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Abortion Politics, Legal Power, and Storytelling

When the United States Supreme Court decided the case of *Roe v. Wade* in January 1973, it simultaneously struck down state abortion laws and helped fuel the creation of the modern social conservative movement. Up through the early 1970s the legality of abortion was largely seen as a "Catholic issue." That changed in the aftermath of *Roe v. Wade*.[1] While it did not happen immediately, legalized abortion became a central issue for social conservatives who came to see *Roe* as a particularly morally intolerable example of the political Left once again marshaling the unelected federal judiciary to undo the popular will of the states.[2]

In this line of conservative thinking, the Supreme Court, headed by Chief Justice Earl Warren, was seen as forcing racial integration, banning prayer and religion from public life, creating soft-on-crime policies, and liberating sexual taboos.[3] This growing catalog of offenses helped bring Nixon's "Forgotten Americans" to the polls in 1968, but even that was apparently not enough to stop the Court's socially disruptive progressive trend. Nixon was almost immediately able to reform the Supreme Court in his first term with four judicial appointments, including Chief Justice, but the Court persisted in producing progressive rulings. Over two decades of controversial court cases and social turmoil had helped to move the Forgotten Americans and the "Silent Majority" to vote, but *Roe v. Wade* was the ruling that would mobilize a more sustained and not-so-silent movement.

The anti-abortion movement has taken many forms in the four decades since.[4] In the 1980s and 90s one of its identifying hallmarks was

clinic-front activism. These protests took various forms, but collectively they served to publicize the cause, gain more members, give participants the feeling of empowerment via direct action, impede clinic access, and tax clinic resources. A less desirable outcome, from the anti-abortion perspective, was that this activism also spurred abortion-rights advocates to organize to directly counter these street-level tactics. While those fighting for abortion rights may have believed that they had reached their goal with the *Roe* decision, it quickly became clear that the Supreme Court case was just one step in a protracted and ongoing movement-countermovement struggle.[5]

As clinic-front anti-abortion protests grew in frequency, magnitude, and intensity, abortion providers and their supporters sought ways to respond. Their search yielded its own direct action strategies, but it also returned abortion-rights proponents to the state and, in particular, to the judiciary.[6] At times, abortion-rights advocates attempted to use state-based means to win dramatic gains against their adversaries. The National Organization for Women (NOW) tried to use federal anti-racketeering (or RICO) laws, which were created to fight organized crime, to criminalize specific anti-abortion tactics and organizations.[7] More commonly, abortion-rights activists sought to obtain court orders and legislation that governed how anti-abortion protests could occur—for example, establishing specific distances that needed to be maintained between activists and clinic doorways.

When clinics and abortion-rights groups succeeded in securing injunctions and other legal measures against their opponents, anti-abortion activists did not cower. Instead, they fought back with a legal strategy of their own. Anti-abortion activists around the country began challenging the restrictions by arguing that such measures violated their constitutional right to free speech. The combination of pervasive clinic-front activism, available legal resources, and crosscutting First Amendment questions touched off a wave of cases that disproportionately occupied the United States Supreme Court's docket.

The nation's high court has heard and written opinions for eight anti-abortion activism regulation cases since the late 1980s.[8] The most recent of these cases, decided on February 28, 2006, settled the prolonged dispute over the application of RICO laws to anti-abortion activists.[9] In addition to the cases that the Court has heard, individual Justices have gone out of their way to author two concurrences and three dissents for denials of certiorari ("cert") (i.e., instances where the Court has decided to not hear

a case).[10] This is a very uncommon step for a Court that rejects roughly 99 percent of the cases that are appealed to it.[11] With these responses to denials of cert included, members of the Court have written opinions for 13 cases related to the regulation of anti-abortion activism in less than 20 years. As the following chapters will show, three of these cases—*Planned Parenthood Shasta-Diablo Inc. v. Christine Williams* (1995), *Schenck v. Pro-Choice Network of Western New York* (1997), and *Hill v. Colorado* (2000)—represent the range of clinic-front activism, the regulatory responses to it, and the period's importance in the progression of abortion politics and the development of the New Christian Right.[12]

Briefly, the *Williams* case represents largely nonviolent, small-scale but repetitive clinic-front protesting. Over the course of this conflict, groups of anti-abortion activists gathered at a clinic in Northern California and typically held signs and attempted to distribute materials to those who were accessing the clinic. This activism was ultimately responded to with a clinic-specific injunction that pushed the anti-abortion activists away from the clinic. While it was twice appealed to the U.S. Supreme Court, the injunction was repeatedly allowed to remain in place.

Similar events led to *Schenck v. Pro-Choice Network of Western New York*, but they occurred on a much larger and more aggressive scale. Instead of relatively small-scale recurrent activism at one clinic, the *Schenck* case included large-scale repetitive protests known as "rescues" at a number of clinics in Western New York State. The nationwide anti-abortion group Operation Rescue popularized rescues. As a form of protest, rescues involved both peaceful and aggressive activities ultimately intended to close the targeted clinics.[13] A coalition of clinic supporters and abortion providers in Western New York organized in response and countered this activism through a collection of direct-action and state-based means. The resulting Supreme Court case centered on the legality of a regional injunction that established both fixed and floating buffer zones around clinics in Western New York. The Court upheld the fixed buffer elements of the injunction, but struck down the floating buffer provision.

The final case, *Hill v. Colorado*, considered the constitutionality of Colorado's "Bubble Bill"—a law governing activism within 100 feet of health care facility entrances.[14] Unlike the previous two cases, the regulation in *Hill* is not in response to a singular event or a particular ongoing conflict. Rather, according to one of the bill's sponsors, the Colorado "Bubble Bill" was born of a feeling that the state needed new "pro-choice legislation."[15] The case is also unique in that it introduces legislative, as

opposed to just judicial, responses to anti-abortion protesting. Noting the adverse effect the Bubble Bill could have on their activities, a group of anti-abortion advocates organized to fight the legislation in public hearings and eventually challenged the law in the U.S. Supreme Court. The Court upheld the Bubble Bill in full, opening the door to the federal Freedom of Access to Clinic Entrances Act, which effectively ended the most aggressive forms of clinic-front anti-abortion activism nationwide.[16]

Taken together, these conflicts illustrate the rise and fall of the most visible, participatory, and overtly contentious period of abortion politics in America. The eventual subsidence of the street politics of abortion in response to clinics' and abortion-rights advocates' legal victories, however, did not mark the end of the anti-abortion movement or abortion politics. Like flowing water that hits an obstruction, efforts in the conflict were merely diverted to a different course. Activists from both sides of the conflict have thus—often literally—moved from the streets to continue the fight in state legislative halls and courtrooms around the country.[17] *Williams*, *Schenck*, and *Hill* trace and explain this path, unpacking reasons for the resilience of abortion politics while also showing how these events matter for the institutionalization of the New Christian Right more broadly.

Through these cases we see how abortion-rights activists have largely taken a defensive stance that reacts to, rather than initiates action against, their opponents. In the decades since *Roe,* the abortion-rights movement has yet to find a way to take the offensive, control the political discussion, or sustain popular involvement. They have come to be both behind and significantly subject to the anti-abortion movement's actions. As a result, they show no signs of being able to slow, let alone end, the ongoing movement-countermovement conflict over abortion. Rather, they can only perpetuate it.

While one side of these cases is illustrative of a movement that faces difficulty in spite of its successes, the other side provides examples of a movement that is in many ways successful in spite of its failures. These cases demonstrate the resilience of anti-abortion activists and show a movement that is both entrepreneurial and developing in ways that have significant ramifications for the broader Religious Right's place in American politics. The anti-abortion movement's lead in transitioning to new "arenas of conflict" is a prime example of strategic creativity, resource development, and the way in which movement-countermovement struggles continue.[18] The anti-abortion movement has been successful at making these transitions

because, as these cases show, they have benefited from a combination of passionate, able activists and available resources. The former creates the will and aptitude to develop new strategies in the face of defeat, while the latter provides the means to persist.

The stories surrounding *Williams*, *Schenck*, and *Hill* largely start with local grassroots organizations with limited resources and elite access. They also, however, introduce then-fledgling organizations and emergent leaders that ultimately rose to prominence through their involvement with these cases and led the way to the new institutional and elite politics of abortion. What's more, some of these organizations and associated leaders have used their experience in these conflicts to become important not only within abortion politics but also within the New Christian Right and the modern Republican Party.

First Amendment Doctrine and Anti-Abortion Protests

Before delving into more detail concerning the specific questions and issues that form this book's core, it is useful first to survey some of the legal matters involved in anti-abortion protest regulation cases. While their specific facts and legal arguments vary, all of the cases examined in this book generally address a similar doctrinal constellation within First Amendment law: the regulation of speech within the "public forum."

Public forum doctrine refers to the collection of cases that began in 1939 and address the regulation of speech in public spaces such as in parks and on sidewalks.[19] Because a broad spectrum of the public mixes and interacts in these spaces, they create a natural space in which to disseminate and debate ideas. As a result, the public forum is at the heart of the First Amendment, and speakers correspondingly experience a higher degree of freedom and protection when they are acting within it than when they are acting on privately owned property.

This being said, the same features that make the public forum an ideal space for speech also make it a volatile and potentially dangerous place. Speech and ideas can excite, offend, and instigate. Unpopular speakers can be attacked, mobs can be mobilized, and violence can be fomented. Considering this, the state must not only protect the rights of speakers within these forums but it must also protect the rights of other people to carry on safely and freely in public. Thus a tension exists in

finding the balance between these competing rights. Many of the Court's First Amendment decisions and the resulting doctrinal lines are the result of trying to strike a balance between these interests. What spaces are, and are not, public forums? When is it permissible to regulate speech, or aspects of speech, within the public forum? And when it has been determined that speech in the public forum can be regulated, what are the limits on the resulting regulation?

In the anti-abortion protest regulation cases, there is relatively little debate between the parties about what is defined as the public forum. Neither side generally questions that property rights restrict the protesters' activities on clinic property.[20] Instead, the conflicts hinge on the degree to which clinics and the state can regulate the protesters when they are on the public sidewalks surrounding these clinics. This leads to a set of more specific legal questions concerning both "time, place, and manner" and "captive audience" doctrine, as well as the "content neutrality" of the existing regulations.

The question of content neutrality refers to whether a regulation takes direct aim at the content of regulated speech. If a regulation targets the speech because of the speaker, the subject matter, the viewpoint expressed, or the predicted impact of the speech upon the audience, it operates as a form of censorship—an end deemed unacceptable by the Supreme Court. In the words of Justice Marshall, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship."[21]

Expressive behavior may, however, be regulated if it is done without reference to content. For example, it is permissible to regulate the conditions of expression, or, in other words, the "time, place, and manner" of speech. At its creation, time, place, and manner reasoning was used by the Court to synchronize the exercise of free speech (in the originating case, a public parade) with other functions of everyday life in order to "conserve the public convenience."[22] While the local government required a permit in order to hold a parade, it was not deemed an unconstitutional restriction on speech rights because the exercise of speech rights needed to be coordinated with other social functions. The Court determined that the way in which the government coordinated the public's and the marchers'

needs did not make reference to the parade's content, its participants, or its predicted impact upon observers. As such, the regulation was considered to be a content-neutral regulation of the time, place, and manner of speech. If, however, obtaining the permit were dependent upon the government approving of the parade's message, the regulation would be declared unconstitutional.

The Court has since attempted to detail what may be considered a content-neutral regulation of the time, place, and manner of speech. The standard applied in the abortion cases directly stems from *Ward v. Rock Against Racism* (1989)—a case that involved a dispute over the regulation of amplified sound in a public venue.[23] In brief, the standard holds that time, place, and manner regulations must meet three requirements. First, "the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[24] Second, the regulation "must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so."[25] Finally, regulation must "leave open ample alternative channels of communication."[26] While the purpose of these regulations is to "coordinate" speech, critics have pointed out that the content-neutrality requirement and the time, place, and manner test still allow the government to "subordinate" speech—a claim also made by those advocating for anti-abortion protesters.[27]

Along with time, place, and manner regulations, the Court has said that intervening on behalf of "captive audiences" is acceptable. The resulting captive audience doctrine is an attempt by the Court to balance the rights of speakers and unwilling audiences. This is a matter of great concern in these anti-abortion protest conflicts. The rights determination in such cases depends upon the speech's context. If the audience is reasonably able to avoid unwanted speech and is in a traditionally defined public forum, the speaker tends to retain a considerable amount of Constitutional protection.[28] If the audience is unable to escape the speech, or is in a place considered insulated from the public forum, "the First Amendment permits the government to prohibit offensive speech as intrusive."[29] The claims made on behalf of clinics and their clients in the cases studied here are: (1) that the patients who are trying to access clinics are captive audiences; and (2) that the inherent medical risks of the abortion procedure require insulation from the public forum.

This brief selection and survey of legal matters at issue in anti-abortion protest regulation cases demonstrates that they are the latest stages in the evolution of some of the First Amendment's core features. This makes apparent that these cases not only affect the specific disputants and the form of abortion politics, but also that they impact the regulation of political speech and expression generally. Furthermore, this survey hints at another point about law. While existing doctrine provides guidelines for action, the presence of court cases reveals that disputes about the application of doctrine remain. Law is thus simultaneously authoritative and incomplete.

This obvious, but seemingly contradictory—and therefore oft-overlooked—dichotomy raises questions about law's claims to legitimately command obedience. It also creates spaces that can be exploited by social movements and other actors. Law's mix of openness and authority allows space for movements to make novel claims that frame their issues, create public notice, and permit them to get into court. If they win in court—and that is a big *if*—they gain the imprimatur of the state, which presumably translates to various policy and other strategic gains. If, however, they lose, the movement can establish precedent that works against their cause and produces other forms of self-inflicted harm. The ways that movements approach and use litigation is thus worth noting for what it can tell us about social change and political institutions.

Movements, Countermovements, and the Law

In general, those who study social movements and the law are interested in the political opportunities and costs of pursuing various legal strategies. While using law might seem attractive for movements, there is widespread academic debate about the utility of doing so. Much has been made of the "myth of rights";[30] the limited conditional nature of judicial power;[31] the structural advantages in litigation enjoyed by established institutions;[32] the ability of court cases to disproportionately consume resources and alienate grassroots activists;[33] and how litigation and "rights talk" escalate conflicts or otherwise backfire on those who use them.[34] Other scholars have noted that while the courts' power might be limited and conditional, it can still produce sought-after political effects;[35] activists can strategically marshal legal resources;[36] and even if movements lose in court, they can still garner indirect benefits from litigation.[37]

Whatever their conclusions, when scholars talk about law and social movements, they characteristically talk about the place of rights and litigation in deliberately planned, but not necessarily strictly controlled or uncontested, strategies meant to advance a social movement's ultimate policy goals. Furthermore, the goals sought are usually some type of equity reform. These features of law and social movement research tend to lead scholars to focus their attention in specific ways.

First, not surprisingly, studies tend to concentrate on social change activists far more than on the other groups involved in a given struggle. Second, the featured social movements are usually organized in opposition to nonmovement entities that control or administer the policies activists oppose (e.g., the state, employers, or other social institutions). What's more, the examination of the activists' opponents is typically limited to asking if, when, why, and/or how the opponents resisted or changed in relation to the advocates' demands. While such research is undeniably important, limiting the approach to social movements in these ways leads to excluding or overlooking other types of social movement conflicts, resulting in an unduly limited view into how social movements, law, politics, and policy interact.

Law and social movement research is also typically constrained through its focus on rights claiming and litigation as tools used—incrementally or immediately—to directly achieve a movement's central policy goals. The popular conception of the National Association for the Advancement of Colored People's (NAACP) desegregation strategy generally, and *Brown v. Board of Education* (1954) specifically, capture this thinking. The belief is that the NAACP brought *Brown* and its predecessors to both immediately (by desegregating specific institutions) and incrementally (by building precedent to overturn the separate but equal standard) achieve the goal of desegregation. Considering the relative success of this strategy, subsequent progressive and conservative movements have followed its form. Given this, it seems logical that if one wants to study social movements and the law one should study groups that use law and litigation in this direct way.

Admittedly the NAACP's desegregation strategy and the surrounding political and social realities were more complex than this example implies. Correspondingly, those who study social movements and the law have more nuanced questions and approaches than this blunt example might suggest. In spite of this, the example's basic point still stands.

Researchers often look at a group's ability or inability to use rights claims and litigation to conceptualize a wrong, mobilize activism, and/or force significant policy change.[38] As with the privileging of activists over their opponents, looking at a movement's use of law to attempt to directly achieve its goals unduly restrains our understanding of law's place in the interaction between social movements, politics, and policy.[39]

Applying the relatively small but compelling movement-countermovement literature to the study of law and social movements exposes some of the limits of the typical approaches to the latter.[40] In movement-countermovement research, scholars pay attention to how directly competing movements interact with one another—and possibly with a more traditional entity like the state—in a dynamic process where each movement in part creates the conditions within which the other acts. The fight is no longer about one social movement against the state or an established institution. It is now about the competition between rival movements and their fights to control resources, public opinion, policy, and the arenas of conflict.

Among the relevant issues in this literature for law and social movement scholars is how opposing movements prolong conflicts through their ability to shift to new political venues when they have been defeated in another; how such venue shifts (and the resulting changes in tactics and demands) of one movement can force the opposing movement to respond in areas and ways that they did not intend or desire; and how these strategic changes can cause opposing movements to develop parallel internal organizational structures over time.[41]

Similar themes are found in the law and social movement literature. Robert Kagan's work on adversarial legalism explores how federalism and the separation of powers allow for conflicts to be prolonged through venue shifting.[42] Michael McCann and Paul Frymer discuss how movements are able to use the law to force unwilling opponents to listen, appear in court, spend resources, and otherwise respond to their claims.[43] Charles Epp and Steven Teles provide detailed studies of how progressive and conservative movements develop organizational structures that allow them to enter and thrive in the legal realm.[44] More generally, both areas of study are interested in the interaction of movements, politics, and policy.

In spite of this overlap, little if any work in either area specifically concentrates on the role and manifestations of law and litigation in movement-countermovement struggles.[45] This poses a question about what

new issues or findings can be produced by deliberately blending the two approaches to social movements. Furthermore, though David Meyer and Suzanne Staggenborg wrote about it over fifteen years ago, there is also still a need within the movement-countermovement literature for "studies comparing the ways in which different conflicts between opposing movements develop . . . within particular contexts . . . and the factors that lead to . . . shifts in strategies and tactics."[46] As court cases that are simultaneously the *result and cause* of changes in rival movements' strategies, structures, and actions, the conflicts examined in this book are fitting means to respond to both of the above concerns.

To back up for a moment, there is much about these cases that is familiar to both law and social movement and movement-countermovement researchers. The cases reflect the trajectory of abortion-rights activists returning to the courts when they needed to address new clinic-front activism—a step that followed their initial legal victory in *Roe*, and that ran concurrently with the need to challenge early post-*Roe* legislative restrictions on abortion. They show how clinics were able to draw from a mix of local lawyers and established legal resources—both from the abortion-rights movements and other left legal networks—when anti-abortion activists adopted clinic-front tactics. The conflicts also show how specific legal strategies to manage and discourage clinic-front activism developed through local trial and error and then spread through nationwide activist networks. Different provisions (e.g., floating and fixed no-entry zones with varying specific requirements) and different legal vehicles (e.g., local restraining orders and injunctions, regional injunctions, and finally legislation) were used in a continual effort to control the conflicts with the right mix of effective and constitutionally defensible regulation. Finally, through the introduction of legislation, the cases demonstrate how the abortion-rights movement was able to shift some of the costs of defending anti-abortion protest regulation to the state.

The abortion-rights movements' actions were spurred by the need to respond to evolving anti-abortion tactics, and they in turn had an effect on the future development of those tactics. The anti-abortion movement developed significant legal resources that began with local lawyers who were loosely connected to the activists that they represented through churches and fledgling anti-abortion networks. Like some of their rivals who represented the clinics, these lawyers predominantly volunteered their time and still had their regular practices to attend to. In order to

fully respond to the abortion-rights activists' growing legal network, resources, and corresponding use of courts, the anti-abortion movement developed organizations that could go beyond the immediate criminal defense of those accused of violating regulations. The movement, in conjunction with the greater New Christian Right, created efficient centralized legal institutions and networks that enabled them to challenge the constitutionality of regulations at the appellate and Supreme Court levels (as seen in the three cases discussed here); identify and attempt to preempt potentially harmful state actions (as they did with the Colorado Bubble Bill); and create the means of going on the offensive in a range of institutional arenas (as organizations like the American Center for Law and Justice [ACLJ] have subsequently done). Given the details that the following chapters provide in terms of the strategic legal moves taken by both sides in response to one another, *Williams*, *Schenck*, and *Hill* provide inviting vehicles for microstudies of movement-countermovement conflicts that add to our understanding of such conflicts as well as of social movement litigation.[47]

The application of a movement-countermovement lens to these conflicts, however, specifically draws out a unique aspect of these cases given the majority of law and social movement research. On one level, these cases are all obvious examples of movement litigation in that they involve activists as litigants. If one looks beyond the cases' surface features to the legal details, however, it is also clear that they are unlike the bulk of movement litigation that has been studied. Instead of examining social movements that bring cases as a means to directly achieve their equity reform goals, the litigation that is of interest here is better classified as what I call "secondary movement litigation." As such, it is a largely heretofore-overlooked form of movement litigation that is produced in the movement-countermovement context.[48]

Using the term "secondary" to describe the type of movement litigation seen in *Williams*, *Schenck*, and *Hill* is not intended to suggest that the activists involved were employing multiple litigation-based strategies with varying degrees of importance. That is, they were not simultaneously pursuing a main and a secondary, or backup, litigation strategy. The difference that is being drawn is in reference to two other interconnected features of these cases. The first stems from the fact that the cases were not part of a broader, premeditated strategy by either movement. Rather, they are unplanned reactions to the current form of the dispute. The second way

in which they are secondary relates to the indirect relationship between the litigation and the movements' ultimate goals. Both of these features are rooted in the greater conflict's movement-countermovement dynamic.

The back-and-forth exchange of evolving tactics in this ongoing struggle muddles the cases' origins, making it hard to attribute them to a specific movement. The cases are, in a sense, reactive and secondary for each side and thus good examples of why Meyer and Staggenborg consider movement-countermovement conflicts to be circular or spiraling rather than linear.[49] For example, it is true that anti-abortion activists initiated legal proceedings in cases like *Hill*, and thus these actions can appear to be part of a deliberate strategy. These cases, however, respond to local, state, and federal protest regulation laws won by abortion-rights activists. The anti-abortion activists only entered the court because they were compelled to in order to defend their direct action tactics. Turning to state and federal injunction cases like those seen in *Williams* and *Schenck*, abortion-rights activists had to go to court to secure, modify, and enforce temporary and permanent injunctions. As a result, these cases can appear to be part of the clinics' intended litigation strategy. In spite of this, it is important to note that the anti-abortion activists elevated and effectively drove cases like *Williams* and *Schenck* when they decided to raise and pursue First Amendment claims.[50]

Taken together, neither side of these disputes necessarily planned to enter or stay in the courts, but they were essentially compelled to by their rival's actions. These cases show that effective steps taken by a movement in a given forum forces opponents either to enter into, or to continue developing in, that same forum. Being drawn into the same venue—in this case, the legal arena—causes the opposing movements to develop similar institutional capacities that allow them to effectively perform and further tactically innovate.[51] While neither movement may have foreseen or desired to develop along this legal course, both have done so. As a result, the abortion conflict and the greater "culture war" have been profoundly affected.

The spiraling nature of the conflict and the resulting cases also illustrate that so long as each side can continue to marshal the resources necessary to respond, innovate, and change forums, opposing movement disputes can seemingly continue indefinitely. Certain individuals or whole categories of participants may be eliminated with each tactical turn, but the overall dispute continues. These protest regulation cases may have

wrought the effective end of popular, street-level anti-abortion activism and activists, but the wider abortion conflict has continued on in new forums and forms. Those who were best positioned to continue on in the new state-legislative-dominated politics of abortion (e.g., activist leaders) have done so, while those who were not similarly situated (e.g., street-level "foot soldiers") either left the movement or found new means to be involved in other arenas (e.g., opening "crisis pregnancy centers" or giving money to established activist organizations on either side).

The next way in which these cases are secondary relates to the disconnect between the cases and the movements' ultimate missions. Instead of addressing the legality of abortion—the central issue for both movements—the *Williams*, *Schenck*, and *Hill* cases are disputes over the legality of the street-level tactics used in pursuit of their goals. The cases are outliers in movement litigation studies in that they are not meant to, nor do they even have the ability to, incrementally or immediately achieve either movement's ultimate policy goals. That is, neither side directly affects abortion policy by winning or losing these cases. Rather, the litigation is one step removed from these goals and is only understood within the context of the sustained interaction between rival movements.

There is no doubt that anti-abortion protest regulation cases are high-stakes, politically passionate affairs that are intimately entwined with broader abortion politics. In the eyes of the protesters, defeat meant the effective end to both the public face of the anti-abortion movement's activism and, in the movement's language, a means to directly save babies and women. For the clinics and their supporters, defeat would not only signal the persistence of clinic-front conflicts and the perceived standing threat to the individuals at clinics but also foreshadow a general threat to the security of abortion rights within the Unites States. In either scenario, the effects upon the two movements are in terms of tactics, not ultimate policy goals.

Furthermore, jurisprudentially, these cases are not about abortion politics. Rather, the case outcomes determine the means by which *any* activists can employ direct action strategies and the extent to which the targets of their activism can use state power to fight back. As such they are First Amendment cases that are substantively secondary for the competing movements. The abortion protest regulation cases' secondary status is made starker through a comparison with what can be termed "primary" abortion politics cases. For example, *Roe v. Wade* (1973) legalized abortion; *Gonzales v. Carhart* (2007) upheld the ban on "partial-birth" abortions;

and *Webster v. Reproductive Health Services* (1989), *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), and *Ayotte v. Planned Parenthood of Northern New England* (2006) each directly imposed restrictions on accessing abortion. All of these are examples of litigation that either incrementally or immediately addressed the competing movements' ultimate policy aims.

The secondary free speech issue was introduced into the conflict by the protesters' desire to respond to the clinics' abilities to effectively regulate anti-abortion direct action strategies. This desire forced the anti-abortion movement to enter the judicial system, which in turn required anti-abortion activists to meet certain institutional criteria. The requirements went beyond hiring lawyers and developing a legal infrastructure. The activists' beliefs about the moral duty to resist abortion were not legally suitable to challenge the regulations—a point that chafed some activists. Given this, the anti-abortion activists were suddenly required to become champions of a new cause. They were now in the position of being advocates for an expansive reading of the First Amendment. This, correspondingly, put the clinics and their supporters in the position of being advocates for a limited reading of speech rights. The introduction of this wholly new and foreign issue into the abortion dispute had multiple effects both within and around the existing conflict. In short, the insertion of First Amendment claims modified both what the disputes were about and to whom they were of interest. This sudden shift is entirely due to the disputes' greater movement-countermovement context.

As might be expected, activists on both sides of these disputes had reason to feel uncomfortable with their new roles.[52] The conflict between clinics and anti-abortion activists represents an inherent tension within speech rights—the tug-of-war between (a) the democratic value of allowing ample room for activism and expression and (b) the moral duty (of states and individuals) to ensure safety and (arguably) civility in the public forum. The weight that one assigns to either side of this tension often reflects one's general political ideology. Traditionally, when it comes to potentially volatile political protest, liberals are thought to put more stock in allowing speech to go forward while conservatives emphasize the importance of public safety and security.[53] Like the interpretation of the limits of acceptable free speech, one's stance on abortion policy typically correlates with political ideology.[54] Liberals, championing individual liberty and equality, tend to support access to abortion. On the other side of the political spectrum,

conservatives, especially social conservatives, tend to cite moral principles (e.g., the sanctity of human life) as grounds for banning abortion, or at least for closely regulating and discouraging access to it.[55]

In these anti-abortion protest regulation cases, the traditional alignment of ideology and interpretation of the First Amendment can be turned on its head by abortion politics. When clinics try to regulate protests via court orders and legislation, reflective liberal clinic members and supporters are placed in a dissonant situation. They must decide whether to endorse the free speech rights of protesters at the potential cost of clinic and client safety (not to mention the security of abortion rights) *or* to support the litigation at the cost of free speech. Similarly reflective social conservatives confront a related dilemma—that is, whether to defend the movement's direct action strategies at the potential cost of weakening the state's ability to maintain order during protests, or to stand with the state and allow anti-abortion activists to be regulated.

The introduction of a foreign, secondary issue into the existing movement-countermovement conflict not only complicated ideological alignments; it also brought newly interested parties to these cases. The original disputants may not have been particularly committed to, well versed, or interested in speech politics, but others clearly were. Labor unions, the ACLU, and other traditional advocates of speech politics suddenly became invested in these disputes. These new groups played active roles in the cases, and they were split by the ideological tensions brought by the blending of abortion and speech politics. As later chapters will illustrate, anti-abortion activists and the majority of elites on both sides of the conflict largely possessed ways to avoid or minimize these dilemmas, while abortion-rights activists were hamstrung by their inability to do so. These ideological tensions and the difficulties that they can, and did, create for those involved highlight the cases' unplanned nature and the strange fruits born of the movement-countermovement context. They thus feed our understanding of both movement litigation and "the ways in which different conflicts between opposing movements develop."[56]

These secondary-movement litigation cases also possess other features that should be of interest to law and social movement scholars. As mentioned earlier, much of the work in this area is concerned with questions of whether or not litigation is helpful or harmful for movements. One major concern involves movements falling victim to the "myth of rights"—that is, taking victory in the courts as a substantive victory

tantamount to policy change.[57] Secondary-movement litigation appears to be immune to the myth of rights and many of its related problems, possibly creating a substantial upside to this type of litigation. Since the rights disputed in these cases are only tangentially related to those that the competing movements are primarily interested in, the litigants are not in a position to mistake these legal victories for substantive policy ones. The same reasoning makes secondary-movement litigation cases insusceptible to the danger of establishing directly harmful precedent for the activists' ultimate policy goals. The greatest risks that the litigants face in secondary-movement cases are those associated with dedicating too many resources to the litigation and surrendering too much power to outside lawyers. Again, however, returning to the indirect goals sought in this type of litigation, movements can presumably withdraw more easily from secondary-movement cases if the associated costs grow too great than they can from cases more directly related to their ultimate policy goals. This leaves movements open to using secondary-movement litigation as a bludgeon, a means to tie up and bleed their opponent's resources, and/or as a means to defend or force changes in movement tactics.

This type of case potentially adds to the list of social movement legal strategies. In doing so, it also expands our understanding of how social movements, law, politics, and policy interact. It remains to be seen, though, if secondary-movement litigation exists in many other movement contexts, or if it is limited to the conditions present in the abortion conflict and possibly others that involve direct action strategies.[58]

Storytelling, Legal Consciousness, and Legal Power

The stories of and from these conflicts also provide the means for another set of lessons—those about the cultural nature of law and legal power. This book builds from the culturalist "Law and Society" premise that law is not simply contested in courts and wholly controlled by the state. Rather, legal power is intimately intertwined with what individuals believe, the stories that they tell, and the ways that they choose to behave.[59] We all know that there is a difference between law as it exists on the books and law as it is lived and discussed. New Yorkers rarely hesitate to cross against the light in front of a police officer, and drivers in Lincoln, Nebraska, have been known to yell at bicyclists who ride in the street as opposed to on the sidewalk where they are largely prohibited from legally riding.[60]