

Rights, Facts, and Roe

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Mary Ziegler, [Abortion and the Law in America](#) (2020).

For almost half a century, [Roe v. Wade](#) has been a dominant presence in debates about the Constitution and the Supreme Court in the United States. Other contentious rulings come and go. (In 1973, the year in which the Supreme Court decided *Roe*, commentators typically identified obscenity regulation as the most explosive issue the justices faced. No one mentioned [Miller v. California](#) at the most recent Supreme Court confirmation hearings.) But *Roe* remains, year after year, a uniquely urgent and divisive focal point in the nation's constitutional discourse. In her important and insightful new book, *Abortion and the Law in America: Roe v. Wade to the Present*, Mary Ziegler explains how the debate over *Roe* has evolved and why it endures.

This is Ziegler's third book on *Roe's* impact on American society and law. In her first, *After Roe: The Lost History of the Abortion Debate*, published in 2015, she explored struggles over abortion in the immediate aftermath of *Roe*. The debate she found in this period was more fluid and multivalent than the pro-choice/pro-life, liberal/conservative, Democratic/Republican dualism that solidified in the 1980s and remains today. In 2018, Ziegler published *Beyond Abortion: Roe v. Wade and the Battle for Privacy*, an examination of how *Roe* reshaped legal debates in contexts outside abortion.

For readers of Ziegler's prior work, her newest book has a familiar feel. She relies on the same research methods she used to such impressive effect in her first two books: archival research, interviews with key players, and analysis of traditional legal sources, such as written opinions, briefs, and oral arguments. She also returns to key themes from her earlier work, locating underappreciated complexities and nuances in debates over *Roe*, emphasizing the radiating effects of *Roe* beyond abortion, and placing political social movement activism alongside litigation as mechanisms of constitutional change.

The fresh insights in *Abortion and the Law in America* come from Ziegler's decision to follow the post-*Roe* abortion debate up to the present day. The book begins with a description of our current abortion debate and then asks how we got here. The chronological narrative of the book is basically an extended answer to this question. Ziegler guides the reader through a thoroughly researched, richly detailed, comprehensive historical account of how, across the last half century, pro-choice and pro-life activists and lawyers pursued their agendas. She is particularly insightful in exploring divisions within the abortion-rights and anti-abortion movements as she navigates back and forth between social movement activism, policy developments, and constitutional litigation. Although it's not hard to discern that her sympathies lie with those who advocate for abortion rights, Ziegler never reduces or caricatures her subjects. She recognizes the principled commitments that drove activists on both sides while also charting their strategic opportunism, inconsistencies, and factionalism.

Within her narrative, Ziegler threads an argument for revising the way we think about the history of abortion rights. She argues that as the leading edge of the abortion debate shifted in the 1980s from demands to ban abortion to battles over "incremental restrictions designed to undermine *Roe*," the terms of the debate "changed in ways we have rarely appreciated." (P. 2.) When pro-life advocates realized that amending the Constitution to end legal abortion across the nation wasn't going to happen, they turned their focus to pushing more aggressive abortion regulations and overturning *Roe* in the courts. As a result, contestation over the social effects of reproductive rights joined and often displaced the foundational question of whether the Constitution protects a right to abortion. Arguments about abortion that centered on rights—the right of the mother to reproductive autonomy on one side, the right to life for the unborn on

the other—shifted to less absolutist debates about regulatory policy. “The struggle,” Ziegler writes, “has increasingly turned not only on rights-based trumps but also on claims about the policy costs and benefits of abortion for women, families, and the larger society.” (P. 2.)

“Fights about abortion have mirrored much more than core arguments about choice and life,” Ziegler writes, and much of *Abortion and the Law in America* is dedicated to documenting the proliferation of the grounds of debate. “Battles about incremental restrictions consistently reflected a complex set of beliefs about issues only tangentially related to abortion,” she explains. “The abortion struggle offered a window into disagreements about poverty, personal responsibility, welfare reform, maturity, parenthood, marriage, the health care system, and the trustworthiness of the media and the government.” (P. 211.)

Ziegler argues that, contrary to commonplace assumptions, when the debate centered on the costs and benefits of abortion rather than on the fundamental rights at stake, the issue became more polarized, and the divide between the sides deeper and more enduring. It’s a provocative claim, although it’s not fully clear how one would prove it. If the abortion debate has in fact become more polarized over time, why, of all the possible contributing factors, would we identify this as the cause? Why would a shift in focus from a fight over the medical necessity of particular abortion procedure or about the health benefits of medical regulations be more polarizing than a debate about when life begins or about the relationship between reproductive rights and equal citizenship for women?

There are alternative frameworks to understand how the abortion debate changed as it diffused into related issues. One possibility would be to highlight the ways in which an already deeply polarized abortion debate fueled polarization elsewhere, while polarization elsewhere, in turn, reinforced the polarization on abortion. People’s views on social welfare, gender roles, and scientific expertise certainly inform their views on abortion. But their views on abortion also inform their views on these closely related issues. This is the polarized world in which we inhabit, filled with mechanisms that reinforce and amplify the cultural divisions.

Rights-based claims and arguments about the costs and benefits of abortion are best understood as symbiotic, as overlapping categories between which activists moved frequently and easily. The idea of absolute rights may be useful rhetorically, but in practice they’re non-starters. In American law rights claims unavoidably raised questions about policy costs and benefits. Rights and policy offer strands of abortion framing that are at once antagonistic and complementary, with the salience and content of the categories shifting across time. Rather than a single persistent abortion debate, *Abortion and the Law in America* reveals a dynamic constellation of overlapping abortion debates.

Ziegler concludes her book by reflecting on how the history of the abortion debate provides insights into possible future developments. One point she emphasizes is that debates about abortion have always been about much more than any single Supreme Court decision. This fact, which Ziegler has demonstrated across her three books, means if the Supreme Court overturns *Roe*—a development she believes likely with recent appointments to the Court—the basic lines of division over reproductive rights will remain. They will remain because the American people remain divided over not only over abortion but also over welfare policies, gender roles, scientific expertise, and all the other issues that have become inextricably intertwined with abortion. *Abortion and the Law in America* offers an essential resource to help us understand not only what *Roe* has accomplished but also what a post-*Roe* world might look like.

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