure of the abortion views of the political system's elites, concluded that it was not until 1979 (perhaps not coincidentally, at the same time Weyrich and Viguerie organized pro-life PACs¹⁴⁸) that congressional Republicans began to vote against abortion at a higher rate than Democrats in Congress. Adams observes: "Up until 1979, for instance, Senate Republicans were split over abortion in about the same proportion as House Democrats. Looking across both chambers, abortion was not a particularly partisan issue. From 1979 on, though, the two groups diverge. Senate Republicans become increasingly more pro-life, while House Democrats grow more pro-choice."¹⁴⁹ Congressional Democrats and Republicans "were only moderately divided over abortion during the 1970s but became extremely polarized by the latter half of the 1980s.

REPUBLICAN PARTY PLATFORM OF 1984 (1984), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25845>.

The Democrats also began mildly and quickly moving in the opposite direction as the party gradually aligned itself with support for abortion rights. The 1976 platform said: "We fully recognize the religious and ethical nature of the concerns which many Americans have on the subject of abortion. We feel, however, that it is undesirable to attempt to amend the U.S. Constitution to overturn the Supreme Court decision in this area." DEMOCRATIC NAT'L COMM., DEMOCRATIC PARTY PLATFORM OF 1976 (1976), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29606>. The 1980 platform declared that "[t]he Democratic Party supports the 1973 Supreme Court decision on abortion rights as the law of the land and opposes any constitutional amendment to restrict or overturn that decision." DEMOCRATIC NAT'L COMM., DEMOCRATIC PARTY PLATFORM OF 1980 (1980), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29607>; see also CHRISTINA WOLBRECHT, *THE POLITICS OF WOMEN'S RIGHTS: PARTIES, POSITIONS, AND CHANGE 23-72* (2000) (describing party platforms, including positions on abortion).

148. See *supra* notes 129-130 and accompanying text.

149. Greg D. Adams, *Abortion: Evidence of an Issue Evolution*, 41 AM. J. POL. SCI. 718, 723 (1997). By the early 1990s, Democratic members of Congress were voting the abortion-rights position eighty percent of the time, while Republicans took the right-to-life position by the same margin. *Id.* at 724, 725 fig.2. The appendix to the Adams article includes dozens of abortion-related votes during the period from 1973 to 1994. *Id.* app. at 736 (listing votes by bill number). After *Roe*, opponents of abortion raised the issue in Congress on a variety of grounds, including constitutional amendments, funding, and other issues. For example, various versions of a proposed constitutional amendment to overturn *Roe* have been introduced regularly in Congress. See *Human Life Amendment Highlights, United States Congress (1973-2003)*, NAT'L COMM. FOR A HUMAN LIFE AMENDMENT, <http://www.nchla.org/datasource/iddocuments/HLAHghlts.pdf> (last visited Jan. 18, 2011). The congressional debate over federal funding of abortions through the Medicaid program also began early, with frequent votes. See *Public Funding for Abortion: Medicaid and the Hyde Amendment*, NAT'L ABORTION FED'N (2006), http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/public_funding.pdf.

Only after Republicans in Congress began to vote systematically against abortion did polling reveal members of the Republican Party to be more opposed to abortion than members of the Democratic Party. Extrapolating from answers to questions about abortion posed to Americans since 1972 by the General Social Surveys (GSS), Adams finds that “Republicans were more pro-choice than Democrats up until the late 1980s.”¹⁵⁰

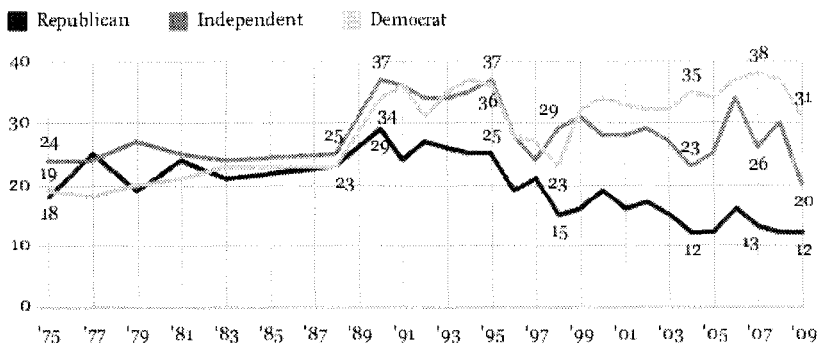
Gallup polling data support Adams’s analysis of the GSS. Only after 1988 does Gallup consistently show more Democrats than Republicans supporting access to abortion.¹⁵¹ Another researcher, drawing on longitudinal polling data

150. Adams, *supra* note 149, at 730-31. The GSS asks respondents whether they would support abortion as a legal option for a woman under any of six circumstances: “(a) If there is a strong chance of a serious defect in the baby? (b) If she is married and does not want any more children? (c) If the woman’s own health is seriously endangered by the pregnancy? (d) If the family has a very low income and cannot afford any more children? (e) If she became pregnant as a result of rape? (f) If she is not married and does not want to marry the man?” *Id.* at 728 n.8.

151. Gallup offers the following graph:

1975-2009 Trends in U.S. Views on Abortion, by Party ID

% Legal under any circumstances



Figures based on average of all polls conducted in each calendar year

GALLUP

Saad, *supra* note 146. In Gallup polls from 1975 until 1988, Democrats and Republicans gave identical answers, within the margin of sampling error, to the question of whether abortion should be legal under any circumstances. In 1988, 23% of each group answered “yes.” Only after that did the parties diverge on the question, with Democratic support rising somewhat erratically over the next twenty years while Republican support fell steadily and sharply. Even in 2009, answers by Democrats and Republicans to the question of whether abortion should be legal “under certain circumstances” were statistically identical at slightly over 50%. *Id.*; cf. Samantha Luks & Michael Salamone, *Abortion, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 80, 98-99 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (“After 1985, attitudes diverged, with Republicans (and to a lesser extent,

from the National Election Study, sets the date of realignment even later, concluding that “it is only since 1990 that Democrats have been consistently more pro-choice than Republicans. Prior to that, partisan differences were slight.”¹⁵² Only gradually have we come to “a system in which pro-choice citizens generally identify themselves as Democrats and pro-life citizens generally identify as Republicans.”¹⁵³

The scholars who have studied party polarization around abortion suggest that the change in position of the Republican and Democratic parties appears to have resulted from the efforts of party leaders rather than from pressure by party members.¹⁵⁴ Whether this hypothesis holds, the more fundamental point on which the analysts of party realignment around abortion agree is that membership of the national political parties diverged into their current polarized positions on abortion only in the late 1980s—ten or fifteen years after *Roe*.

III. BLAMING *ROE*: JURICENTRIC AND POLITICAL ACCOUNTS OF CONFLICT

How might the history of conflict over abortion before *Roe* inform our understanding of the nature of conflict over abortion after *Roe*? In this Part, we survey commentary in the academy and popular press that attributes escalating conflict over abortion to the Court’s decision in *Roe*. The “*Roe*-caused-

Independents) becoming increasingly opposed to abortion, while Democrats became somewhat more supportive of abortion.”).

152. Paul Freedman, *Framing the Abortion Debate: Public Opinion and the Manipulation of Ambivalence* 67 (1999) (unpublished Ph.D. dissertation, University of Michigan) (on file with authors).

153. *Id.* at 68.

154. One study concluded that the parties’ positions did not diverge in response to voter preferences—rejecting the hypothesis that “the parties were pulled apart by the positions of their voters” and suggesting that “[i]t seems likely that the party positions have diverged as the parties catered to a subset of political activists organized into interest groups.” ELIZABETH ADELL COOK, TED G. JELEN & CLYDE WILCOX, *BETWEEN TWO ABSOLUTES: PUBLIC OPINION AND THE POLITICS OF ABORTION* 166, 170 (1992) (correlating attitudes on abortion with voting patterns during the 1970s and 1980s using data from the American National Election Studies). In his study of party realignment on abortion, Greg Adams also reads the data as suggesting that party leaders adopted their current positions on abortion in advance of their members. Adams, *supra* note 149, at 734-35. Adams associates his findings with the “issue evolution model,” finding that “[t]he process unfolds gradually, and causality appears to run from elites to masses, rather than from masses to elites.” *Id.* at 718. For more on the general concept of issue evolution, see EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* (1989).

backlash” narrative has acquired a life of its own, such that those who invoke it scarcely look to history. In what follows, we survey familiar claims about *Roe*’s role in causing conflict and then consider how the history that we have examined in this paper illuminates different structures of motivation for conflict over abortion.

A. Claims About *Roe*

Accounts of abortion backlash differ in the particular failings that they ascribe to the Supreme Court, but the assumption that binds them together is that it was the Court’s decision in *Roe* that began conflict over abortion.¹⁵⁵ As Ken I. Kersch, director of the Clough Center for the Study of Constitutional Democracy at Boston College, explains, “Politically, the Court’s decision to declare abortion to be a national right served as a catalyst for the Right to Life movement. That movement, in turn, played a major role in realigning the party loyalties of millions of Americans.”¹⁵⁶

Not only is it commonly assumed that *Roe* started the conflict over abortion but the common assumption, both outside and within the legal academy, is that *Roe* has driven the realignment of Republican and Democratic voters around abortion. According to Benjamin Wittes, “One effect of *Roe* was to mobilize a permanent constituency for criminalizing abortion—a constituency that has driven much of the southern realignment toward conservatism.”¹⁵⁷ As Cass Sunstein put it, “[T]he decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women’s movement by spurring opposition and demobilizing potential adherents.”¹⁵⁸ Or as Sanford Levinson explains, “I have often referred to *Roe*

155. For example, Cynthia Gorney attributes nationalization of the right-to-life movement to the *Roe* decision rather than the efforts of the Catholic Church that began in 1967, almost six years before the decision. Compare Cynthia Gorney, *Imagine a Nation Without Roe v. Wade*, N.Y. TIMES, Feb. 27, 2005, at WK5 (“Indeed, *Roe* created the national right-to-life movement, forging a powerful instant alliance among what had been scores of scattered local opposition groups.”), with *supra* Section II.A (showing that Catholic opposition to decriminalizing abortion was highly motivated and nationally organized before the Supreme Court ruled).

156. Ken I. Kersch, *Justice Breyer’s Mand[a]rin Liberty*, 73 U. CHI. L. REV. 759, 797 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

157. Benjamin Wittes, *Letting Go of Roe*, THE ATLANTIC, Jan./Feb. 2005, at 48, 51.

158. Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991); see also Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739, 1751 (1997) (describing the “conventional understanding of *Roe v.*

as ‘the gift that keeps on giving’ inasmuch as it has served to send many, good, decent, committed largely (though certainly not exclusively) working-class voters into the arms of a party that works systematically against their material interests but is willing to pander to their serious value commitment to a ‘right to life.’”¹⁵⁹ David Brooks charges yet more harshly: “Justice Harry Blackmun did more inadvertent damage to our democracy than any other 20th-century American. When he and his Supreme Court colleagues issued the *Roe v. Wade* decision, they set off a cycle of political viciousness and counter-viciousness that has poisoned public life ever since.”¹⁶⁰ Robert P. George invokes *Roe* in warning the Supreme Court not to accept the constitutional claim for same-sex marriage: “By short-circuiting the democratic process, *Roe* inflamed the culture war that has divided our nation and polarized our politics.”¹⁶¹

Thus, *Roe* not only is believed by many to have ignited conflict over abortion but also is commonly represented as having single-handedly caused societal polarization and party realignment around the question of abortion. Backlash narratives about *Roe* thus rest both on temporal assumptions (that conflict over abortion and polarization began with *Roe*) and on institutional assumptions (that the Supreme Court decision caused the abortion conflict, societal polarization, and party realignment).

Those who claim that the Court caused the abortion conflict in fact offer different accounts of why the Court’s decision had such powerful effects on the nation’s politics. They assert that *Roe* caused backlash because the decision nationalized conflict,¹⁶² because the Court was too far ahead of public

Wade” as the notion that, “far from reconciling abortion opponents to a woman’s fundamental right to terminate her pregnancy, the decision actually spawned a right-to-life opposition which did not previously exist”).

159. Sanford Levinson, *Should Liberals Stop Defending Roe?: Sanford Levinson and Jack M. Balkin Debate*, LEGAL AFFAIRS (Nov. 28, 2005), www.legalaffairs.org/webexclusive/debateclub_ayotte1205.msp. Larry Bartels offers an analysis of election returns that disputes this common view, contending that it better describes developments in the South and among better-educated white voters. See *infra* note 199.

160. Brooks, *supra* note 4.

161. Robert P. George, Op-Ed., *Gay Marriage, Democracy, and the Courts*, WALL ST. J., Aug. 3, 2009, at A11.

162. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in part and dissenting in part) (“Not only did *Roe* not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. . . . *Roe*’s mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level.”); *id.* (asserting that before *Roe*, “[n]ational politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress”).

opinion,¹⁶³ or because the decision prevented compromise. The premise on which all of these accounts rest is that bad judicial decisionmaking—whatever the opinion’s precise flaws—caused bad politics. Escalating conflict is a symbol of a politics deformed by judicial overreaching.

The underlying assumption is that the Court blundered by issuing a decision that shut down politics, short-circuiting a process of democratic-based legislative change that would have been accorded more legitimacy, even by those members of the public who disagreed with it. In *What’s the Matter with Kansas*, Thomas Frank charged that:

[*Roe*] unilaterally quashed the then-nascent debate over abortion, settling the issue by fiat and from the top down. And it cemented forever a stereotype of liberalism as a doctrine of a tiny clique of experts, an unholy combination of doctors and lawyers, of bureaucrats and professionals, securing their “reforms” by judicial command rather than by democratic consensus.¹⁶⁴

163. It is also commonly asserted that the Court caused conflict because it rendered a decision that diverged from popular opinion. Jeffrey Rosen, for example, contrasts *Roe* with *Brown*, which he asserts “was supported by more than half of the country when it was handed down . . . [while] *Roe v. Wade* was an entirely different matter. The Court’s decision, in 1973, to strike down abortion laws in forty-six states and the District of Columbia was high-handed, and represents one of the few times that the Court leaped ahead of a national consensus.” Jeffrey Rosen, *The Day After Roe*, THE ATLANTIC, June 2006, at 56, 56-57. Rosen also contends that the Court could have avoided backlash if only it had limited its holding to the termination of early pregnancies. Jeffrey Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L.J. 1, 8 (2007) (“The parts of *Roe* that provoked a backlash were those that called into question later term restrictions that most Americans support.”).

Historical evidence does not suggest that a more temporally limited abortion right would have been acceptable to the antiabortion movement at the time of *Roe*. The fervent minority who entered politics to work against abortion rights before and after *Roe* sought criminalization and were not willing to settle for less. To those who believe that abortion is murder, there is no middle ground; it makes no difference whether a judicial or legislative decision permits abortion up to twelve weeks’ gestation or twenty. That is why the Catholic Church began to organize at the national level to block abortion reform when the only reform on offer was the ALI therapeutic legislation. See *supra* notes 66-79 and accompanying text; see also Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173, 173 (1960) (attacking, from a Catholic perspective, the abortion provisions of the proposed Model Penal Code, recently tentatively approved by the ALI, and describing the proposal as “a violent departure from all existing laws”).

164. THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA* 199 (2004).

The assumption that *Roe* caused backlash by repressing politics is now part of how we reason about courts.¹⁶⁵ It made an appearance in the case challenging the constitutionality of California’s ban on same-sex marriage, in the form of Judge Vaughn Walker’s question to Ted Olson at the close of testimony. Questioning the plaintiffs’ attorney, Judge Walker asked:

[I]sn’t the danger . . . to the position that you are taking is not that you’re going to lose this case, either here or at the Court of Appeals or at the Supreme Court, but that you might win it?

And, as in other areas where the Supreme Court has ultimately constitutionalized something that touches upon highly-sensitive social issues, and taken that issue out of the political realm, that all that has happened is that the forces, the political forces that otherwise have been frustrated, have been generated and built up this pressure, and have, as in a subject matter that I’m sure you’re familiar with, plagued our politics for 30 years, isn’t the same danger here with this issue?¹⁶⁶

David Brooks has expressed a similar conviction:

Harry Blackmun and his colleagues suppressed that democratic abortion debate the nation needs to have. The poisons have been building ever since. You can complain about the incivility of politics, but you can’t stop the escalation of conflict in the middle. You have to kill it at the root. Unless *Roe v. Wade* is overturned, politics will never get better.¹⁶⁷

165. See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279, 1312 (2005) (“*Roe* essentially declared a winner in one of the most difficult and divisive public law debates of American history. Don’t bother going to state legislatures to reverse that decision. Don’t bother trying to persuade your neighbors (unless your neighbor is Justice Powell.)”); Michael Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 *FORDHAM L. REV.* 1739, 1751 (1997) (describing the “conventional understanding of *Roe v. Wade*” as being that, “far from reconciling abortion opponents to a woman’s fundamental right to terminate her pregnancy, the decision actually spawned a right-to-life opposition which did not previously exist”).

166. Transcript of Record at 3095, *Perry v. Schwarzenegger*, No. C 09-2292-VRW (N.D. Cal. June 16, 2010). Mr. Olson replied, “I think the case that you’re referring to has to do with abortion,” to which Judge Walker responded: “It does indeed.” *Id.*

167. Brooks, *supra* note 4 (“When Blackmun wrote the *Roe* decision, it took the abortion issue out of the legislatures and put it into the courts. If it had remained in the legislatures, we would have seen a series of state-by-state compromises reflecting the views of the centrist majority that’s always existed on this issue. These legislative compromises wouldn’t have

This is a compelling story. We will have a better politics—civil, respectful, compromising—which will reassert itself as soon as the Court withdraws and leaves democracy to work itself pure.¹⁶⁸ Had the Court never enforced its (mistaken?) understanding of the Constitution, we would have civic peace.¹⁶⁹

The power of this story is its power as a story. What is often missing is the kind of fact-based analysis of competing explanations for the abortion conflict that would support it.

B. Court-Centered and Political Accounts of Conflict: Some Questions

Why did the abortion debate escalate and become the defining site of political division in the nation? The history of the abortion conflict in the period before *Roe* raises a variety of questions about Court-centric explanations for *Roe* rage—and accordingly suggests the need for historical inquiry into the sources of the polarization so often attributed to the decision. While the history of conflict over abortion before *Roe* cannot tell us what happened after the Court ruled, it can and does raise powerful questions about the logic of polarization in the decades after *Roe* precisely because it demonstrates how the abortion conflict could accelerate and become entangled in party politics in a period when the abortion conflict cannot be plausibly construed as a response to judicial review. The history of the pre-*Roe* period thus illustrates the need for a deep history of the post-*Roe* period if we are to make any reliable judgments about how and why *Roe* came to be the site of polarizing and identitarian conflict that it now is.

The dominant account of the abortion conflict is Court-centered: it explains the abortion conflict as a bad form of politics triggered in response to the Supreme Court's efforts to shut down democratic decisionmaking.¹⁷⁰ Our history of the pre-*Roe* period, by contrast, shows how ordinary politics can produce escalating forms of conflict over abortion, without the intervention of courts.

pleased everyone, but would have been regarded as legitimate. Instead, Blackmun and his concurring colleagues invented a right to abortion . . .”).

168. Cf. FRANK, *supra* note 164, at 121 (invoking “the great abortion controversy, which mobilizes millions but which cannot be put to rest without a Supreme Court decision overturning *Roe v. Wade*”).

169. Critics of *Roe* frequently assert that *Roe* disrupted a process of state-by-state legislative compromise on abortion that would have produced general public acceptance of laws liberalizing access to abortion. The case is very far from clear. Liberalization efforts seem to have stalled after 1970. See *supra* note 69 and accompanying text; *infra* note 175.

170. See *supra* notes 163-169 and accompanying text.

This political account of conflict generates a variety of historical questions about the genesis and shape of the abortion controversy. With an appreciation of the many ways in which nonjudicial actors can provoke escalating forms of conflict, the political account is interested in the role that the Catholic Church played in escalating and in nationalizing the abortion conflict in the years before *Roe*.¹⁷¹ By 1967, the National Conference of Catholic Bishops responded to the introduction of ALI reform bills in state houses across the nation by creating a national organization devoted to blocking abortion reform.¹⁷² What led the National Conference of Catholic Bishops to found what would come to be known as the National Right to Life Committee—an organization that funded and organized opponents of abortion reform at the state level and helped develop secular and nonsectarian arguments against abortion’s decriminalization? The provocation was not judicial review but instead increasing popular support for reforming abortion law.¹⁷³ Conflict intensified precisely because law was beginning to change in response to growing public interest in abortion reform, and a minority that cared passionately about the issue had the resources to organize in opposition—a possibility that the Court-centered account of backlash does not consider.

The political account understands that countermobilization and escalating conflict (often referred to as “backlash”) is a normal response to increasing public support for change that may—but certainly need not—have a relationship to judicial review.¹⁷⁴ Just as the political account suggests why

171. For scholars of the abortion conflict before us who have asked questions of this kind, see, for example, sources cited *supra* note 15.

172. See *supra* Section II.A.

173. See Fiske, *supra* note 77, at 35 (“The action on abortion was proposed by the Most Rev. Walter W. Curtis, Bishop of Bridgeport, who stated that the number of states in which there are campaigns to liberalize laws against abortion has grown from 12 last September to 31 at the present time.”). For an account of the Catholic Church’s decision to separate the National Right to Life Committee from official connection to the Church in the immediate aftermath of the *Roe* decision, see PAIGE, *supra* note 70, at 57, 62-63, which describes that separation as well as a 1974 lawsuit challenging “both the USCC and the National Right to Life Committee for violating the rules prohibiting political activities by non-profit organizations.”

174. As one of us has observed:

Countermobilization is likely to occur only as movement claims begin to elicit public response. Utopians and cranks can make all the claims on a constitutional tradition they want; but they are by definition marginal. On the other hand, when a movement advances transformative claims about constitutional meaning that are sufficiently persuasive that they are candidates for official ratification, movement advocacy often prompts the organization of a counter-movement dedicated to defending the status quo. At just the point that a movement for

increasing public support for change can motivate conflict, it understands that countermobilization can block change, *despite* increasing public support. The political account of conflict thus generates questions about the dynamics of legislative change in the period before *Roe*. Does the fact that legislative abortion reform seemed to stall after 1970 reflect the countermobilizing efforts of a large, well-financed, and nationally networked group that voted on a single-issue basis,¹⁷⁵ or does the failure of legislative reform after 1970 instead

social change begins to elicit public response, it is likely also to elicit this energetic defense of status quo, which, since the filibuster over the 1964 Civil Rights Act, has been referred to as “backlash.”

Siegel, *supra* note 52, at 1362-63 (footnotes omitted).

175. By the early 1970s, “abortion had become a public and controversial enough concern that it had become increasingly difficult to pass legislative initiatives.” BURNS, *supra* note 15, at 218; see sources cited *supra* note 15. State-by-state efforts to liberalize abortion law met a much larger and more organized opposition following the 1970 “high point” of successful reform legislation. See ABORTION POLITICS IN AMERICAN STATES 4 (Mary C. Segers & Timothy A. Byrnes eds., 1995). In the years immediately after decriminalization in New York, “public opinion polls showed better than 60 percent popular support for the 1970 law, but the intensity and commitment of abortion opponents had more than offset the majority sentiment.” GARROW, *supra* note 23, at 546-47. Abortion law liberalization in New York led to a response from the Catholic Church hierarchy that “helped stimulate a very politically influential right to life upsurge all across the country . . .” Garrow, *supra* note 15, at 841.

This pattern was followed elsewhere as groups supported by the Catholic Church displayed organization and motivation that overwhelmed popular support for change. Robert Karrer describes the local response to a proposed reform measure in Michigan that received national attention and was seen as a bellwether for the fate of the state-by-state reform effort. Karrer, *supra* note 79. Early in 1970, “the opposition consisted of the Michigan Catholic Conference and a handful of anti-abortion physicians, ministers, and lawyers who recruited ordinary citizens to speak out against the proposed bill in public hearings across the state.” *Id.* at 75. Within two years, Michigan opponents formed organizations, found local and national allies, and, by the spring of 1972, were able to hire an advertising agency to spend \$250,000 for radio and television advertising. *Id.* at 85-87. Opponents took out full-page newspaper ads, set up booths at county fairs, and effectively used preexisting religious networks. See *id.* at 88, 94. Legislative reform “failed because anti-abortionists were more organized, used more sophisticated advertising, and ably articulated the moral issue” in a way that abortion reform advocates were not prepared to match. *Id.* at 95. For an account of the role of the Catholic Church in blocking legislative reform, see STANSELL, *supra* note 43, noting that

[i]n every state where there was a significant Catholic presence, the hierarchy instituted a parish-by-parish effort to block reform bills. . . . But despite the huge resources the Catholic Church had at its disposal, there was an insoluble problem: Its influence stopped short of federal appeals courts, and the courts were issuing sympathetic decisions on abortion cases with increasing frequency.

Id. at 321; see also *supra* notes 69-70, 78 (describing the Church’s role in opposing abortion reform in a variety of states).

reflect the views of a popular majority?¹⁷⁶ Examining the logic of conflict in the pre-*Roe* era identifies important questions about the dynamics of conflict in the period after the decision and, more generally, about the model of politics that implicitly organizes stories of constitutional change.

The Catholic Church was not the only institution to shape the abortion conflict in the pre-*Roe* period. As we have seen in Section II.B, the Republican Party began to shift position on abortion between 1970 and 1972 as party strategists came to appreciate that the issue might be used to court Catholic single-issue voters historically aligned with the Democratic Party. The pre-*Roe* record thus illustrates how the competition between the national political parties for voters supplies a powerful motivation for party leaders to enter—or even change positions—in the abortion conflict. As party strategists explained: “[F]avoritism toward things Catholic is good politics; there is a trade-off, but it leaves us with the larger share of the pie.”¹⁷⁷ In the period between 1970 and 1972, the Republican Party’s interest in raiding the Democratic Party’s traditional coalition of voters supplied reason for President Nixon to take a stand on abortion at odds with positions staked out by his own administration and allies.

This shift in elite politics was at least in part responsive to beliefs of mobilized groups of voters. Yet, causal arrows run in both directions. The efforts of strategists to attract new voters into the party could also fatefully contribute to reshaping popular understandings of abortion—by the end of the 1980s transforming abortion into a symbol of partisan identity bearing on questions of sex, religion, and even race.

As the record before *Roe* richly illustrates, as Republican Party leaders began attacking abortion to court Catholic Democratic voters, they began to argue about abortion in new ways, framing abortion in terms that helped change its social meaning. Where prominent leaders of the Republican Party had associated abortion with “population control,”¹⁷⁸ Pat Buchanan and Kevin Phillips began to associate abortion with “permissive” youth movements that

176. Opinion polls offer an important window into political developments, even if opinion polls supply no information about who enters politics in order to vindicate their views, who has the resources to persuade others, or how issues are bundled or presented. In this case, it is striking that polling data from the period just before *and after* the *Roe* decision seem to show rising public support for liberalizing access to abortion. See sources cited *supra* note 118.

177. Dividing the Democrats, Memorandum from “Research” to the Att’y Gen. H.R. Haldeman 5 (Oct. 5, 1971), in *Hearings Before the S. Select Comm. on Presidential Campaign Activities*, 93d Cong. 4197, 4201 (1973) (emphasis omitted). See generally Section II.B.

178. See *supra* Section I.B. President Nixon appointed a commission, chaired by John D. Rockefeller III, to report on population growth and the American future. ROCKEFELLER COMMISSION REPORT, reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 201.

challenged traditional social roles. During the 1972 presidential campaign, Republicans used the “triple-A” strategy to tar McGovern with support for “abortion on demand” and other symbols of feminist activism—even as McGovern refused to support the feminist plank on abortion rights at the Democratic Party’s 1972 Convention.¹⁷⁹ It bears noting that this Republican strategy importantly depended on antecedent associations that had only recently been forged by feminist abortion-rights activism. The Republican Party’s use of the triple-A frame to attack McGovern in the 1972 campaign illustrates how the feminist movement’s entrance into the debate over abortion had imbued abortion with powerful new symbolic associations that in turn enabled—and motivated—new forms of conflict around the practice. Early public health and population control arguments for reforming abortion law contemplated no challenge to women’s traditional family role; by contrast, feminist repeal arguments tied abortion to arguments for changing women’s sexual, economic, and political roles¹⁸⁰—as Phyllis Schlafly, a Catholic cold-warrior who brilliantly led countermobilization against the ERA, began to emphasize, even before the 1972 election.¹⁸¹ Attuned to these shifts in popular support for repeal of abortion laws, Nixon’s reelection campaign could thus attack abortion as a general symbol of social “permissiveness” (as the “triple-A” attack on McGovern illustrated), much as the campaign attacked crime and presented Nixon as the candidate of law and order.¹⁸²

There were, in short, several institutions engaged in conflict over abortion in the decade before *Roe* that had independent motives and independent pathways for conflict in the decades after *Roe* (for example, the Catholic Church, the adversaries in the campaign to ratify the ERA, and the national political parties competing for voters).

179. Feminist writer Germaine Greer covered the convention for *Harper’s Magazine*. Germaine Greer, *McGovern, The Big Tease*, HARPER’S MAG., Oct. 1972, at 56. She related her dismay at what she called “the railroading of the abortion issue” by the McGovern campaign, as well as at the way in which Gloria Steinem and other feminist leaders allowed the campaign to marginalize the National Women’s Political Caucus. *Id.* at 66. Though the 1972 Democratic Platform included a substantial section on the “Rights of Women,” there was no mention of abortion or reproductive issues. DEMOCRATIC NAT’L COMM., DEMOCRATIC PARTY PLATFORM OF 1972 (1972), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29605>.

180. Compare Sections I.A-B (discussing initial arguments for abortion reform based on public health and social welfare), with Sections I.C-D (discussing subsequent feminist arguments for abortion reform).

181. See *supra* note 107 and accompanying text.

182. See Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 259 (2007).

If we are to understand not only “whether” but also “how” and “why” judicial review played a role in escalating the abortion conflict, there is much that we yet need to investigate concerning the dynamics of conflict over abortion the years after *Roe*. For example, if the Court’s decision in *Roe* was the sole cause of backlash, why did polls after *Roe* show no sign of decline in public support for abortion – and by some measures, record an increase in support for liberalizing access to abortion?¹⁸³ Who attacked the Court’s abortion decision and when? Why, for example, was there not a single question asked about *Roe* at the confirmation hearings of Justice John Paul Stevens nearly three years after the decision?¹⁸⁴ Why did it take until the end of the 1970s for the Southern Baptist Convention to oppose abortion categorically¹⁸⁵ and for leaders of conservative Protestant evangelicals to enter politics in opposition to *Roe*?¹⁸⁶ And, strikingly, why did those affiliated with the Democratic and Republican parties switch positions on abortion in the decades after *Roe*? For that matter, how is it that leaders of the national political parties seem to have switched

183. Popular support for abortion’s legalization had been rising before the decision, *see supra* note 119 and accompanying text, and, depending on the poll, either continued to rise afterward or remained stable at a high level. *See, e.g.*, Donald Granberg & Beth Wellman Granberg, *Abortion Attitudes, 1965-1980: Trends and Determinants*, FAM. PLAN. PERSP., Sept.-Oct. 1980, at 250, 252 (“Following the 1973 Supreme Court decisions that ruled restrictive state abortion laws unconstitutional, there was a five-point rise in average approval. . . . The one-year increase between 1972 (before the Supreme Court abortion decisions) and 1973 (after the decisions) was sharper than the average annual increase of about three points between 1965 and 1972.”). More than two years after *Roe*, the Harris Survey reported that approval of permitting access to abortion during the first trimester of pregnancy had reached “the highest level of support the Harris Survey has ever recorded for legal abortion [54 percent] and a turnabout from 1972 when abortion in the first trimester of pregnancy was opposed by a 46 to 42 percent plurality.” Louis Harris, *Majority Supporting Abortion Laws Grows*, CHI. TRIB., May 26, 1975, at 7. This article concluded that “[t]here is no doubt that the U.S. Supreme Court decision solidified public support for legalizing abortion.” *Id.* Also in 1975, the respected California-based Field Poll reported a sharp increase in support for abortion among California adults. *See* Mervin D. Field, *Poll Shows Dramatic Rise in Support for Abortions*, L.A. TIMES, Apr. 2, 1975, at D1. Whatever these various polls have to offer in the nature of scientific proof, they at least serve to refute any notion that the public greeted *Roe* with a spontaneous negative reaction.

184. Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749, 751 (2010).

185. *See* BEFORE *ROE V. WADE*, *supra* note 6, at 71-72 (discussing positions of the Southern Baptist Convention and the National Association of Evangelicals in the period before and after *Roe*); *see also supra* note 132 (periodizing shifts in position and political activism of the Southern Baptist Convention on abortion in the decades after *Roe*).

186. *See supra* notes 137-144 and accompanying text.

positions on abortion nearly a decade *before* citizens affiliated with the parties?¹⁸⁷

A Court-centered account of conflict does not seem well suited to notice these historically specific features of polarization over abortion—or to explain them. Where the Court-centered account interprets signs of extraordinary conflict over abortion as evidence that the Court has repressed politics,¹⁸⁸ the political account of backlash asks whether extraordinary conflict and polarization over abortion might instead be the very expression of politics.

In particular, this paper raises the question of whether extraordinary conflict and polarization over abortion might be the expression of the special form of politics associated with partisan competition to realign voters. Here electoral data are striking, although by no means dispositive. It would appear that a majority of Republicans in Congress began to vote against abortion in 1979, nearly a decade before polls registered similar trends among citizens affiliated with the Republican Party—a sign that abortion was entangled in realignment strategies of the Republican Party in the late 1970s, as it was in the years just before *Roe*.¹⁸⁹ As we probe the accuracy and significance of these numbers, we can also test them against other forms of evidence. For example, we know that New Right leaders, including Paul Weyrich and Richard Viguerie, played a crucial role in disciplining the voting of Republicans in Congress in the late 1970s.¹⁹⁰ These actors have left a rich record of their concerns.¹⁹¹ Like Pat Buchanan and Kevin Phillips in the pre-*Roe* period, Viguerie and other movement strategists were frank about their interest in using abortion as a way to attract voters: “The New Right is looking for issues that people care about, and social issue[s], at least for the present, fit the bill,”

187. See *supra* notes 147-150 and accompanying text. For evidence of this shift expressed in party platforms, see *supra* note 147.

188. See *supra* notes 163-168 and accompanying text.

189. See *supra* Section II.C. It would appear that Watergate disrupted the focus of the Republican Party on abortion, as it disrupted much else. The team of Gerald Ford and Nelson Rockefeller, who completed the remainder of Nixon's 1972 term, generally were supportive of women's rights and the liberalization of abortion. See *supra* note 124 (discussing views on abortion held by leaders of the Ford Administration).

190. See *supra* note 129. For more on Viguerie's role in developing direct mail fundraising for the New Right, see Siegel, *supra* note 130, at 212-14, and on his role in developing direct-mail fundraising strategies that integrated the antiabortion movement into the electoral strategies of the New Right, see PAIGE, *supra* note 70, at 125-217, which discusses, among other issues, the development of “ballots for babies” strategies.

191. For example, coverage of abortion in Viguerie's magazine *Conservative Digest* is sparse in 1975 but spikes by 1979, see *supra* notes 129-130,—the year that more Republicans than Democrats in Congress vote against abortion, *supra* note 149 and accompanying text.

Paul Weyrich explained, adding: “Yes, [social issues] are emotional issues, but that’s better than talking about capital formation.”¹⁹²

Weyrich’s remarks illustrate how abortion’s entanglement in realignment politics reflects a complex mix of top-down and bottom-up forces. New Right strategists for the Republican Party seem to have recognized—and indeed to have helped create—abortion as a vivid symbol to motivate political participation. By 1979, Republicans could invoke abortion to talk about opposition to the Equal Rights Amendment and Christian concerns of “secular humanism”¹⁹³ as well as to protest the excesses of a Supreme Court that, in matters of family and faith (and, for many, crime and race¹⁹⁴) had strayed far from the Framers’ intent.¹⁹⁵

In the 1960s, Republicans initially courted Democratic voters with a “southern strategy” famously focused on issues of race. But by the 1970s, as we have seen, Phillips, Buchanan, Weyrich, and Viguerie were exploring how to realign voters by appeal to the new “social issues”¹⁹⁶ (a term that Buchanan’s

192. *The New Right: A Special Report*, CONSERVATIVE DIG., June 1979, at 10.

193. See *supra* notes 137-140 and accompanying text; see also Perry, *supra* note 144, at 103 (reporting that Richard Viguerie promoted connection between “abortions,” “sexual ethics,” and “secular humanism”).

194. The Republican Party began to recruit Democratic voters with a strategy initially focused on race (whether through “busing” or “law and order”). See PHILLIPS, *supra* note 89, at 461-74; Weaver, *supra* note 182. Over the course of the 1970s, conservatives would identify a new set of “social issues,” prominently including matters of family and faith. Viguerie and Weyrich played an important role in persuading evangelical Protestants—by the late 1970s beginning categorically to oppose abortion—to enter politics around abortion. In several accounts, however, Weyrich has insisted that what actually concerned and motivated conservative Protestants to enter politics was the federal government’s threat to withdraw the tax-exempt status of any evangelical school that was not racially integrated. See *supra* note 141 and accompanying text.

195. One of us has elsewhere argued that the New Right’s appeal to originalism gave constitutional form to a “social issues” agenda that the Republican Party used in service of realignment. See Siegel, *supra* note 130, at 218 (“Meese’s speeches endorsing original intent . . . gave the movement’s constitutional politics jurisprudential form.”); *id.* at 221 (showing how, by the 1980s, the Reagan Administration was appealing to the Constitution’s “original intent” to challenge “disfavored lines of cases that tracked ‘social issues’ of the New Right (for example, the rights of criminal defendants, school prayer, and contraception and abortion)”; *id.* at 224 (observing that “originalism advanced the ‘social issues’ agenda of the New Right”); see also *id.* at 217 n.122 (discussing polling by Weyrich’s Heritage Foundation in the spring of 1980 eliciting public attitudes on courts and “such ‘social issues as abortion, busing and voluntary prayer in the schools” (quoting John Chamberlain, *Moral Issues Not a Good Core for Political Coalitions*, IRONWOOD DAILY GLOBE, Dec. 1, 1981, at 4)).

196. See *supra* notes 129 & 192.

“Assault Book” first used in reference to abortion¹⁹⁷). In 1977, Ronald Reagan, a key architect of this “social issues” realignment strategy, famously observed:

[T]he so-called social issues—law and order, abortion, busing, quota systems—are usually associated with the blue collar, ethnic, and religious groups [that] are traditionally associated with the Democratic Party. The economic issues—inflation, deficit spending, and big government—are usually associated with Republican Party members and independents. . . . The time has come to see if it is possible to present a program of action based on political principle that can attract those interested in the so called “social” issues and those interested in “economic” issues. In short, isn’t it possible to combine the two major segments of contemporary American conservatism into one politically effective whole?¹⁹⁸

Scholars of realignment are still debating how this combination of race, sex, and religion shattered the coalition that had sustained the Democratic Party since the New Deal.¹⁹⁹ What we have still to learn is how these developments

197. See Buchanan, *supra* note 109, at 216 (grouping abortion under “SOCIAL ISSUES—Catholic/Ethnic Concerns,” along with “Amnesty” (for draft evasion in the Vietnam war), “Marijuana,” and “Aid to Nonpublic Schools”).

198. THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 141 (1991). The speech was entitled “The New Republican Party” and was delivered on February 6, 1977, by then-Governor Ronald Reagan to the Fourth Annual Conservative Political Action Conference. See Governor Ronald Reagan, Address at the Conservative Political Action Conference: The New Republican Party (Feb. 6, 1977), available at <http://www.conservative.org/cpac/archives/cpac-1977-ronald-reagan/>.

199. There is, for example, ongoing debate over whether the “social issues” agenda has moved working-class Americans from affiliation with the Democratic Party to the Republican Party. Compare FRANK, *supra* note 164, at 5 (“While earlier forms of conservatism emphasized fiscal sobriety, the backlash mobilizes voters with explosive social issues—summoning public outrage over everything from busing to un-Christian art—which it then marries to pro-business economic policies.”), with Larry M. Bartels, *What’s the Matter with What’s the Matter with Kansas?*, 1 Q. J. POL. SCI. 201, 201 (2006) (questioning the popular account in Thomas Frank’s *What’s the Matter with Kansas?* that working-class Americans have moved from Democratic to Republican political affiliation because of a cultural issues agenda and reporting findings that it is only in the South that the Republican Party has converted a significant number of white working-class voters and that “[t]he apparent political significance of social issues has increased substantially over the past 20 years, but more among better-educated white voters than among those without college degrees”).

intersected with and shaped our understanding of the institution of judicial review.²⁰⁰

There are many possible explanations for how *Roe* has come to matter as it has. Perhaps polarization around abortion occurred because the Supreme Court repressed politics. Or perhaps partisan conflict escalated because the Court channeled politics into federal arenas, by enunciating law for the nation that was most easily reversed through national institutions. With polls in the wake of *Roe* showing growing public support for liberalizing access to abortion,²⁰¹ perhaps conflict escalated because a cohesive and well-organized minority opposed the decision and was encouraged to resist it by voting on a single-issue basis. Or perhaps conflict escalated because in the years after the decision *Roe* came increasingly to be associated with feminist challenges to the family, and so came to be viewed as a threat to traditional and religious forms of social order. Or perhaps conflict escalated because certain prominent law professors helped discredit *Roe*'s constitutional authority because they associated the decision with a line of cases that the legal academy had criticized for a generation.²⁰² Or perhaps conflict escalated because criticism of *Roe* by liberal elites legitimized demands to replace Supreme Court Justices by Americans who hated the Supreme Court's race decisions but who no longer felt as free to campaign against those rulings as they once had. Or perhaps conflict escalated because the Court's involvement in abortion gave political leaders the opportunity to unite disparate groups against the Court and in a quest for constitutional restoration, forging a new governing coalition of citizens who before never made common cause with one another.

Note how very different are these various explanations for *Roe*'s role in polarization. Note, too, how very different are their implications for the institution of judicial review. With a better account of the facts, we might conclude that the particular storm of forces that made "*Roe*" is not likely to converge again. Or, we might identify features of the Court's decision responsible for inflaming an already ongoing conflict. Even so, our ability to

200. The Republican Party's 1980 platform first made "traditional family values" and abortion the litmus in the selection of judges: "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." REPUBLICAN PARTY PLATFORM OF 1980, *supra* note 147.

201. See *supra* note 183 (observing that popular support for abortion's legalization had been rising before the Court's decision, and depending on the poll, either continued to rise afterward or remained stable at a high level).

202. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 940 (1973) (arguing that in its substantive due process analysis, *Roe* not only threatened to revive the discredited doctrine of *Lochner v. New York*, 198 U.S. 45 (1905), but also "may turn out to be the more dangerous precedent").

identify which aspects of the Court's decision aggravated an ongoing conflict would still require some account, beyond that provided by the conventional Court-centered narrative, of the structure of conflict in which the Court ruled.

CONCLUSION

To be clear, we do not argue that the Supreme Court played no role in provoking conflict over the legalization of abortion. We suggest rather that the dominance of the "Court-caused-it" backlash narrative has shortchanged both legal scholars and the general public of a more complete understanding of an important chapter in America's social, political, and legal history. Our book's account of the sources and dimensions of the abortion conflict before *Roe* suggests a considerably more complex explanation than what the conventional backlash narrative provides for what happened after *Roe*, as we demonstrate here with further evidence of the entanglement of abortion with party realignment not only after the decision but before it, as well.

The powerful preemptive effect of the juricentric narrative has blunted curiosity about *Roe*'s roots and its reception; it has become a barrier to the kind of scholarly reexamination that we hope this paper inspires. A generation of lawyers and political actors has come of age schooled in *Roe* as a chastening lesson on the consequences of relying on courts to address the claims of those engaged in challenging social norms and existing arrangements. But we believe that a more complete understanding of *Roe*'s story may offer a different, more productive lesson. That lesson is not that adjudication inevitably causes political conflict and polarization and is thus to be avoided at all cost. Conflict is a part of our political life. And adjudication plays a special role in defining our political community. Rather, the history of conflict before and after *Roe* suggests that in thinking about the possibilities and limits of adjudication, we need to be attentive to the motives for conflict that emerge from sources outside as well as inside the courtroom, from directions and actors that may shift over time.

As we noted at the beginning of the paper, facts matter. The stakes in achieving a more accurate appreciation of what occurred before (and after) *Roe v. Wade* are substantial for our understanding of the relationship between courts and politics. An account of the pre-*Roe* period in all its multidimensional richness instructs us, on the one hand, that extremes of conflict can occur, and important social conversations can emerge, without reference to courts at all. On the other hand, from the perspective of nearly four decades after the decision, we see that judicial review, far from forcing an end to politics, offers a canvas on which nonjudicial actors continue to paint, reconfiguring legal

BEFORE (AND AFTER) *ROE V. WADE*

meaning to their own uses, until *Roe v. Wade* the case is all but effaced and “*Roe*” the symbol is what remains.