ESSAY

BAD EFFECTS: THE MISUSES OF HISTORY IN *BOX V. PLANNED PARENTHOOD*

Mary Ziegler†

Justice Clarence Thomas's concurrence in *Box v. Planned Parenthood of Indiana and Kentucky* sparked considerable controversy.[1] Offering a lengthy historical narrative about the relationship between abortion and eugenics, Thomas argued that one part of a disputed Indiana law, a measure banning abortion in cases of race, sex, or disability selection, addressed a grave present-day problem. This Essay identifies deeper stakes in *Box*, exploring how Thomas's concurrence reflects the evolving uses of history in abortion jurisprudence—approaches based not the original intent or original public meaning of the Fourteenth Amendment but on the motives of those seeking and exercising a right and the effects of any precedent protecting that right. This style of argument figures centrally in certain justices' reasoning about the application of stare decisis to both *Roe v. Wade*[2] and *Planned Parenthood v. Casey*.[3] But as *Box* and its predecessors show, this form of historical argument is deeply problematic, radically oversimplifying both historical arguments about causation and the motives, goals, and divisions defining social movement lawyering. As the Essay shows, *Box* may become known for more than an incendiary concurrence. Instead, the misuses of history may play a central role in the future of abortion jurisprudence, discouraging popular engagement and muddying an already divisive issue.

The Court's decision in *Box v. Planned Parenthood of Indiana and Kentucky* sparked considerable controversy for saying so little.[4] *Box* involved two provisions of an Indiana law

---

† Mary Ziegler is the Stearns Weaver Miller Professor at Florida State University College of Law.

1 39 S. Ct. 1780, 1782 (2019).

2 410 U.S. 113 (1973).

3 505 U.S. 833 (1992).

4 139 S. Ct. 1780 (2019). For some of the controversy surrounding *Box*, see Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven*

passed during Vice President Mike Pence's time as governor of Indiana.[5] The Court upheld a measure regulating the disposal of fetal remains.[6] Reasoning that the provision did not directly deal with abortion, the Court applied rational basis review to the Indiana law and upheld it.[7] The Court did not weigh in on the constitutionality of a second provision forbidding any doctor from knowingly performing an abortion in cases of race, sex, or disability selection.[8] In a lengthy concurrence, Justice Thomas told a troubling story about the shadow cast by eugenic legal reformers over the movement for abortion rights—and over contemporary women choosing abortion.[9]

Justice Thomas's concurrence reflects the evolving uses of history in abortion jurisprudence. It comes as no surprise that Thomas, a self-described originalist, views historic context as crucial.[10] But in abortion cases like *Box*, Thomas and other self-professed originalists do not focus on the original intent or original public meaning of the Fourteenth Amendment. Instead, as *Box* shows, the Court's conservatives enlist historical stories as part of their analysis of stare decisis. *Box* illuminates just one example of how the justices use historical narratives to question the motives of those seeking and exercising rights. *Box* also illuminates how these claims factor into larger consequentialist claims about specific judicial precedents. In this way, Thomas's *Box* concurrence is far more than an incendiary comment on a law that the Court has yet to fully consider. It exposes a broader line of argument for transforming abortion jurisprudence—one centered not on original purpose or original meaning but on consequentialist claims about the real-world effects of a decision or the motives of those who sought it out. This Essay explores the fundamental flaws inherent in this line of historical argument.

Historians Told The Post He's Wrong, WASH. POST, (May 30, 2019, 9:50 PM), https://www.washingtonpost.com/history/2019/05/31/clarence-thomas-tried-link-abortion-eugenics-seven-historians-told-post-hes-wrong/?utmterm=.68c4682dff4c [https://perma.cc/BE4D-TA9W]; Alexandra Minna Stern, *Clarence Thomas' Linking Abortion to Eugenics Is as Inaccurate as it Is Dangerous*, NEWSWEEK, (May 31, 2019, 12:02 PM), https://www.newsweek.com/clarence-thomas-abortion-eugenics-dangerous-opinion-1440717 [https://perma.cc/ZDT6-5U64].

5 *See Box*, 139 S. Ct. at 1781–82.

6 *See id.* at 1782–83.

7 *See id.* at 1782.

8 *Id.*

9 *See id.* at 1782–93 (Thomas, J., concurring).

10 *See, e.g.*, Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J. F. 94, 94–100 (2015).

I
THE USES OF HISTORY IN ABORTION JURISPRUDENCE

Contested historical arguments have played an important role in abortion jurisprudence since the decision of *Roe v. Wade*. Some of these, conventionally originalist, were instantly familiar.[11] *Roe* concerned a Texas law criminalizing all abortions unless a woman's life was at risk.[12] By a 7-2 margin, the majority struck down the Texas law, reasoning that the constitutional right to privacy was broad enough to encompass a woman's decision to end a pregnancy.[13] Justice Rehnquist's dissent in *Roe* focused on what he described as the disconnect between the original intentions of the framers of the Fourteenth Amendment and the right recognized by the *Roe* majority.[14] Justice Rehnquist noted that, at the time of the ratification of the Fourteenth Amendment, most states criminalized abortion (unless a woman's life was at risk).[15] From this, Rehnquist concluded that the framers of the Fourteenth Amendment would have said something if they intended the amendment to change the law on abortion so substantially.[16] "The only conclusion possible from this history," Rehnquist wrote, "is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter."[17]

The *Roe* majority did not respond to this analysis of the original intent of the Fourteenth Amendment, but historical arguments nevertheless played a central role in the Court's decision.[18] The majority's historical narrative primarily centered on the intentions and knowledge of those who banned abortion, not those who had crafted the protections of the Fourteenth Amendment.[19] This style of historical reasoning is hardly unique to *Roe*. Most forms of constitutional analysis, including the Court's tiers of scrutiny, require the Court to weigh the strength of the government's interest.[20] Following a now-famous summer of research at the Mayo Clinic, Justice

---

11 *See* Roe v. Wade, 410 U.S. 113, 172–78 (1973) (Rehnquist, J., dissenting).
12 *See id.* at 153–59.
13 *See id.* at 161–67.
14 *See id.* at 173.
15 *See id.* at 174–76.
16 *See id.*
17 *See id.* at 177.
18 *See id.* at 129–51.
19 *See id.*
20 *See id.* at 150–52.

Blackmun, a former attorney for the famed medical institution, wielded a historical narrative to show that any justification for criminalizing abortion was neither strong nor deeply rooted in the nation's traditions.[21]

In recent decades, the Court's conservatives have made a similar mode of reasoning central to substantive due process analysis, asking whether a *right* is deeply rooted in the nation's history and tradition.[22] The *Roe* Court similarly treated the states' interest in regulating abortion.[23] The majority traced attitudes toward abortion reaching all the way back to ancient times.[24] *Roe* suggested that opposition to abortion ebbed and flowed.[25] The Court pointed out that in many eras, even in ancient times, the law did not treat abortion as a crime.[26] *Roe* suggested that even in eras where abortion prohibitions seemed stronger, no real consensus existed.[27] The Court stated, for example, that even though the Hippocratic Oath explicitly required physicians not to provide patients with abortifacient drugs, many medical professionals did not adhere to the requirement.[28] When most states did prohibit abortion in the nineteenth century, the Court asserted that very few seriously punished doctors who performed the procedure.[29] This narrative suggested to the majority that the United States had no unbroken tradition of criminalizing abortion.[30] The relatively recent emergence of abortion bans, the Court suggested, proved that neither side could identify a longstanding tradition in its favor.[31]

The Court's historical narrative also asserted that the women-protective health reasons underlying nineteenth-century bans had collapsed.[32] *Roe* stated that physicians had led the campaign to criminalize abortion largely because of concerns about the safety of the procedure.[33] For this reason, the Court found it significant that in the 1960s or 1970s, elite

---

21 *See id.* at 129–51.

22 *See, e.g.*, Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 540–49 (2012).

23 *Roe*, 410 U.S. at 129–51.

24 *See id.* at 130–32.

25 *See id.* at 129–51.

26 *See id.* at 130–32.

27 *See id.* at 129–51.

28 *See id.* at 130–32.

29 *See id.* at 138–41.

30 *See id.*

31 *See id.* at 140.

32 *See id.* at 149–50.

33 *See id.* at 141–42.

medical organizations had softened or abandoned their opposition to abortion.[34] The AMA had rescinded its earlier condemnation of abortion in 1970.[35] The American Public Health Association set out guidelines for physicians performing abortions and conceded the need for legalization.[36] The Court suggested that if abortion was safe, abortion bans no longer had any justification.[37] History proved that "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."[38]

Historians have hotly contested the accuracy of the narrative on which *Roe* relies. The history wars surrounding *Roe* began in earnest in the 1990s.[39] Rather than questioning the relevance of the Court's historical narrative, scholars have primarily debated its accuracy.[40] First, researchers have debated whether prior to the 1800s, the common law treated abortion as a crime, either in principle or in practice.[41] This line of inquiry matters if the Court focuses on whether an abortion right fits within longer-standing Anglo-Saxon legal traditions. The second debate focuses on the reasons for

---

34 *See id.* at 142–46.

35 *See id.* at 142–43.

36 *See id.* at 144–46.

37 *See id.* at 149.

38 *Id.*

39 *See, e.g.*, JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006) (arguing that moral opposition to abortion defined American common law both before and after the criminal bans of the mid-nineteenth century); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900 (1978) (contending that nineteenth-century abortion bans upset a longstanding status quo and largely reflected the ambitions of newly organized "regular physicians"); MARVIN OLASKY, ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA (1992) (tracing the history of cultural and legislative strategies to restrict abortion in the United States); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973 (1997) (arguing that abortion was widespread and broadly accepted before the mid-nineteenth century); Carla Spivack, *To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England*, 14 WM. & MARY J. WOMEN & L. 107 (2007) (disputing Dellapenna's analysis of opposition to abortion in medieval law).

40 *See generally* DELLAPENNA, *supra* note 39 (arguing that legal and cultural sanctions on abortion reached back much further than the *Roe* Court suggested); OLASKY, *supra* note 39 (same).

41 *Compare* DELLAPENNA, *supra* note 39 (insisting that moral and legal disapproval of abortion began centuries before nineteenth-century prohibitions), *with* REAGAN, *supra* note 39, at 34–100 (arguing that before the mid-nineteenth century abortion prior to quickening was both common and widely accepted), *and* SPIVACK, *supra* note 39, at 107–30 (same).

criminalization in the nineteenth century.[42] *Roe* assumed that the government's interest in regulating abortion had grown less compelling over time because abortion had become safer for women.[43] If the framers of abortion restrictions did not care about women's health and instead privileged fetal life, that conclusion would not hold. Finally, scholars have disputed whether abortion was harshly condemned and rare or omnipresent and tacitly accepted.[44] This inquiry matters to those who wish to argue that sweeping abortion restrictions did not reflect most Americans' actual beliefs about abortion.

Joseph Dellapenna has argued that Anglo-Saxon law always treated abortion as a serious crime.[45] In Dellapenna's view, moreover, the purpose of abortion laws had nothing to do with protecting with women.[46] Instead, he contends that from the beginning, criminal abortion laws primarily reflected a desire to protect fetal life.[47] Finally, Dellapenna and his allies assert that Americans viewed abortion as a grave moral error.[48] For this reason, Dellapenna believes that the framers of the Fourteenth Amendment would have assumed the personhood of a fetus and strongly rejected the idea of a right to abortion.[49]

Other historians have suggested that the *Roe* Court's history was not as wrong as Dellapenna suggests. James Mohr's seminal account argues that until the nineteenth century, neither the common law nor actual practice generally treated abortion as a crime until the point of quickening, the time when a woman could detect fetal movement.[50] Mohr and historian Leslie Reagan likewise argue that abortion was incredibly common in the nineteenth century—perhaps to an even greater extent than the *Roe* Court estimated.[51]

---

42 *See, e.g.*, Olga Khazan, *Bringing Down the Flowers: The Controversial History of Abortion*, THE ATLANTIC, (Mar. 2, 2016) (discussing the debates on the frequency and legality of abortions during and before the nineteenth century), https://www.theatlantic.com/health/archive/2016/03/bringing–down-the-flowers-the-controversial-history-of-abortion/471762/ [https://perma.cc/7EA4-H5SW].

43 *See Roe*, 410 U.S. at 149–50.

44 *Compare* DELLAPENNA, *supra* note 39, *with* REAGAN, *supra* note 39, at 34–100, *and* SPIVACK, *supra* note 36, at 107–30.

45 *See* DELLAPENNA, *supra* note 39, at 3–24.

46 *See id.*

47 *See id.*

48 *See id.*

49 *See id.*

50 *See generally* MOHR, *supra* note 39 (contending that before quickening, early criminal laws permitted abortion).

51 *Accord* JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH–CENTURY AMERICA 42-69, 230-54 (1997); KRISTIN LUKER, ABORTION &

What about the purpose of nineteenth-century abortion bans? Dellapenna insists that criminal abortion laws always focused on the protection of fetal life.[52] While not dismissing this fetal-protective interest, other scholars paint a more complex picture.[53] Sociologist Kristin Luker,[54] historian Carla Spivack, Reagan, and Mohr argue that abortion bans reflected not only a desire to protect fetal life but also eugenic interests in the racial composition of the population and professional interest in eliminating the competition that "regular" physicians faced from midwives.[55]

This historical debate may well play a role in the future of abortion doctrine, but for the most part, is not the subject of this Essay. Since the Court's 1992 decision in *Planned Parenthood v. Casey*, a very different historical debate has occupied the Supreme Court. Both the majority and dissent in *Casey* emphasized claims about the effects of *Roe* on the larger society.[56] Since *Casey*, the justices have expanded historical inquiries even further, looking at the intentions of the social movements litigating key cases. *Roe*'s style of historical reasoning has sparked a rich and complex historical literature. It is to the more recent, consequentialist styles of history that we should turn our attention now.

A. The Road to Consequentialist Historical Arguments

In the 1970s, pro-lifers mostly discounted work in the courts (and stayed out of historical arguments about abortion).[57] Their reasons for doing so were straightforward. It seemed extremely unlikely that the Court, as then constituted, would overturn *Roe* regardless of any evidence that abortion foes could theoretically have marshalled. And even in the unlikely event that the justices reconsidered the 1973 decision, the Court seemed unlikely to mandate a

---

THE POLITICS OF MOTHERHOOD 13–29 (1984). *See* MOHR, *supra* note 39, at 4–36; REAGAN, *supra* note 39, at 8–14.

52 *See* DELLAPENNA, *supra* note 39, at 3–24.

53 Mohr, for example, acknowledges that those backing abortion bans partly emphasized their views of fetal life. *See* MOHR, *supra* note 39, at 229–35.

54 *See id.* at 213–18; REAGAN, *supra* note 39, at 3–20.

55 *See* MOHR, *supra* note 39, at 182–95; REAGAN, *supra* note 39, at 3–20; SPIVACK, *supra* note 39, at 108–50.

56 *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 856–57 (1992); *id.* at 924 (Blackmun, J., concurring-in-part and dissenting-in-part).

57 *See* Jennifer L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, THE AM. HISTORIAN, Nov. 2016, https://www.oah.org/tah/issues/2016/november/abolishing-abortion-the-history-of-the-pro-life-movement-in-america/ [https://perma.cc/VS87-48AH].

nationwide abortion ban. At most, the Court might adopt the position taken in Justice Rehnquist's dissent—that the Constitution said nothing about abortion—and that as a result, the states could ban abortion but were under no obligation to do so.[58] This kind of outcome stopped far short of what pro-lifers demanded.[59]

For this reason, abortion foes, many of whom had organized during the previous decade in the states to oppose reform efforts, uniformly prioritized a constitutional amendment that would take the abortion issue away from the states and the courts alike. Such an amendment, pro-lifers hoped, would criminalize all abortions, even those performed by private actors.[60] At a major 1973 strategy rally, leading antiabortion groups almost unanimously passed a resolution stating that "State Right to Life groups and people pro-life everywhere unanimously support an effort to bring about an amendment to the United States Constitution that would guarantee the right to life for all humans."[61]

In fighting for such an amendment, abortion foes spent relatively little time discussing the original intent of the framers of the Reconstruction Amendment or the broader history of abortion in America.[62] On occasion, antiabortion scholars discussed the intentions of the framers of the Thirteenth Amendment, but for the most part, abortion foes focused on other arguments, especially those rooted in science.[63] Representative Larry Hogan (R-MD), the sponsor of an antiabortion amendment, spoke for many in asserting that "the question of when life begins [. . .] has been established beyond a reasonable doubt by modern medical science."[64] The antiabortion movement fielded physicians who claimed to be experts in the science of fetology.[65] For many abortion foes,

---

58 *See* Roe v. Wade, 410 U.S. 113, 171–75 (1973).

59 *See* Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 870–84 (2014).

60 *See* MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 42–62 (2015).

61 *Meeting Minutes, NRLC Ad Hoc Strategy Meeting (Feb. 11, 1973)*, *in* THE AMERICAN CITIZENS CONCERNED FOR LIFE PAPERS, Box 4, Gerald Ford Memorial Library, University of Michigan.

62 *See* ZIEGLER, *supra* note 60, at 42–62.

63 *Proposed Constitutional Amendments on Abortion: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Judiciary Comm.*, 94th Cong. 24 (1976).

64 *Abortion Part 3: Testimony on S. 119 and S. 130 before the S. Subcomm. on Constitutional Amendments of the Senate Judiciary Comm.*, 93d Cong. 448–49, 2d Sess. (1974), (Statement of Representative Larry Hogan).

65 *See, e.g.*, ZIEGLER, *supra* note 60, at 42–50.

fetal personhood was a biological fact, and the rights that flowed from personhood were beyond any serious question.[66]

Between *Roe* and *Casey*, *Roe*'s skeptics on the Court similarly stayed away from historical arguments. For the most part, those amenable to upholding some restrictions proved responsive to the litigation strategy developed by early public-interest litigators, including Americans United for Life (AUL) and National Right to Life Committee (NRLC).[67] Rather than demanding that *Roe* be overruled, these antiabortion lawyers insisted that *Roe* permitted some abortion restrictions.[68] At least at times, some on the Court agreed. In *Planned Parenthood of Central Missouri v. Danforth* (1976), the majority agreed that *Roe* already allowed for some regulation of abortion, even in the first trimester.[69] When upholding an informed-consent restriction, for example, the Court emphasized the importance of women being informed before making an important and stressful decision.[70] By contrast, when evaluating a husband-consent regulation, the Court emphasized that only women could gestate a pregnancy.[71] *Danforth* reasoned that if spouses could not agree on what to do about a pregnancy, the pregnant woman was the most affected and therefore had the right to break the tie.[72] A similar incremental strategy took center stage when the Court took up the question of whether states could prohibit Medicaid reimbursement for abortion.[73] In *Maher v. Roe* (1977) and its companion cases, the Court upheld state and federal prohibitions on public funding of abortion without questioning the historical narrative in *Roe*.[74] Instead the majority reasoned that the Constitution afforded women only freedom from government interference, not access to abortion.[75]

Even as some justices called for reconsideration of *Roe* in the 1980s, historical reasoning did not initially play much of a role in their decisions. In *City of Akron v. Akron Center for Reproductive Health* (1983), three dissenters found *Roe*'s

---

66 *See, e.g.*, *id.* (explaining the centrality of personhood arguments to the early antiabortion legal movement).

67 *See id.* at 60–72.

68 *See id.*

69 428 U.S. 52, 56–68 (1976).

70 *See id.*

71 *See id.*

72 *See id.* at 69–74.

73 *See* Maher v. Roe, 432 U.S. 464, 474 (1977); *see also* Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

74 *See Maher*, 432 U.S. at 474.

75 *See id.*

trimester framework unworkable because both the point of viability and the standard of care for women would constantly change how much states could legislate.[76] Justice Sandra Day O'Connor, Ronald Reagan's first selection for the Court, zeroed in on the incapacity of the Courts to analyze technical medical questions and the unfairness of expecting legislators to keep up with constantly-changing obstetric standards. After four justices seemed ready to overturn *Roe* in *Thornburgh v. American College of Obstetricians and Gynecologists* (1986),[77] *Webster v. Reproductive Health Services* (1989) again seized on what the majority presented as medical, rather than historical flaws, in the *Roe* decision.[78]

In *Planned Parenthood v. Casey*, those prepared to overturn *Roe* developed a new consequentialist style of historic argument. To a much greater extent than before, the Court, like advocates on both sides of the abortion issue, interrogated whether stare decisis factors militated in favor of preserving *Roe*.[79] These factors had not always invited historical analysis. Just a year before the decision of *Casey*, for example, in *Payne v. Tennessee*, a death penalty case, the Court looked only at whether a precedent was unworkable, had generated reliance interests, or was badly reasoned.[80] In theory, none of these questions required the Court to look at history. While the Court has not clearly defined workability, any definition has more to do with the incoherence of a decision or its inconsistency with other doctrinal principles.[81] The Court had likewise analyzed reliance interests mostly by applying abstract doctrinal categories rather than any historical analysis, for example, treating contract or property cases differently from those where the parties did not plan in advance.[82] The quality of a decision's reasoning could intersect with history (in cases, such as *Roe*, where history played a role in the justices' conclusions) but need not.

Casey, however, made some kind of historical approach central to stare decisis analysis in three independent ways.

---

76 462 U.S. 416, 452–57 (1983).

77 476 U.S. 747, 782–833 (1986).

78 492 U.S. 490 (1989).

79 *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854–58 (1992).

80 501 U.S. 808, 827–30 (1991).

81 *See* Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1215–63 (2018).

82 *See, e.g.*, *Payne*, 501 U.S. at 827–30; United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924).

First, the Court added an additional element to stare decisis analysis: whether doctrinal or factual changes had undermined the logic of a precedent.[83] To understand whether the world had changed since a precedent came down, the justices would logically look at history. Second, the Court treated reliance interests at least partly as a historical question rather than simply applying predetermined doctrinal categories, asking whether (and how) women had actually profited from legal abortion.[84] Finally, both the majority and dissenters in *Casey* explored the effects of *Roe* (and the probable effects of overturning *Roe*) on the legitimacy of the Court.[85] These arguments differed from the ones made in *Roe.* Both *Roe* and *Casey* examined whether social, political, and economic changes had undermined the justification for an outcome (abortion bans in *Roe*, the reasoning of *Roe* in *Casey*).[86] But much of *Casey* went further, emphasizing historical arguments about the consequences of *Roe* for the Court and the larger society.[87]

B. Historical Consequences and the *Casey* Majority

Casey addressed a conventional multi-restriction Pennsylvania law, and many expected the Court to reconsider *Roe.*[88] After all, a plurality in *Webster* had suggested that the trimester framework was unworkable.[89] Justice Sandra Day O'Connor, who had not joined that aspect of the plurality, had levelled similar charges against the *Roe* Court in earlier dissents.[90] *Casey* shocked many observers, preserving a constitutional right to abortion.[91] The Court, however, discarded the trimester framework, instead adopting the undue-burden test as an alternative.[92] Under that rule, an abortion regulation would not be unconstitutional unless it had the purpose or effect of creating a substantial obstacle for

---

83 *See Casey*, 505 U.S. at 854–58.

84 *See id.*

85 *See id.* at 865–68, 962–64 (Rehnquist, J., dissenting), 995–96 (Scalia, J., dissenting).

86 *See* Roe v. Wade, 410 U.S. 113, 143–59 (1973); *Casey*, 505 U.S. at 865–73.

87 *See Casey*, 505 U.S. at 865–70.

88 *See* Dawn Johnsen, *A Progressive Reproductive Rights Agenda for 2020*, *in* THE CONSTITUTION IN 2020 255, 260 (Jack M. Balkin & Reva B. Siegel eds., 2009).

89 *See* Webster v. Reproductive Health Services 492 U.S. 490, 519–22 (1989).

90 *See id.* at 523–32.

91 *See Casey*, 505 U.S. at 857–69.

92 *See id.* at 877.

women seeking abortions.[93]

For the most part, historical arguments did not factor into the application of the undue-burden test or into *Casey*'s reasons for rejecting the trimester framework.[94] But for both the plurality and the dissenters, the historical consequences of the *Roe* decision loomed large in analysis of stare decisis.[95] The Court evaluated whether a precedent was unworkable, had generated meaningful reliance interests, or had run up against substantial changes in the law or the broader world.[96]

The plurality's reliance analysis drew heavily on consequentialist arguments involving history.[97] Usually, reliance analysis is fairly abstract, focused on the nature and timing of a commercial transaction.[98] *Casey* instead homed in on what the Court described as the historical effects of the *Roe* decision: "the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[99] The Court gestured at recent economic and social changes that made child-bearing decisions important in new ways.[100] "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives[,]" *Casey* concluded.[101]

Justice Scalia's dissent developed an alternative history of *Roe*'s effects.[102] Scalia did not engage with the majority's reliance reasoning so much as with its conclusion that overturning *Roe* "under fire" would undermine the Court's legitimacy.[103] The plurality had concluded that any decision perceived to come in response to political pressure would "subvert the Court's legitimacy."[104] Rejecting this conclusion, Scalia highlighted what he saw as the negative consequences of the 1973 opinion.[105] Whereas the Court set out to "*resolve*

---

93 *See id.*
94 *See id.*
95 *See id.* at 854–69.
96 *See id.*
97 *Id.* at 855–857.
98 *See id.*
99 *Id.*
100 *See id.*
101 *Id.*
102 *Id.* at 867.
103 *See id.*
104 *See id.*
105 *Id.* at 995 (Scalia, J., dissenting).

the deeply divisive issue of abortion[,]" Scalia argued, *Roe* "did more than anything else to nourish it[.]"[106] Scalia explained:

> National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided. Profound disagreement existed among our citizens over the issue—as it does over other issues, such as the death penalty—but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-*Roe*, moreover, political compromise was possible. *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. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. ("If the Constitution *guarantees* abortion, how can it be bad?"—not an accurate line of thought, but a natural one.)[107]

Justice Scalia's response to the plurality suggested that the historical effects of a precedent should factor into the Court's stare decisis analysis. *Roe* deserved reconsideration, in this analysis, because it had produced so much of the nation's political dysfunction.[108] Scalia attributed the distortion of national elections and of Supreme Court nominations to the Court's decision in 1973 to resolve the issue "uniformly, at the national level."[109] He further blamed on the Court's decision in *Roe* for creating "a vast new class of abortion consumers and abortion proponents" who would likely drive up abortion rates.[110] And Scalia suggested that *Roe* produced the extreme polarization of the abortion issue that "destroyed the compromises of the past [and] rendered compromise impossible for the future . . . ."[111] Just as the *Roe* Court argued that the justification for abortion bans did not hold water, Scalia claimed that *Roe*'s justification—the constitutional settlement of the abortion conflict—militated in

---

106 *Id.*
107 *See id.* at 995–96.
108 *See id.*
109 *Id.*
110 *Id.*
111 *Id.*

favor of overruling the 1973 decision.[112]

C. History and Effects in *Box*

Justice Thomas's *Box* concurrence used a related historical strategy: questioning the effects of *Roe* and its progeny by criticizing the motives of those who pursued the legalization of abortion. Thomas defended what he called the "State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[113] Thomas used a historical narrative to argue for the importance of this state interest.[114] He argued that the birth control movement of the early twentieth century had laid the foundations for later calls to legalize abortion.[115] In Thomas's narrative, the birth control movement, in turn, had aligned itself with demands for eugenic laws.[116] He specifically emphasized that "Planned Parenthood founder Margaret Sanger recognized the eugenic potential of her cause."[117] Acknowledging that Sanger did not endorse legal abortion, Thomas nonetheless concluded that abortion was "significantly more effective as a tool of eugenics" than any form of birth control.[118]

He then turned to the broader history of eugenics, which he described as a philosophy committed to "promoting reproduction between people with desirable qualities and inhibiting reproduction of the unfit . . . ."[119] According to Justice Thomas, eugenics became an "intellectual craze" in the 1920s, gaining popularity in leading universities and inspiring a variety of legislative strategies, including immigration quotas and compulsory sterilization laws.[120] For Thomas, many of these laws specially targeted non-white Americans.[121]

While noting that eugenics itself lost popularity after the Second World War, Thomas concluded that the movement's history shed light on both the motives of abortion-rights reformers and of individual women who chose to end their

---

112 *Id.*

113 Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780, 1783 (2019).

114 *See id.* at 1783–84.

115 *Id.* at 1783.

116 *See id.* at 1783–85.

117 *Id.*

118 *See id.*

119 *See id.* at 1784–86.

120 *See id.*

121 *See id.*

pregnancies.[122] Justice Thomas first emphasized the connection between Planned Parenthood, a group that fought for abortion rights, and Margaret Sanger's courting of the eugenic legal reform movement.[123] Next, Thomas observed that after World War II, as support for legal abortion grew, many abandoned open support for eugenics, instead endorsing population control, a movement to curb demographic growth at home and abroad.[124] His concurrence cited prominent reformers, including Dr. Alan Guttmacher, who publicly argued that abortion would improve the quality of the population while lowering its quantity.[125] This history bolstered Thomas's conclusion that many individual women already had abortions for eugenic reasons, especially in cases of race, sex, or disability selection.[126] Thomas suggested that striking down Indiana's law would "constitutionalize the views of the 20th-century eugenics movement."[127]

Like Justice Scalia's *Casey* dissent, Justice Thomas's concurrence focused on the supposed effects of *Roe*—and how they connected to the motives of those who led the abortion-rights movement.[128] Thomas suggested that the history of the abortion-rights movement showed that those who had fought for the Court's decision in *Roe* likely had far darker motives than many would have imagined.[129] In Thomas's view, the reasons behind *Roe* put its effects in a light—the unleashing of racist, eugenic decisions made by individual women.[130]

Commentators have long questioned the Court's use of historical reasoning in service of originalism.[131] Some believe that judges cannot competently carry out historical analysis.

---

122 *See id.*

123 *See id.*

124 *See id.*

125 *See id.*

126 *See id.*

127 *See id.*

128 *See id.*

129 *See id.*

130 *See id.*

131 *See, e.g.*, Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 675 (2013) (detailing how appeals to history—and accusations of "law office history"—have defined certain forms of both originalism and living constitutionalism); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 47–51 (1998) (calling certain forms of originalism "anachronistic" and a "historic non sequitur"); Jamal Greene, *On the Origins of Originalism*, 88 Tex. L. Rev. 1, 62 (2009) (explaining the appeal of originalism in the face of widespread criticism); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 77–78 (2006) (questioning the capacity of lawyers and judges to carry out the historical analysis that originalism seemingly demands).

Others assert that the Framers themselves rejected originalism and its accompanying reliance on history.[132] Still others see the historical logic of originalism as a distraction from the fact that originalism differs little from living constitutionalism.[133] All, some, or none of these arguments may be true, but few have noted the Court's use of history in consequentialist reasoning, often to illuminate what a judge believes about the effects of a decision or the motives of those who pursued or defend it. As Thomas's *Box* opinion reminds us, this style of historic argument is deeply problematic.

II
CASEY'S BAD HISTORY

Since the 1990s, skeptics of *Roe* have woven historical narratives into claims about the despicable motives of those who fought for legal abortion or about the decision's adverse political, legal, and economic effects. A close look at the historical arguments made in both *Casey* and *Box* expose serious problems with this mode of historical reasoning. It is notoriously difficult to suss out the intentions of historical actors. Describing the aims, beliefs, or motives of a social movement that pursued a particular constitutional outcome is no easier than identifying the intentions of the Framers. Social movements are internally divided and change over time. Attributing a single motive to those who fought for a specific constitutional ruling will almost always be misleading. Ascribing the same motives to those availing themselves of a right created by that ruling is even more indefensible. Other problems are more specific to these consequentialist claims, which vastly oversimplify arguments about historic causation.

A. *Roe* and Polarization

These flaws become clearer after a close look at *Casey*, particularly Justice Scalia's pithy dissent. The plurality, too, made arguments about the effects of *Roe*.[134] The plurality's reliance analysis primarily relied on inferences about *Roe*'s broader societal influence, rarely citing empirical evidence in

---

132 *See, e.g.*, R. Randall Kelso, *Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt a Living Constitution*, 72 U. MIAMI. L. REV. 112, 126–51 (2017) (arguing that the framers "intended the meaning of the words they used to evolve over time").

133 *See supra* note 131 and accompanying text.

134 *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 865–68 (1992).

support of its findings.[135] The Court first reasoned that Americans would logically have made specific reproductive or intimate decisions based on the assumed availability of legal abortion.[136] When the Court takes up historical questions, it would be preferable if the justices could turn to reliable research before drawing a conclusion.[137] Nevertheless, this conclusion seemed unobjectionable, and abortion foes have rarely focused on it in attacking *Roe*.

Second, the plurality took up whether *Roe* had benefited women and their families.[138] "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives[,]" *Casey* noted, citing political scientist and prominent feminist Rosalind Petchesky.[139] "The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling Roe for people who have ordered their thinking and living around that case be dismissed."[140]

One might worry about the Court's willingness to emphasize a "fact" that the plurality openly admitted could not "be exactly measured. . . ."[141] The Court's recent decision in *Gonzales v. Carhart* similarly concluded that women would often regret abortions without citing any empirical evidence.[142] "While we find no reliable data to measure the phenomenon[,]" *Gonzales* stated, "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[143] Without looking at any historic or empirical evidence, the Court can and does obviously make mistakes.[144]

Nevertheless, for the most part, *Casey*'s statements do accord with subsequent research. The effects of legal abortion have spawned a rich literature, but work on the causal effects

---

135 *See id.*

136 *See id.*

137 *See, e.g.*, Lee Epstein et al., *Foreword: Testing the Constitution*, 90 N.Y.U. L. REV. 1001, 1010-1012 (2015) (detailing the need for "empirics in constitutional law scholarship").

138 *See Casey*, 505 U.S. at 865–68.

139 *Id.*

140 *Id.* at 835.

141 *Id.*

142 *See* 550 U.S. 124, 159 (2007).

143 *Id.*

144 *See, e.g.*, Epstein et al., *supra* note 137, at 1024 (arguing that the Justices too often "rely on bad empiricism"). Lee Epstein et al., *Foreword: Testing the Constitution*, 90 N.Y.U. L. REV. 1001, 1012 (2015).

of legal abortion on women's educational and career outcomes has been rarer.[145] Existing research nevertheless supports the conclusions drawn by the *Casey* plurality.[146] A 2000 study indicated that legal abortion in the 1970s reduced adolescent pregnancies for all women and improved educational attainment for Black women (while having no effect on white women's educational outcomes).[147] Several studies suggested that access to abortion increased all women's workforce participation (although the effects were more pronounced for Black women).[148] Recent research on the effects of abortion restrictions reinforces these conclusions.[149] Scholars have and will dispute these findings, but the problems with historic consequentialism are much more visible in Justice Scalia's *Casey* dissent—partly because Scalia blames so much on *Roe* alone.

Justice Scalia attributed to *Roe* the polarization of the abortion conflict and the dysfunction of Supreme Court nominations and presidential elections.[150] But this conclusion underestimates the extent to which the conflict had already escalated.[151] The movement to legalize abortion took shape in

---

145 For an overview, see Anna Bernstein & Kelly M. Jones, *The Economic Effects of Abortion Access: A Review of the Evidence*, CENTER ON THE ECONOMICS OF REPRODUCTIVE HEALTH (2019), https://iwpr.org/wp-content/uploads/2019/07/B379_Abortion-Access_rfinal.pdf [https://perma.cc/7QKU-PL5H] (accessed July 24, 2019).

146 *See id.*

147 *See* Joshua D. Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms*, 18 RES. LAB. ECON. 75, 75–118 (2000).

148 *See id.*; David Kalist, *Abortion and Female Labor Force Participation: Evidence Prior to* Roe v. Wade, 25 J. LAB. RES. 503, 503–14 (2004).

149 *See, e.g.*, David Bloom et al., *Fertility, Female Labor Force Participation, and the Demographic Dividend*, 13 J. ECON. GROWTH 79, 79–101 (2009) (finding a large negative effect on female workforce participation associated with increased abortion restrictions and increased fertility); David M. Fergusson et al., *Abortion Among Young Women and Subsequent Life Outcomes*, 39 PERSP. ON SEXUAL AND REPROD. HEALTH 6, 6–12 (2007) (finding that among women who became pregnant before age 21, those who had abortions fared better on six out of ten measurements of wellbeing, including income and education); Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407, 407–13 (2018) (finding that women denied abortions were more likely to experience poverty and economic hardship in the years immediately following a refusal).

150 *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 995–97 (Scalia, J., dissenting).

151 *See, e.g.*, GENE M. BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES 227-335 (2005) (explaining that "discussion of the [abortion] issue was divided and morally charge" well before *Roe*"); Linda Greenhouse & Reva B. Siegel, *Before (and After)*

the 1950s and early 1960s when some doctors increasingly expressed frustration with the limits of criminal abortion law.[152] At this point, observers could have assumed that compromise on abortion was possible. The reform movement, primarily led by doctors, rallied behind a model law first proposed by the American Law Institute (ALI) in 1959.[153] The ALI model allowed for legal abortion only in cases of rape, incest, fetal defect, or a threat to a woman's health.[154] The physicians and legal elites leading the early reform movement certainly framed their solution as a modest, humanitarian one. The ALI estimated that the total number of abortions would remain relatively low.[155] The goal, if anything, was to allow doctors to do what they were already doing.[156] As Louis B. Schwartz, one of those leading the writing of the new Model Penal Code, explained, physicians appeared to be "in revolt" against the law before reform fell into place.[157] Reform, then, would simply ratify the modest number of abortions that were already occurring.[158] In Colorado, for example, supporters of reform reported that legalizing abortion was simply a "health matter."[159]

But even when the ALI model was ascendant, a compromise solution on abortion was already out of reach. Notwithstanding the relative narrowness of the ALI model, abortion foes, many of them initially tied to the Catholic Church, organized groups to defeat state reform efforts.[160] In an effort to distance themselves from Catholic doctrine, these groups defined themselves in reference to a right to life they

---

Roe v. Wade*: New Questions about Backlash*, 120 YALE L.J. 2028 (2011) (detailing how the conflict escalated before *Roe*, particularly during the 1972 presidential election).

152 *See, e.g.*, LUKER, *supra* note 51, at 42–56 (explaining physicians' growing impatience with existing abortion laws).

153 *See, e.g.*, REAGAN, *supra* note 39, at 64–85 (exploring the early history of efforts to pass laws modeled on the ALI proposal).

154 *Continuation of Discussion on the Model Penal Code*, 36TH ANNUAL ALI MEETING PROCEEDINGS 243, 243–56 (1959).

155 *See, e.g.*, *id.* (detailing the predictions made by ALI about the effects of reform).

156 *See, e.g.*, *id.* (explaining the goal of the ALI proposal to harmonize the law and current medical practice).

157 *Id.* at 255.

158 *See, e.g.*, *id.* (confirming the purpose of the ALI framers to authorize the existing practices of physicians).

159 DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 428 (1994).

160 *See, e.g.*, ZIEGLER, *supra* note 60, at 42–68; DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* (2016).

located in the Declaration of Independence.[161] Americans United for Life (AUL), a leading antiabortion group, echoed the claim that under "the Declaration of Independence, [. . .] 'all men are created equal.'"[162] This language, AUL suggested, meant that "this nation must guarantee to the least and most disadvantaged among us an equal share in the right to life."[163]

Antiabortion groups defending this idea often supported access to abortion in cases in which a woman's life would be threatened but almost completely rejected the ALI bill.[164] Take, for example, the rape or incest exception written into the reform. Antiabortion scholars argued (inaccurately) that women could not get pregnant as a result of sexual assault and that even in cases of authentic rape, women should not have the right to take the life of an innocent child.[165]

Abortion foes' constitutional commitments also stood in the way of any compromise. The central constitutional argument of pre-*Roe* activists mixed the logic of the Due Process and Equal Protection Clauses.[166] Both claims, in turn, depended on recognition of fetal personhood.[167] If the fetus was a rights-holding person, then abortion might constitute an act of discrimination under the Equal Protection Clause—and the unborn child might be viewed as part of a protected class, similar to racial minorities.[168] And if the fetus was a rights-holding person, then an abortion might count as a deprivation of life without due process of the law, especially if a woman

---

161 *See, e.g.*, Fred C. Shapiro, *'Right to Life' has a message for New York State legislators*, N.Y. TIMES, Aug. 20, 1972, at SM10 [perma.cc/X99S-3WRZ] (explaining how a New York antiabortion group defined itself in reference to a right to life activists identified with the Declaration of Independence); Keith Monroe, *How California's Abortion Law Isn't Working*, N.Y. TIMES, Dec. 29, 1968, at SM10 (explaining the relevance of right to life rhetoric in early antiabortion organizations); SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 35 (1991) (same).

162 Ziegler, *supra* note 59, at 887 (quoting Declaration of Purpose from Americans United for Life (1971), on file with the Concordia Seminary, Lutheran Church-Missouri Synod, St. Louis, Missouri, the Executive File).

163 *Id.*

164 *See, e.g.*, WILLIAMS, *supra* note 160, at 39–42 (exploring the antiabortion response to the ALI proposal in the 1960s).

165 *See, e.g.*, Robert M. Byrn, *The Abortion Question: A Nonsectarian Approach*, 11 CATH. LAW. 316, 321 (1965) (offering an antiabortion critique of the ALI bill); John Francis, *Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 423 (1968) (same); Eugene Quay, *Justifiable Abortion— Medical and Legal Foundations*, 49 GEO. L.J. 173, 174–177 (1960) (same).

166 *See, e.g.*, Ziegler, *supra* note 59, at 890–97 (explaining the constitutional logic of early antiabortion arguments).

167 *See, e.g.*, *id.* at 889–90.

168 *See, e.g.*, *id.*

could end a pregnancy without any prior trial or proceeding.[169] Allowing for abortion in any case but a threat to a woman's life implicitly denied fetal personhood.[170] A rape victim could not legally kill a child after birth because of that child's parentage. Abortion foes wished to treat the fetus identically to an older child. "[F]or the law to make a general exception in all cases involving rape and incest . . . in effect, denies the fetus any title to life," one commentator stressed.[171]

Indeed, even in states where the ALI bill passed easily, the vote did not reflect a willingness to compromise. Instead, in some states like Georgia, there was simply not a large enough Catholic population to mount a meaningful opposition.[172] In states where the opposition organized more effectively, the reform process dragged on or halted altogether.[173] The idea of a right to life could not be reconciled with even modest reform of abortion laws.

By the late 1960s, compromise was even more difficult. While abortion foes had long opposed any changes to the legal status quo, the abortion-reform movement abandoned its previous interest in middle-ground bills.[174] In part, this shift reflected the inadequacy of reform laws. Physicians uncertain of how courts would interpret the ALI categories sometimes hesitated to perform abortions.[175] In California, a reform state, the abortion rate did not increase following the passage of the reform bill.[176] Women who had expected broader access grew frustrated with the goals of the reform movement.[177]

And more important, the reform movement itself had

---

169 *See, e.g.*, *id.*

170 *See, e.g.*, Paul G. Reiter, *Trends in Abortion Legislation*, 12 ST. LOUIS U. L.J. 260, 271 (1967); *see also* Ziegler, *supra* note 162 and accompanying text.

171 *Id.*

172 *See, e.g.*, GARROW, *supra* note 159, at 245–50 (detailing the reasons for the passage of the ALI bill in Georgia).

173 *See, e.g.*, WILLIAMS, *supra* note 160, at 180–200 (detailing antiabortion efforts to derail ALI bills); GARROW, *supra* note 159, at 250–90 (same).

174 *See, e.g.*, LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE DEBATE BEFORE THE SUPREME COURT'S DECISION 127–97 (2010) (exploring the forces shaping the switch from a movement for abortion law reform to demands for the repeal of criminal laws); Linda Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, N.Y. TIMES, Jan. 25, 1970, at 200 [perma.cc/J22T-U35K] (describing the emergence of the repeal movement); Keith Monroe, *How California's Abortion Law Isn't Working*, N.Y. TIMES, Dec. 29, 1968, at SM10 (outlining the shortcomings of ALI bills that were already in effect).

175 *See, e.g.*, Monroe, *supra* note 174, at SM10 (exploring patients' inability to access abortion in reform states); Greenhouse, *supra* note 174, at 200 (same).

176 *See, e.g.*, Monroe, *supra* note 174, at SM10.

177 *See supra* note 174 and accompanying text.

changed. The physicians and lawyers who led the early reform movement prized respectability and sought to legitimize what they saw as existing practice.[178] By contrast, those who sought repeal—a sometimes-awkward group of population controllers, doctors, public-health workers, and feminists—believed that the law needed to go much further.[179] Those focused on public health argued that the ALI did nothing to reduce injuries and deaths tied to botched illegal abortions.[180] Population controllers, those who wished to control demographic growth at home and abroad, did not always support legal abortion, but those that did concluded that the reform bill did nothing to curb demographic growth.[181] Feminists and civil libertarians framed abortion as a fundamental right that women should be able to exercise for any reason.[182] Groups like the National Association for the Repeal of Abortion Laws (NARAL) and the National Organization for Women (NOW) demanded the complete decriminalization of all abortions.[183]

In state fights, while the forces of reform increasingly sought the complete decriminalization of abortion, and pro-lifers fought to keep virtually all abortions illegal.[184] The antiabortion movement had expanded beyond its Catholic beginnings but hardened its opposition to abortion even further.[185] In New York, for example, after reformers successfully pushed for repeal, abortion foes secured a vote reinstating criminal penalties until Governor Nelson Rockefeller vetoed the move.[186] In Michigan, in 1972, supporters of reform sought to pass Proposition B, a measure that would legalize abortions earlier in pregnancy but not remove all abortion restrictions.[187] Pro-lifers in the state

---

178 *See, e.g.*, LUKER, *supra* note 51, at 73–96 (studying the goals of the reform movement of the 1960s).

179 *See, e.g.*, ZIEGLER, *supra* note 61, at 6–8 (detailing the varying ambitions of those demanding the repeal of abortion restrictions).

180 *See, e.g.*, *id.*

181 *See, e.g.*, *id.*

182 *See, e.g.*, *id.*

183 *See, e.g.*, *id.*

184 *See, e.g.*, BURNS, *supra* note 151, at 65–124; WILLIAMS, *supra* note 157, at 180–210; ZIEGLER, *supra* note 57, at 6–8.

185 *See, e.g.*, WILLIAMS, *supra* note 160, at 180–201.

186 *See, e.g.*, William E. Farrell, *Governor Vetoes Abortion Bill as Not Justified*, N.Y. TIMES, May 14, 1972, https://www.nytimes.com/1972/05/14/archives/governor-vetoes-abortion-repeal-as-not-justified-tells-legislature.html [https://perma.cc/74GJ-SRP6] (accessed July 10, 2019).

187 *See, e.g.*, *Michigan to Vote on Abortion Issue*, N.Y. TIMES, Sept. 11, 1972, https://www.nytimes.com/1972/09/11/archives/michigan-to-vote-on-

organized to defeat the measure and succeeded.[188] Nor were there any signs of a willingness to compromise in the courts. Abortion-rights supporters argued that constitutional interests in autonomy, bodily integrity, dignity, and equality applied to a woman's abortion decision.[189] While opposing these efforts, pro-lifers requested that courts recognize fetal personhood, both inside and outside the abortion context.[190] Arguing that *Roe* eliminated important possible compromises ignores how much the conflict had already escalated.

The same was true of *Roe*'s supposedly poisonous effects on presidential politics. Justice Scalia argued that *Roe* had infected elections, making presidential elections a referendum on abortion.[191] But this, too, simplifies the causal forces shaping presidential politics and abortion. Politicians had already used abortion as a wedge issue before 1973.[192] In the 1972 presidential election, for example, Richard Nixon and his advisor Patrick Buchanan already saw the potential of using abortion to divide voters.[193] Nixon had stated his personal opposition to abortion "as a method of population control" before 1972 and tried to convince New York Governor Nelson Rockefeller to veto that state's repeal of its criminal abortion laws.[194]

Nixon later made his opposition to abortion central to his reelection strategy. He had chartered a commission to study strategies for population control, but after it delivered its 1972 report endorsing legal abortion, Nixon frequently condemned abortion.[195] He hoped to peel away blue-collar Catholic and evangelical Protestant voters who had been part of a New Deal

---

abortion-issue-300000-sign-petition-to-put.html [https://perma.cc/RGL6-EGHL].

188 *See, e.g.*, WILLIAMS, *supra* note 160, at 190–95.

189 *See, e.g.*, SIEGEL and GREENHOUSE, *supra* note 174, at 160–245.

190 *See, e.g.*, Ziegler, *supra* note 59, at 895–97.

191 *See, e.g.,* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 996–99 (Scalia, J., dissenting) (arguing that *Roe* distorted American democracy and produced the modern abortion wars).

192 *See, e.g.*, DONALD T. CRITCHLOW, INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA 169–75 (1999) (explaining the terms of the abortion conflict before *Roe*); RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 528, 745 (2008) (exploring Nixon's use of abortion to win over new voters).

193 *See, e.g.*, DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 245 (2001); PERLSTEIN, *supra* note 192, at 406.

194 *See, e.g.*, CRITCHLOW, *supra* note 192, at 149.

195 *See, e.g.*, *id.* (studying Nixon's shifting position on abortion and population control).

coalition.[196] Indeed, Nixon's campaign against anti-war candidate Senator George McGovern (D-SD) centered on accusations that McGovern embraced the "three As"—acid, abortion, and amnesty for draft dodgers.[197] The abortion issue had already deformed presidential elections before *Roe*.

Justice Scalia's argument that *Roe* caused extensive polarization is wrong for a second reason: some of the escalation of the conflict we associate with *Roe* came well after the decision and for reasons beyond the Supreme Court.[198] For almost ten years after 1973, those on opposing sides tried to reach middle-ground solutions—certainly not on abortion itself, but on matters that might make fewer women turn to abortion, matters such as pregnancy discrimination at work, funding for family planning or prenatal care, rights for unwed mothers and illegitimate children, and the strengthening of the nation's social safety net.[199] For example, Congress expressed considerable concern about rising rates of adolescent pregnancy.[200] Pro-choice groups like Planned Parenthood lobbied for legislation expanding family-planning funding for adolescents as well as paying for care for school-age girls who still had abortions.[201] So do did certain antiabortion groups like American Citizens Concerned for Life.[202] Groups on both sides likewise lobbied for the federal Pregnancy Discrimination Act of 1978.[203] When the two sides moved further apart, *Roe* alone was not to blame. The mobilization of the New Right and Religious Right encouraged the antiabortion movement to adopt a more socially conservative stance on a variety of

---

196 *See, e.g.*, KOTLOWSKI, *supra* note 193, at 245; CRITCHLOW, *supra* note 192, at 149; SIEGEL AND GREENHOUSE, *supra* note 174, at 2030–50.

197 *See, e.g.*, PERLSTEIN, *supra* note 192, at 668; JEFFERSON R. COWIE, STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS 97 (2010).

198 *See, e.g.*, ZIEGLER, *supra* note 60, at 186–218 (exploring the reasons for the polarization of the abortion conflict in the decade after *Roe*).

199 *See, e.g.*, *id.* at 193–95.

200 *See, e.g.*, *id.*

201 *See, e.g.*, *Adolescent Health, Services, and Pregnancy Prevention Act of 1978: Testimony Before the S. Comm. on Human Resources*, 95th Cong. 1st Sess. 192–93 (1978) (statement of Faye Wattleton); *School Age Mother and Child Health Act of 1975: Hearing Before the Subcomm. on Health of the Senate Comm. on Labor and Welfare*, 94th Cong. 1st Sess. 552–81 (1975) (Statement of Jack Hood Vaughn).

202 *School Age Mother and Child Health Act*, *supra* note 201, at 499 (Statement of Marjory Mecklenberg); *Adolescent Health, Services, and Pregnancy Prevention Act of 1978*, *supra* note 198, at 422–40.

203 *See, e.g.*, ZIEGLER, *supra* note 60, at 195–99; Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 453–97 (2014).

issues.[204] Compromises that would lead fewer women to choose abortion became politically out of bounds when pro-lifers embraced a Republican Party opposed to strong laws against employment discrimination or measures to increase support for the poor.[205]

And contrary to what Justice Scalia suggested, political-party realignment contributed to polarization in the 1970s at least as much as *Roe* did. By 1980, the parties' positions on abortion had hardened and diverged.[206] This, too, took time. In 1976, neither major party took a firm stand on abortion.[207] Jimmy Carter, the Democratic nominee, treated *Roe* as the law of the land but opposed the funding of abortion, preferring to bankroll "alternative[s] to abortion" like family planning.[208] Gerald Ford, the Republican incumbent in office after Watergate, ran on a Republican platform that included support for an antiabortion constitutional amendment.[209] But in practice, Ford stayed far away from the issue and seemed publicly opposed to any constitutional solution that would criminalize abortion nationwide. Ronald Reagan, a politician who had frequently denounced abortion during his failed 1976 presidential campaign, put the issue front and center during the 1980 presidential campaign.[210] Larger antiabortion groups like the National Right to Life Committee (NRLC) successfully influenced the GOP platform.[211] Meanwhile, as the Democratic National Convention gave more power to women and people of color, pro-choice feminists exercised more control over the party's agenda.[212] Both pro-life and pro-choice activists attached significant importance to their new political alliances and recognized that voters did not necessarily line up behind

---

204 ZIEGLER, *supra* note 60, at 186–218.

205 *Id.*

206 *See id.*

207 *See, e.g.*, *id.* (exploring parties' positions on abortion in 1976); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 147 (1992) (same).

208 *See, e.g.*, LAWRENCE J. MCANDREWS, WHAT THEY WISHED FOR: AMERICAN CATHOLICS AND AMERICAN PRESIDENTS, 1960–2004 195 (2014) (studying Carter's position on abortion); Williams, *supra* note 160, at 24–49 (same).

209 *See, e.g.*, WILLIAMS, *supra* note 160, at 24–49 (detailing Ford's abortion position).

210 *See, e.g.*, KRISTIN HEYER ET AL., CATHOLICS AND POLITICS: THE DYNAMIC TENSION BETWEEN FAITH & POWER 18 (2008) (examining Reagan's influence on the politics of abortion); ZIEGLER, *supra* note 60 (same).

211 *See, e.g.*, WILLIAMS, *supra* note 160, at 245–50 (exploring antiabortion efforts to shape the GOP platform).

212 *See, e.g.*, STACIE TARANTO, KITCHEN TABLE POLITICS: CONSERVATIVE WOMEN AND FAMILY VALUES IN NEW YORK 202–10 (2017) (examining the ways that feminists gained more influence over the Democratic platform).

the positions taken by party leaders (well into the decades after *Roe*, for example, many pro-choice voters identified as Republicans, and many pro-life voters remained loyal to the Democratic Party long after *Roe*).[213] For this reason, leading groups on either side of the issue saw a willingness to compromise as a political liability, especially when the support of single-issue voters seemed to be the best leverage either movement had over reluctant politicians.[214]

Even after 1980, the conflict continued to get uglier for reasons unrelated to *Roe.* Pro-lifers often fought for laws that only restricted access to abortion, hoping these statutes would reduce the number of abortions and would chip away at *Roe*.[215] In defending these laws, abortion foes increasingly made contested scientific and medical claims about the effects of abortion that pro-choice groups strongly rejected.[216] Starting in the 1980s, pro-life groups claimed that abortion restrictions should pass partly because abortion itself caused trauma and damaged women's fertility.[217] After *Casey*, similar claims multiplied.[218] Abortion foes argued that abortion increased the risk of everything from suicidal ideation to breast cancer.[219] Opponents and supporters of abortion rights disagreed about the timing of fetal pain, the definition of a fetal heartbeat, and the medical need for specific abortion procedures.[220] As the terms of the debate changed, the two sides could no longer agree about the basic facts, much less about constitutional principle.[221]

Even Justice Scalia's complaints about *Roe*'s effect on judicial confirmations is a radical oversimplification. As Laura Kalman has shown, the politicization of the Supreme Court nomination process began years before *Roe*—during the administrations of Lyndon Johnson and Richard Nixon.[222]

---

213 *See, e.g.*, Greg D. Adams, *Abortion: Evidence of an Issue Evolution*, 41 AM. J. POL. SCI. 718, 718–36 (1997).

214 *See, e.g.*, ZIEGLER, *supra* note 60, at 212–18.

215 *See, e.g.*, *id.* at 65–89.

216 *See, e.g.*, Mary Ziegler, *Substantial Uncertainty: Whole Woman's Health v. Hellerstedt and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 89–99 (2016).

217 *See, e.g.*, *id.*

218 *See, e.g.*, *id.*

219 *See, e.g.*, *id.*

220 *See, e.g.*, *id.* at 111–16.

221 *See, e.g.*, Mary Ziegler, *The Abortion Wars Have Become a Fight Over Science*, N.Y. TIMES, (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/opinion/abortion-roe-science.html [https://perma.cc/U9BE-XSVB] (accessed July 10, 2019).

222 *See, e.g.*, LAURA KALMAN, THE LONG REACH OF THE 1960S: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT (2017) (canvassing the history

Perhaps Scalia would respond that *Roe* made things worse, instantly making abortion the central issue in Supreme Court nominations. But neither *Roe* nor the abortion issue figured centrally in the Supreme Court confirmation process for some time after *Roe* was decided.

The first Supreme Court confirmation after *Roe*, that of Justice John Paul Stevens, went smoothly, and the abortion issue went unmentioned.[223] Antiabortion groups like NRLC almost completely ignored Stevens' confirmation process.[224] To be sure, Justice Stevens would not change the outcome in any abortion case since the original vote in *Roe* was seven to two. Antiabortion groups, who nonetheless could have hoped to move the Court one vote closer to overturning *Roe*, simply did not seem to be paying much attention to the Supreme Court confirmation process.[225] To the extent his hearings created any controversy, questions swirled around Justice Stevens' statement that he was "more concerned about the racial situation" in the United States than about discrimination against women because people of color "had been a more disadvantaged group than the half of our population that is female.").[226] Briefly, some also questioned whether Stevens had concealed assets from Congress during the confirmation process.[227] The abortion question, quite simply, was absent. The Senate approved him by a vote of 98-0.[228]

Even after abortion entered into discussion of Supreme Court nomination, the process initially did not change much.

---

of Supreme Court nominations and their politicization).

223 For coverage of then-Judge Stevens' nomination, see, e.g., Jack Landau, *Stevens Would Boost Conservative Flavor*, ATL. J.-CONST., Nov. 29, 1975, at N1; Robert D. McFadden, *The President's Choice: John Paul Stevens*, N.Y. TIMES, Nov. 29, 1975, at 1.

224 For example, the November and December 1975 editions of *National Right to Life News* did not include a single story on then-Judge Stevens' nomination or hearings.

225 *See supra* note 223 and accompanying text.

226 *Women's Group Blasts Stevens*, ATL. J.-CONST., Dec. 9, 1975, at 11A; see also Lesley Oelsner, *Judge Stevens Questions Equal Rights Amendment*, N.Y. TIMES, Dec. 9, 1975, at 85 (exploring Stevens' comments on sex discrimination); Arthur Siddon, *At Senate Hearing, Stevens Shunned on ERA, Death Penalty*, N.Y. TIMES, Dec. 9, 1975, at 1 (same).

227 *See, e.g.*, Linda Mathews, *Court Nominee's Worth: $172,000*, L.A. TIMES, Dec. 10, 1978, at A10 (considering questions about Stevens' assets); Leslie Oelsner, *Stevens Calls Court Pay Too Low*, Puts His Net Worth at $171,284, N.Y. TIMES, Dec. 10, 1975, at 10 (same).

228 Leslie Oelsner, *Senate Confirms Stevens 98 to 0*, N.Y. TIMES, (Dec. 18, 1975), https://www.nytimes.com/1975/12/18/archives/senate-confirms-stevens-98-to-0-he-will-be-sworn-by-burger-tomorrow.html [https://perma.cc/VG3W-BMUP].

In 1981, when President Ronald Reagan nominated then-Judge Sandra Day O'Connor, pro-lifers hoped to make abortion the central issue of debate about her selection.[229] As an Arizona state legislator, O'Connor had reportedly supported abortion rights, and leading antiabortion organizations resisted her selection both privately and publicly.[230] But O'Connor's supposed record on abortion alone did not explain the importance of her nomination to antiabortion organizations. During the 1980 presidential election season, Ronald Reagan had separated himself from earlier candidates by frequently proclaiming his opposition to abortion.[231] Once abortion became a primary concern in presidential campaigns, abortion foes had different expectations of the nominees whom a GOP president would select.[232]

Abortion foes struggled mightily to scuttle then-Judge O'Connor's nomination.[233] Howard Phillips, a leading member of the New Right, led a campaign to inform the grassroots of O'Connor's supposed support for abortion.[234] But Phillips' campaign did not sway the Senate's Republican (and pro-life) majority.[235] To be sure, conservatives asked O'Connor about her position on abortion during her confirmation hearing—itself a change from Stevens' 1975 hearings.[236] The nominee stated that while she personally opposed abortion, she would base her judicial decisions on the law and facts and not her personal leanings.[237] The answer did nothing to placate O'Connor's antiabortion critics, but the issue hardly inflamed

---

229 *See, e.g.*, Patrick Buchanan, *Reagan Letter Draws Ire of Pro-Lifers*, CHI. TRIB., Aug. 15, 1987, at A1 (detailing abortion foes' opposition to O'Connor); Arthur Siddon, *Abortion Foes Rap Court Nominee*, CHI. TRIB., July 10, 1981, at A10 (same); Steven R. Weisman, *Reaction Is Mixed*, N.Y. TIMES, July 8, 1981, at A1 (same).

230 *See, e.g.*, Weisman, *supra* note 229, at A1.

231 *See supra* note 229 and accompanying text.

232 *See id.*

233 *See, e.g.*, Buchanan, *supra* note 229, at A1 (detailing antiabortion opposition to O'Connor); *Abortion Foes to Protest O'Connor's Nomination*, ATL.-J. CONST., Aug. 29, 1981, at A1 (same); Adam Clymer, *Nomination of Judge O'Connor Protested by Abortion Foes at Rally*, N.Y. TIMES, Sept. 4, 1981, at A8 (same); Charles Madigan, *Abortion, O'Connor on Agenda of Christian Right Convention*, CHI. TRIB., Sep. 4, 1981, at 5 (same).

234 *See* Clymer, *supra* note 233, at A8.

235 *See supra* note 192 and accompanying text.

236 *See, e.g.*, *O'Connor Reiterates Abortion Opposition*, L.A. TIMES, Sept. 9, 1981, at A1; Arthur Siddon, *Personally Opposed, She Says*, CHI. TRIB., Sept. 9, 1981, at 2.

237 *See, e.g.*, *O'Connor Reiterates*, *supra* note 236, at A1; Siddon, *supra* note 236, at 2.

the proceedings.[238] The Senate confirmed her by a unanimous vote.[239]

Far from what Justice Scalia indicated, the politicization of nominations took place more gradually, especially when it came to abortion. More than a decade after *Roe*, the abortion issue played a much more important role in the explosive confirmation hearings of Robert Bork.[240] Firing one of the first shots in the war to keep Bork off the Court, Senator Ted Kennedy (D-MA) argued that the nominee would ensure that women would once again die during back-alley abortions.[241]

What explains the shift in 1987? Bork himself certainly played a role. As a scholar, Bork had criticized popular and salient Supreme Court rulings, including both *Roe* and *Griswold v. Connecticut.*[242] Bork seemed almost inevitably to be a vote against *Roe.* And the stakes of the confirmation were obviously higher. Four justices had dissented from the Court's most recent abortion decision, *Thornburgh v. American College of Obstetricians and Gynecologists*, and with Bork, the Court would have an anti-*Roe* majority.[243] And because Democrats controlled the Senate, those opposed to his nomination had the power to make an issue of his views. .[244]

But the politics of abortion and the confirmation process had also changed. In the 1970s and early 1980s, abortion foes primarily emphasized a constitutional amendment that would take the abortion question away from the Supreme Court entirely.[245] By 1987, leading groups like NRLC had given up on passing such an amendment, recognizing that even a conservative Congress would not pass an absolute ban and

---

238 *See, e.g.*, *O'Connor Reiterates*, *supra* note 236, at A1; Siddon, *supra* note 236, at 2.

239 Linda Greenhouse, *Senate Confirms Judge O'Connor; She Will Join High Court Friday*, N.Y. TIMES (Sept. 22, 1981), https://www.nytimes.com/1981/09/22/us/senate-confirms-judge-o-connor-she-will-join-high-court-friday.html [https://perma.cc/2W8Q-WGLT] (accessed July 10, 2019).

240 *See, e.g.*, ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 177–84 (2007) (detailing the conflict over Bork's selection).

241 *See, e.g.*, *Ted Kennedy Slams Robert Bork in 1987 Speech*, HUFFINGTON POST (Dec. 19, 2012), https://www.huffpost.com/entry/ted-kennedy-robert-bork_n_2332730 [https://perma.cc/RS2Z-BPJC] (accessed July 10, 2019).

242 *See, e.g.*, GARROW, *supra* note 159, at 671.

243 *See* 476 U.S. 747, 749 (1986).

244 *See, e.g.*, Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever*,' NPR (Dec. 19, 2012, 4:33 PM ET), https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever [https://perma.cc/56TD-VT4H] (accessed July 10, 2019).

245 *See, e.g.*, ZIEGLER, *supra* note 60, at 42–67.

that the movement was too divided to settle on a second-best solution.[246] As an alternative mission, groups like NRLC vowed to overturn *Roe*.[247] This idea seemed far more realistic after O'Connor's scathing dissent in a 1983 abortion case, *City of Akron v. Akron Reproductive Health Center*.[248] After Reagan's first nominee criticized *Roe*'s trimester framework, abortion foes believed that changing the Court's membership might be more valuable than previously thought.[249] Pro-lifers repeatedly framed Supreme Court nominations as the most important issue for abortion foes.[250] Movement politics as much as the *Roe* decision made abortion a central issue in the Supreme Court confirmation process.

Justice Scalia's consequentialist use of history blames far too much on *Roe*. Legal historians have been careful about making causal arguments for some time.[251] The Critical Legal History (CLH) movement exposed the problems with the straightforward causal arguments that had once been common in the academy.[252] In the 1960s, the Russel Sage Foundation funded a major expansion of studies at the intersection of law and social science, starting four university centers and organizing both the Law and Society Review and the Law and Society Association.[253] The early law and society movement often focused on causal questions about legal doctrine.[254] As Christopher Tomlins writes, "the objective was to explain distinctively 'legal' outcomes by locating law in explanatory social and economic contexts."[255] Beginning in the 1980s, the CLH movement heavily criticized this approach.[256] CLH scholars problematized causal arguments by insisting that

---

246 *See, e.g.*, *id.*

247 *See, e.g.*, Ziegler, *supra* note 60.

248 *See* 462 U.S. 416, 453–72 (1983).

249 *See, e.g.*, MARY ZIEGLER, ABORTION IN AMERICA: A LEGAL HISTORY, *ROE V. WADE* TO THE PRESENT 69-82 (2020) (exploring the rise of a court-centered antiabortion strategy).

250 *See id.*

251 *See, e.g.*, Charles Barzun, *Causation, Legal History, and Legal Doctrine*, 64 BUFF. L. REV. 81, 99 (2016) (detailing the reluctance of legal historians to rely on causal claims).

252 *See, e.g.*, Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE J.L. & HUMAN. 323, 384–95 (2004) (offering a history of CLH concerns about causal arguments).

253 *See* Christopher Tomlins, *What Would Langdell Have Thought? UC Irvine's New Law School and the Question of History*, 1 U.C. IRVINE L. REV. 187, 204 (2011).

254 *See, e.g.*, David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1, 78 (1990).

255 Tomlins, *supra* note 253, at 205.

256 *See, e.g.*, Tomlins, *supra* note 252, at 384–95.

"law (partially) constitutes society, and society constitutes law."[257] These scholars also insisted that the legal principles at issue, such as "*Roe*" or "property rights in land," were too indeterminate to cause anything, especially since doctrines and decisions can be interpreted differently, ignored, or even worked around.[258] Critical legal historians' preoccupation with causal indeterminacy, however, came with its own costs.[259] As Robert Gordon recognized, "The notion that every form of legality is a constructed artifact [. . .] tends [. . .] to deprive people of any strong basis for confidence in transcendent standpoints for critique of the present order."[260]

Legal histories now address causal questions enough to "tell a story with a narrative arc."[261] The temporal nature of history, after all, invites some kind of argument about whether earlier events influenced later ones. But critical theory has left a powerful legacy. Almost inevitably, legal historians treat causal factors are multiple and complex.[262] As Catherine Fisk writes, historians gravitate to "more qualified and more multi-factored causal claims, [. . .] or resist straightforward causal claims entirely."[263]

But in the context of stare decisis, narratives like Justice Scalia's almost inevitably seize on a single cause. For Scalia, the relevant question is whether that precedent on its own has had destructive social or political effects.[264] To say that *Roe* was one of many factors, or that *Roe* might have contributed to polarization, would make a far weaker case for reconsidering the 1973 precedent. But the lesson of decades' worth of legal historical debate is that any simpler causal argument is likely to obscure more than it reveals.

---

257 Robert Gordon, "*Critical Legal Histories Revisited": A Response*, 37 L. & SOC. INQUIRY 200, 203 (2012).

258 *See, e.g.*, Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 101 (1984); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 580–81 (1982); Mark Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383 (1980).

259 *See* Tomlins, *supra* note 252, at 205–09.

260 Robert W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument, in* TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW (2017).

261 Catherine Fisk, *Society in Historical Research*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY 490 (Christopher Tomlins & Markus Dubber eds., 2018).

262 *See, e.g.*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 vii–viii (1992).

263 *See* Fisk, *supra* note 261, at 490.

264 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 995–97 (1992).

Justice Thomas's *Box* concurrence introduces a second strand of historical argument, one focused on the motives of those who pursued or benefitted from a ruling as well as its past effects. His historical narrative focuses not on the beliefs of those who wrote a law or a constitutional amendment but on the intentions of social-movement members.[265] Focusing on social movements certainly makes sense in the abortion context, where the law and grassroots activism have long been closely intertwined. But the Court could easily adopt a similar historical approach in other doctrinal contexts. After all, in recent decades, social movements have played a central role in shaping constitutional norms, creating test cases, framing issues, and supplying the Court with rhetorical tools that figure centrally in judicial decisions.[266] Thomas's concurrence in some ways recognizes the importance of social movement entrepreneurs in key constitutional rulings like *Roe*. Understanding the motives of those social-movement actors who litigated a case might illuminate the intended or even real-world effects of a precedent. That, at any rate, seems to be Thomas's theory in *Box*. The history of those who pursued a ruling, Thomas suggests, can help us understand the influence of that precedent on society. And that history, in turn, can help guide any analysis of stare decisis. But as Thomas's *Box* concurrence shows, this approach creates far more problems than it solves.

III
BAD HISTORY IN *BOX*

Justice Thomas's concurrence in *Box* suggests that the motives of those who fought for a particular constitutional outcome matter. Why would we care about what these actors had in mind? If social movements' arguments shape a Court's ruling, then judges might pay attention if those arguments were not made in good faith or if the actual objective of social-movement actors differed radically from what they proclaimed.[267] Thomas levels just such an accusation against

---

265 *See* Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780, at 1735–39 (2019).

266 *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2073–77 (2002); Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. CR-CL L. REV. 1, 70-72 (2016); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1326 (2006).

267 *Cf.* Barzun, *supra* note 251, at 83.

the abortion-rights movement.[268] To discover the motives of those who pursued and still defend a ruling in *Roe*, Thomas began with what he presented as the origin story of demands for legal abortion.[269] Of course, there are any number of places where one could begin such an origin story, many of them more centrally focused on abortion than is Thomas's argument. Thomas, however, picked the birth-control movement of the early twentieth century and highlighted the work of Planned Parenthood founder Margaret Sanger.[270] Sanger, of course, has loomed large in pro-choice rhetoric (and all the more so for Planned Parenthood).[271] She also figures centrally in antiabortion narratives as an embodiment of the racism that supposedly drives Planned Parenthood.[272]

Justice Thomas's historical narrative focused heavily on Sanger's eugenic reasoning.[273] He reasons that if we can trace the modern abortion-rights movement to Sanger's work, we should question the motives of those who still support legal abortion or end their own pregnancies.[274] But Sanger's motives were likely far more complicated than Thomas suggests. In the 1910s, as he notes, eugenic legal reform attracted a wide range of supporters.[275] Democrats and Republicans approved of eugenic sterilization laws by large margins.[276] By contrast, the early birth-control movement was marginalized and struggling.[277] Sanger's praise of eugenics must be read in

---

268 *See Box*, 139 S. Ct. at 1735–39.

269 *See id.*

270 *See id.*

271 *See, e.g.*, ZIEGLER, *supra* note 60, at 138–61 (exploring the symbolic role played by Sanger in movement advocacy); *Margaret Sanger- Our Founder*, PLANNED PARENTHOOD (Oct. 2016), https://www.plannedparenthood.org/files/9214/7612/8734/Sanger_Fact_Sheet_Oct_2016.pdf [https://perma.cc/6RW2-FKLP] (accessed July 10, 2019).

272 *See, e.g.*, *Planned Parenthood and Racism*, STUDENTS FOR LIFE, https://studentsforlife.org/high-school/planned-parenthood-and-racism/ [https://perma.cc/MX84-4W2U] (accessed July 10, 2019) (weaving Sanger into claims about the racism of abortion-rights supporters); *Margaret Sanger*, AMERICAN LIFE LEAGUE, https://www.all.org/learn/planned-parenthood/margaret-sanger/ [https://perma.cc/6K3S-ZJ83] (same).

273 *See Box*, 139 S. Ct. at 1735–39.

274 *See id.*

275 *See, e.g.*, ADAM SETH COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 3–10 (2016) (exploring the diversity of the movement for eugenic legal reform); JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 5–12 (2017) (same).

276 *See, e.g.*, SYLVIA NASAR, GRAND PURSUIT: THE STORY OF ECONOMIC GENIUS 299 (2011) (detailing bipartisan support for eugenic legal reform).

277 *See, e.g.*, ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA 222–45 (1992) (studying the history of the

context. Courting eugenicists made sense for a movement lacking popularity, powerful political allies, or elite intellectual credentials.[278] And Sanger's use of eugenic rhetoric was hardly remarkable. President Teddy Roosevelt, a Republican, called on Anglo-Saxon women to halt "race suicide" by having more children (and bemoaned the fertility of less "racially desirable" women).[279] Roosevelt's rhetoric, like that of other Republicans or Democrats in the period, tells us nothing especially important about the views of progressives or conservatives today. If anything, Sanger's view reflects how widespread support for eugenics was in the early twentieth century. Describing her support for eugenics as sincere rather than strategic is a serious oversimplification.

Next consider Justice Thomas's effort to connect the eugenics movement to the population control movement of the 1950s through the 1970s—and to connect the population control movement to the modern abortion-rights movement.[280] In *Box*, Thomas suggests eugenics lost popularity because of opposition to the Nazi movement (which openly endorsed compulsory sterilization) and because of the obvious problems with the science underlying eugenicists' work.[281] Population-control arguments, in his telling, simply replaced eugenic rhetoric that had become taboo.[282]

But the motives of those demanding population control were infinitely more complex and varied than Justice Thomas suggests. The population-control movement emerged in the immediate aftermath of World War II.[283] This loosely knit coalition worked to expand federal family planning programs as a way to control the growing world population and check the American birth rate.[284] To be sure, some of those who

---

early birth control movement); PETER C. ENGELMANN, A HISTORY OF THE BIRTH CONTROL MOVEMENT IN AMERICA 106 (2011) (same).

278 *See, e.g.*, Mary Ziegler, *Eugenic Feminism: Mental Hygiene, the Women's Movement, and the Campaign for Eugenic Legal Reform, 1900–1935*, 31 HARV. J. L. & GENDER 211, 230–35 (2008) (studying the incentives for Sanger and her allies to court the eugenic movement).

279 *See* Theodore Roosevelt, *Motherhood Is the Duty of Women*, N.Y. TIMES, Mar. 14, 1905, at 2.

280 *See* Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780, at 1734–39 (2019).

281 *See id.*

282 *See id.*

283 *See, e.g.*, CRITCHLOW, *supra* note 192, at 4–15 (tracing the emergence of the population control movement); LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 281 (2002) (considering the rise of the population-control movement).

284 *See, e.g.*, CRITCHLOW, *supra* note 192, at 4–15 (detailing the aims of the

joined the movement harbored eugenic intentions. Hugh Moore, the co-founder of the Dixie Cup Company and the founder of a major population-control group, the Population Crisis Committee, described eugenic and even racist goals for his organizations behind the scenes.[285] Moore was certainly not alone. Frederick Osborn, one of the founders of the prominent and prestigious Population Council, was a eugenicist.[286] But many flocked to the population-control movement for other reasons. Some, like Representative George H.W. Bush of Texas, viewed population control as part of Cold War politics, a strategy to stop the growth of communism that might be expected in developing countries severely lacking in resources.[287] On college campuses, students sometimes flocked to Zero Population Growth, Inc. (ZPG), a group that framed population control as a strategy for liberating women or protecting the environment.[288]

These activists and politicians disagreed with one another, especially when it came to abortion.[289] And perhaps unsurprisingly, the organizations that most closely connected to eugenics, often home predominantly to older men, opposed abortion as a tool for population control.[290] More student-oriented organizations joined the movement to legalize abortion.[291] The Population Council, for example, took no position on abortion.[292] Nor did Moore's Population Crisis Committee.[293] ZPG, by contrast, (a group that primarily attracted younger Americans) worked closely with the National Association to Repeal Abortion Laws.[294]

The abortion-rights movement likewise disagreed about the role of population-control rhetoric and politics. Groups like NARAL clashed about whether to feature arguments about population control, and feminists fiercely resisted the move.[295] Similar struggles unfolded within Planned Parenthood and

---

population control movement).

285 *See* ZIEGLER, *supra* note 60, at 99–105.

286 *See* Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 CARDOZO J.L. & GENDER 319, 331–50 (2008).

287 *See* ZIEGLER, *supra* note 60, at 103.

288 *See id.* at 99–124; *see also* STAGGENBORG, *supra* note 161, at 5–12.

289 *See* ZIEGLER, *supra* note 60, at 98–124.

290 *See supra* note 288 and accompanying text.

291 *See id.*

292 *See id.*

293 *See id.*

294 *See id.*

295 *See id.*

NOW.[296] African-Americans were similarly divided. Some, as Justice Thomas notes, denounced abortion as race genocide, including prominent liberals like Jesse Jackson (who subsequently changed his position on abortion).[297] But well-known Black feminists and even Black Republicans endorsed legal abortion.[298] Quite simply, it is wrong to equate the population-control and abortion-rights movement—or to argue that eugenicists dominated the movement for population control. Both claims oversimplify a complex history to the point of incoherence.

Even Thomas's effort to connect modern uses of eugenics to racist comments made by Sanger or other supporters of eugenics raises historical difficulties. In many states, most of those victimized by compulsory eugenic sterilization before World War II resided in state institutions or had otherwise come into contact with the government.[299] Racial segregation temporarily shielded many Africans-Americans from the worst of compulsory sterilization primarily because many states denied any welfare benefits whatsoever to people of color.[300] And sterilization decisions often had as much to do with sex stereotypes as it had to do with racism, especially before World War II when the vast majority of sterilizations took place. In California, for example, one of the states that performed the most sterilizations, "feeble-minded" women were often accused of being sexually promiscuous.[301] After World War II, some states, such as North Carolina, more often sterilized women of color as well as poor whites, but often, women who had sex out of wedlock (or those whose mothers had done so) were targeted.[302] Anger about sexually active women may well motivate opposition to abortion. The same also motivated some eugenicists.[303] However, race-selection abortions bear little resemblance to the forced sterilizations once authorized by eugenic laws.

Justice Thomas uses this oversimplified narrative to indict both individual women choosing abortion and, at least by implication, those who fought for legal abortion in the first

---

296 *See id.*
297 *See id.*
298 *See id.*
299 *See* Ziegler, *supra* note 286, at 330–31.
300 *See id.*
301 *See* Ziegler, *supra* note 278, at 215–19.
302 *See* Ziegler, *supra* note 286, at 344–50.
303 *See id.*

place.[304] In this way, Justice Thomas's *Box* concurrence, like Justice Scalia's *Casey* dissent, is not just historic but consequentialist.[305] Thomas suggests that we should reexamine the constitutional framework set out by the Court—one won by those, he argues, with motives darker than we believed.[306] If abortion-rights groups pursued a ruling in *Roe* for perverse reasons, we should worry about that the decision gave them what they asked for. We should reconsider the effects unleashed by *Roe*.[307]

Historically, this style of consequentialist argument creates even more difficulties than the one used by Justice Scalia in *Casey*. Justice Thomas zeroes in on the role of social movements in constitutional litigation.[308] But as *Box* itself illustrates, social movements are often internally divided, home to activists with many, often conflicting, objectives. Identifying a single, driving mission for a movement over time is even harder. Thomas's narrative requires a massive oversimplification not only of the work of those who demanded legal abortion but also of the relationship between their movement and others with somewhat related objectives. Identifying the original intention of the framers, as many have noted, invites incoherence.[309] It is for this reason that leading originalists have developed more sophisticated ways to talk and think about original public meaning. Thomas's style of reasoning creates similar problems. His approach would require the Court to identify a driving motive of divided movements—a motive that stayed relatively constant over decades of political, social, and economic change.

And Justice Thomas suggests that this driving intention illuminates the consequences of the original *Roe* decision.[310] This argument raises the same causal problems seen in Justice Scalia's *Casey* dissent. If we could identify the goal or intention of those who achieved success in *Roe*, that would not on its own tell us anything about the effects of the decision. Those who wished or expected *Roe* to have certain effects might easily be wrong. Or the effects these activists anticipated may come to pass, along with other, unintended consequences,

---

304 *See* Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780, 1735–41.

305 *See id.*

306 *See id.*

307 *See id.*

308 *See id.*

309 *See supra* note 131 and accompanying text.

310 *See Box*, 139 S. Ct. at 1734–40.

good or bad. And just as blaming *Roe* for our current political dysfunction ignores a richer, more complex, and more accurate story, blaming *Roe* for what Thomas views as the contemporary reemergence of eugenics is completely unconvincing.

The problems with this style of historic reasoning do not stop with the fact that Justice Thomas wrote an unconvincing concurrence. There are two independent reasons for worrying that similar historic consequentialist arguments will spread. First, both conservatives and liberals have more often emphasized the role of social movement lawyers in Supreme Court decision-making.[311] During then-Judge Brett Kavanaugh's contested confirmation hearing, Democratic Senators asked the nominee repeatedly about the prominence of conservative movement lawyers in submitting amicus briefs and bringing test cases.[312] As *Box* suggests, conservatives can make similar arguments against progressive public-interest litigators. As social movements figure more centrally in constitutional debates, we should expect the justices to take a greater interest in the kind of argument Thomas makes.

More important, historic consequentialist arguments play a central role in the ongoing campaign to reverse *Roe*, particularly when it comes to stare decisis. The Court seems to have retooled its approach to stare decisis beginning with its recent decision in *Janus v. American Federation of Municipal, State, and Federal Employees*, a case on the First Amendment implications of mandatory union dues.[313] Although the Court's approach to stare decisis is far from settled, recent decisions seem to confirm that the ascendancy of the *Janus* approach.[314] The Court now seems to examine the quality of the original decision's reasoning, "the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[315] Antiabortion groups heavily use historical consequentialist arguments in claiming that stare decisis principles do not militate in favor of preserving *Roe*.[316] In

311 *See supra* note 212 and accompanying text.

312 *See* Paul Blumenthal, *Sheldon Whitehouse Says Brett Kavanaugh's Confirmation Hearing Is 'A Sham*,' HUFF. POST (Sept. 4, 2018, 7:27 PM ET), https://www.huffpost.com/entry/brett-kavanaugh-confirmation-hearing-sheldon-whitehouse_n_5b8efa15e4b0162f4727e447 [https://perma.cc/3WKQ-LUGM] (accessed July 10, 2019).

313 138 S. Ct. 2448 (2019).

314 *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2445 (2019) (relying on the Janus factors in approaching stare decisis).

315 *Janus*, 138 S. Ct. at 2478.

316 *See* ZIEGLER, *supra* note 249.

particular, groups like AUL and NRLC maintain that if abortion hurts women and the communities in which they live, then there can be no reliance interest in preserving it.[317] Some abortion foes seek to show that women who end their pregnancies suffer devastating health consequences.[318] Other abortion foes focus on what they describe as the negative effects of *Roe* on American politics.[319] All of these arguments oversimplify a complex history much as did Justices Scalia and Thomas's opinions.

Regardless of what thinks one of *Roe*, these arguments should not be the basis of a decision radically transforming abortion law. Historical consequentialist arguments often obscure as much as they reveal. These arguments blame the Supreme Court for wide-ranging phenomena that have nothing to do with the justices' decisions. And such arguments often play down the consequences of overturning a precedent—or the Court's inability to anticipate what likely will follow from a particular outcome or line of history. If the Supreme Court reconsiders *Roe*, bad history should not guide the analysis.

And these historic arguments often take the place of more detailed constitutional arguments against the ongoing recognition of abortion rights. Lay actors have strong opinions on how constitutional values of autonomy, equality, and dignity apply to abortion as well as on how the Constitution treats fetal life. Any major abortion decision should be transparent enough to invite rather than discourage public engagement. Historical arguments, even bad ones, have a veneer of expertise that would undermine any meaningful popular response. Thomas's *Box* concurrence, at any rate, shows us what future opinions should not look like. Historians deserve better, and so do the rest of us.

---

317 *See id.*
318 *See id.*
319 *See id.*