

A Progressive Reproductive Rights Agenda for 2020

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SINCE THE 1970s, the issue of abortion has pervaded U.S. law and politics. The Supreme Court's decision in *Roe v. Wade* continues to be both celebrated and reviled with an intensity rarely inspired by a Court decision.¹ Responses have ranged from a torrent of legislation and litigation, to mass demonstrations and marches, and even to the bombing of health care clinics and the murder of abortion service providers. Whether abortion will remain legal has loomed large—too large, some charge—in electoral politics and judicial nominations.

What will the next decades bring? The editors of this book challenged the contributors to be proactive and visionary, to look ahead to the year 2020 and contemplate the constitutional change we hope to promote between now and then. This chapter asks: What vision of reproductive justice, and what objectives and strategies to achieve that vision, should progressives adopt? This book was inspired in part by *The Constitution in 2000*, a 1988 Department of Justice report that, along with others in a series, set forth a blueprint for radically remaking constitutional law on the great issues of the day, including by overruling dozens of Supreme Court opinions.² Although the substance of the Reagan administration's agenda was terribly wrong, its breathtaking

ambition and subsequent successes demonstrate the value of having a vision and a long-term strategic plan. Progressives similarly should take the long view and formulate ambitious goals that are informed by deep ideological commitments and not unduly constrained by present realities. In short, progressives should think big—and then devise effective strategies for moving toward their objectives.

The progressive agenda should aspire to protect genuine reproductive health and liberty for all. Toward this ideal, I would suggest the following three shifts in strategic priorities to augment ongoing efforts to persuade courts to invalidate abortion restrictions. First, focus more on persuading the public to support meaningful reproductive options through political action, grassroots organizing, and public education. Second, focus relatively less on the threat of criminal abortion bans that would be enforceable if the Court overruled *Roe* and more on existing and forthcoming abortion restrictions, both legislative and extralegal, which cumulatively deprive a growing number of women of access to abortion services. Finally, situate abortion within the full range of progressive policies essential to genuine reproductive health and liberty, policies that empower women and men to prevent unintended pregnancies and to bear and raise healthy and wanted children.

These recommendations entail not radical changes, but significant shifts in emphasis. They will be familiar to prochoice advocates, who long have led efforts against all manner of abortion obstacles and in favor of pregnancy prevention. Yet in the public's eye, the prochoice effort is associated far more with extremism and "abortion on demand" than with healthy childbearing and reductions in unintended pregnancies. Effective strategies must target public misperceptions and emphasize political action, preventing harmful incremental abortion obstacles and instituting a broad range of policies that promote reproductive choice and health. Finally, even while broadening this political agenda, progressives must counteract new strategies to stigmatize and induce shame into a woman's decision to terminate a pregnancy, by affirming the vital place of legal and accessible abortion services on that agenda and by resisting any temptation to avoid the controversy of abortion.

Reproductive Rights in the Courts

The concerted attack on *Roe v. Wade* began in earnest in the late 1970s and accelerated with the election of Ronald Reagan. The Reagan constitutional blueprint targeted the Supreme Court and *Roe*, as well as

earlier landmark cases that protected fundamental liberties through substantive due process analysis. Under the Reagan view, the constitutional guarantee of “liberty” created no obstacle to laws that ban abortion during the earliest stages of pregnancy, criminalize the use of contraception,³ or forcibly sterilize people as a form of punishment.⁴ The Reagan agenda also warned against expansions of liberty, for example, to protect same-sex physical intimacy. It situated this opposition to fundamental liberties within a broad framework that sought both diminished judicial protection for rights and liberties (justified by the “original intent” of the framers) and judicial enforcement of a “federalism” that would narrow Congress’s authority to safeguard rights.

One way to formulate a progressive reproductive rights agenda for 2020 would similarly identify Supreme Court decisions as consistent or inconsistent with the desired vision of reproductive liberty. This list should start by acknowledging losses—principally, that *Roe v. Wade* no longer governs the constitutionality of abortion restrictions. Instead, the Court’s 1992 decision in *Planned Parenthood v. Casey* controls.⁵ Best known for its reaffirmation of *Roe*’s “essential holding,” *Casey* confounded expectations that the Court would overrule *Roe* expressly and completely, bringing tremendous relief to *Roe*’s supporters—and disappointment and outrage to its opponents.

Far less noted, *Casey* allowed the government substantially greater authority to interfere with women’s reproductive choices. The Court overruled protective rulings from the 1980s and upheld the very types of restrictions it previously had held to be unconstitutional.⁶ Chief Justice William Rehnquist’s *Casey* dissent noted, “*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.”⁷

The Court’s 2007 *Gonzales v. Carhart* decision confirmed and extended *Casey*’s damage to *Roe*. Justice Anthony Kennedy, a swing fifth vote in both cases, emphasized in *Carhart* that *Casey* “struck a balance” that centrally included the government’s “substantial interest in preserving and promoting fetal life” from the outset of pregnancy; he omitted any mention of women’s essential interests, which were so eloquently described in his joint opinion in *Casey*.⁸ Using antichoice terminology, *Carhart* upheld a criminal ban on a method of abortion that intentionally omitted any exception for women’s health. The dissent charged that the majority “dishonors our precedent” and that “the Act, and the Court’s defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court.”⁹ *Casey*—and even more, *Carhart*’s reading of *Casey*—is inconsistent with a progressive notion of liberty.

The list of wrongly decided cases also should include several that upheld harmful and deceptively reasonable-sounding restrictions on access to abortion services: decisions that upheld the exclusion of abortion from government-provided health care for the poor, the prohibition of abortion services at publicly funded medical facilities (even when no public funds subsidized the services), and parental notice and consent requirements.¹⁰ Progressives should also anticipate future controversies, including those that might arise from medical and scientific advances.

Most critical, just as conservatives promoted “federalism” and “originalism” in the courts and, more effectively, in political arenas, progressives should develop improved understandings of the constitutional bases for reproductive liberty. Progressives need to rethink *Roe*’s theoretical underpinnings—and what remains after *Casey* and *Carhart*. The *Carhart* dissent, for four justices, made significant progress in this regard. It responded to the majority’s shocking reliance on gender stereotypes about women’s natural role as mothers by describing reproductive liberty in terms of equal protection and equal citizenship: “Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”¹¹

Priority One: Enhance Public Education and Political Action

To date, litigation has served as the primary and most effective weapon against dangerous abortion restrictions. Progressives should continue to secure whatever protections are achievable from judicial enforcement of both state and federal constitutions and to develop constitutional theory for the long haul. Litigation, however, should not remain the principal means of safeguarding reproductive rights. The Supreme Court is unlikely in the near future to overrule *Casey*’s undue burden test in favor of *Roe*’s more protective approach (or a new protective theory), let alone overrule earlier rulings that upheld onerous parental consent requirements and discriminatory funding provisions. A Court-centered strategy for the coming decades would be dangerously inadequate.

Some progressives have criticized *Roe* on the grounds that (over)reliance on the Court has inadvertently energized opponents and falsely reassured supporters of *Roe*. In my judgment, *Roe*’s enormous and immediate benefits to women and families—and its positive effect on

expectations about women's rights—outweighed any resulting loss in political momentum since the 1970s. Regardless of differences in judgments about the past, progressives should agree in the coming decade to dedicate relatively greater resources to build public and political support at every level of government.

Progressives also should agree—and should endeavor to persuade others—that restrictive abortion laws do violate women's constitutional rights, whether or not the Court protects those rights. Even in political arenas, prochoice aspirations can be strengthened by appeals to the Constitution and to the notion that compulsory pregnancy and childbirth are beyond the government's authority. Given *Roe's* stature and the Court's prior vigorous protection of reproductive liberty, an appeal to the Constitution in political battles over abortion seems particularly helpful. It is far more effective (and, to my mind, more accurate) to emphasize that the Court protected the constitutional right to choose until the ideological Right took over the Court, than it is to argue that the Court went too far and that the debate is now where it belongs, in the legislatures.

Prochoice advocates, with national organizations headquartered in Washington, D.C., and New York, have done more to supplement litigation with national political work than they have expanded efforts at the state and local levels. Notwithstanding the good work of the affiliates of Planned Parenthood, the American Civil Liberties Union, and NARAL Pro-Choice America throughout the country, the greatest reproductive rights need for 2020 is the building of strong grassroots political organizations with public education capabilities. Progressives must work effectively outside the courts in state legislatures, local communities, political parties, and elections at every level of government. Electing representatives who will safeguard reproductive health and liberty also promotes a more protective judiciary, both directly through judicial appointments and less directly, for history instructs that the courts will not stray very far from political and public opinion. The dramatic political, legislative, and judicial successes of opponents of *Roe* have resulted directly from their decades-long attention to public persuasion and grassroots organizing.

My two remaining recommendations elaborate on the desirable content of the largely political reproductive rights agenda, but first a caution. As attention to state and local politics increases, progressives should take care not to condone gross inequalities determined by a woman's physical location. A 2006 *New York Magazine* article illustrates the danger. It celebrates a state court decision that declined to find a right to same-sex marriage, suggesting that the court had avoided the *Roe* problem

of getting too far ahead of the public. The article concluded: “With the right ascendant, it’s clear that states’ rights is an essential American principle without any inherent ideological tilt. . . . If letting Georgia and Indiana and Utah go their own way is the price for Massachusetts and California and New York’s being free to go ours, I’m willing to pay it.”¹² As a former New Yorker now living in Indiana, I am not willing to accept this view of “states’ rights.” Fundamental liberties essential to equality should not vary state by state, despite the necessity for state-by-state efforts to protect them. States’ rights should entail the opportunity to expand, not curtail, rights guaranteed by the federal Constitution. Progressives should aim for uniform nationwide protection of the fundamental right of all women to meaningful access to legal contraception and abortion services.

Priority Two: Oppose Incremental Obstacles

One question has drowned out virtually all others in the abortion debate since the Republican Party began calling for the appointment of anti-*Roe* justices and President Reagan began replacing justices in the *Roe* majority: Will the Court overrule *Roe*? And the natural follow-up: Will states again criminalize abortion, forcing many women to risk their lives and health with illegal “back-alley” abortionists? That was the proper focus for the 1980s, but it is increasingly inadequate.

With each appointment, the Court’s support for *Roe* diminished, from *Roe*’s solid, bipartisan seven justices, to a bare majority of five in 1986. But *Roe* proved resilient. Many court watchers expected *Roe*’s demise in the 1989 *Webster* case. The Court upheld all the restrictions before it, but the justice in the middle—Sandra Day O’Connor—declined to join the four justices who wanted to go further and strike at *Roe*’s heart. Justice Harry Blackmun, *Roe*’s author, warned in dissent that the reprieve likely was temporary and that “a chill wind blows.” By 1992, Presidents Reagan and George H. W. Bush had replaced five of the seven justices in the *Roe* majority, and *Planned Parenthood v. Casey* was widely expected to deliver the final blow. The *Casey* Court’s partial (and eloquent) reaffirmation of *Roe* shocked supporters and opponents of *Roe* alike.

Looking ahead to 2020, the risk remains real that the Court will overrule *Roe*. But more likely is a continued death by a dozen decisions, with no express overruling (if at all) until after the Court has rendered the formal protections practically useless. At least since *Casey* authorized increased governmental restriction while purporting to reaffirm *Roe*, the

preoccupation with whether the Court will expressly overrule *Roe* has proven misplaced. It has worked to the detriment of women and to the advantage of opponents of reproductive liberty.

Since *Casey*, states have adopted literally hundreds of abortion restrictions, reflecting an incremental, multitiered strategy to create “abortion-free” states and to deter women from having abortions, often through deception. (With its 2003 ban on so-called partial birth abortions, Congress joined the effort, which previously had been justified with appeals to federalism and states’ rights.) Cumulatively, these efforts—restrictive legislation that the courts will uphold, diminished abortion training in medical schools, stigmatization of women who have abortions and physicians who perform them, harassment and violence directed at health care providers at work and at home—have dramatically reduced the number of abortion providers. In many parts of the country, abortion services are unavailable for hundreds of miles, while antichoice “crisis pregnancy centers” flourish (often with the assistance of public funding). Legislative and extralegal obstacles combine to thwart women’s access to the clinics that do remain open: Mandatory forty-eight-hour waiting periods translate into multiple long-distance trips often over weeks, “informed consent” requirements amount to state-mandated antichoice propaganda, and two-parent consent requirements for minors thwart the wishes not only of the pregnant girl but of her custodial parent. As of 2008, abortion services were less available in the United States than at any time since 1974. Three states were just one clinic away from being abortion-free.

One single-clinic state, South Dakota, achieved fame when it outlawed abortion in all cases except when necessary to save a woman’s life: No exceptions were allowed even for rape, incest, severe fetal abnormalities, or threats to a woman’s health. The fact that only one abortion clinic existed in the entire state was far less publicized. The abortion ban was controversial even among some strong opponents of legal abortion (and ultimately was repealed by a November 2006 ballot measure) because of its lack of a rape or incest exception and also because it faced almost certain judicial invalidation (at least absent the appointment of one additional anti-*Roe* justice). Prominent national antichoice organizations even refused to endorse the ban, favoring instead the incremental approach of more reasonable-sounding and limited restrictions tailored to shut down the one remaining clinic.

A 2005 *Frontline* documentary, *The Last Abortion Clinic*, illustrates the effectiveness of the incremental approach. Antichoice efforts reduced Mississippi, like South Dakota, to just one clinic that provides abortion

services.¹³ *Frontline* interviewed Mississippi women who described their utter lack of any meaningful right to decide whether to terminate a pregnancy. They lived many hours of travel from the nearest clinic. As in the pre-*Roe* years, women who most suffer from legal and practical obstacles to safe abortion services are those without resources and the ability to travel. These include women who never have traveled out of their home towns, who cannot afford the travel, who do not own cars or have access to any other transportation, who would lose their jobs if they missed the days of work required to make multiple long-distance trips, who cannot arrange child care, or who have abusive husbands they cannot escape. The litany is familiar: Poverty, location, and abuse are the circumstances that, prior to *Roe*, determined which women had to risk their lives to terminate a pregnancy.

The *Frontline* episode also described efforts to close that last Mississippi clinic, including TRAP, or “targeted regulation of abortion providers,” laws that impose medically unnecessary, extremely expensive regulations, such as hallway widths and room sizes that mirror those in hospitals. Another restriction would require physicians who perform abortions at the clinic to have admitting privileges at the local hospital, a requirement that is both medically unnecessary (the clinic already has a transfer agreement with the hospital) and, as those who devised the restriction well know, unattainable: The hospital will not confer admitting privileges to an out-of-state physician, and no in-state physician is willing to work at the clinic because of the continual antichoice protests and harassment.

Given the effectiveness of ingenious, reasonable-sounding options, why bother with a highly contentious abortion ban? In Indiana, anti-choice legislators introduced two bills in 2006: one to ban abortion and one TRAP law that would have closed every abortion clinic in the state, unless and until they could implement expensive renovations or relocate. The criminal ban went nowhere, but the legislature nearly enacted the TRAP law. That law would have shut down every one of Indiana’s nine clinics, located in just five of the state’s ninety-two counties—clinics that devote the overwhelming majority of their resources to preventing unintended pregnancies (thereby decreasing the need for abortion) and other non-abortion health care. Opponents of reproductive choice in Indiana responded by working county by county to try to enact ordinances that would close down those same clinics through local ordinances.

Activists on both sides understand the true intent and serious costs behind such reasonable-sounding regulations. Prochoice advocates, however, have not found effective ways to communicate those harms to a public that favors keeping abortion legal, but not too easily available. Some

progressives speculate that preserving meaningful access to abortion would be easier if the Court expressly overruled *Roe* and galvanized prochoice Americans to act and vote accordingly. The speculation continues that this is precisely what many self-proclaimed antichoice politicians most fear (and therefore secretly resist). In my view, an express overruling of *Roe* would be far worse than existing restrictions, particularly for the most vulnerable of women who cannot manage to travel to faraway clinics.

The most underappreciated obstacles to abortion, though, are those already in place or soon to come: the protests, harassment, and violence directed at abortion clinics, providers, and their families; the lack of abortion training opportunities in medical schools; and the hundreds of state abortion restrictions that are designed both to sound reasonable and to stop the performance of abortions as effectively as a criminal ban.

Priority Three: Advance a Comprehensive Reproductive Choice Agenda

As progressives plan for 2020, the agenda must include meaningful access not only to abortion services, but also to the full range of policies essential for genuine reproductive choice and health. Advocacy for the right to decide whether to continue or terminate a pregnancy—for keeping the government out of highly personal, life-altering decisions about when and whether to have a child—should be paired explicitly with policies that support women in all their reproductive decisions. Being prochoice means not only keeping the government out of people's private lives, but also defining and promoting the right role for government and society in supporting women and families.

The progressive reproductive rights agenda should include policies that support healthy pregnancies and healthy families, including universal health care, affordable child care, paid family leave, and other workplace support for employees who need to care for children and other family members. Prochoice progressives also should address the full range of economic justice issues, from the minimum wage to taxation policy to financial support for struggling families. Also key are efforts to protect women from violence, including in their own homes.

Reproductive liberty also encompasses the ability to prevent unintended pregnancy. Progressive priorities should include support for comprehensive and age-appropriate sexuality education, universal access to reproductive health care, and new contraceptive technologies. Also critical is opposition to all politicization and distortion of reproductive health

care information and services: inaccurate abstinence-only programs that mislead and endanger children, government support for deceptive crisis pregnancy centers, restrictions on the over-the-counter availability of emergency contraception, protocols that omit any mention of emergency contraception for the treatment of rape victims, pharmacists' refusals to fill prescriptions for contraception, biased reproductive health counseling, and the costly TRAP laws that burden reproductive health clinics. All of these so-called conservative policies actually increase the rate of unintended pregnancy and thus abortion—not coincidentally, because many abortion opponents also oppose contraceptive use.

Major prochoice organizations have worked in these broader directions—especially to champion pregnancy prevention. Eighty-one percent of Planned Parenthood clients receive services to prevent unintended pregnancy, while 10 percent receive abortion services.¹⁴ This work has borne real fruit, including significant reductions in unintended pregnancy and abortion rates and the enactment of the Family and Medical Leave Act. Organizations that work for reproductive justice, however, should expand their emphasis to include the range of issues essential to healthy childbearing and healthy families. Moreover, it remains an essential task to convey continually that prochoice candidates and advocates are not pro-abortion, but pro-prevention and pro-family. This is a promising message, for it substitutes a true picture for a caricature, offers an affirmative agenda around which to organize, and addresses antichoice sentiment in ways that empower rather than burden vulnerable women and families.

With greater emphasis on pregnancy prevention and healthy childbearing, some cautions are warranted. First, progressives must not portray all abortions as tragedies. Beginning in 1992, President Bill Clinton popularized the saying “abortion should be safe, legal and rare,” which reflects a worthy aspiration for policies that emphasize prevention and make abortion less necessary. Senator Hillary Clinton, in a 2005 speech commendable for setting forth a prochoice, pro-prevention, pro-family agenda, took the aspiration a step in the wrong direction when she called for policy changes so that abortion “does not ever have to be exercised or only in very rare circumstances.”¹⁵ But absent unforeseen technological and medical changes, abortion is unlikely to become truly “rare” and certainly not nonexistent. An estimated one-third of all women will choose to terminate a pregnancy by age forty-five. Our nation can and should significantly reduce that number by reducing unintended pregnancies (roughly half of all pregnancies). But abortion will remain a necessary option, for example, when contraception fails and a woman is not ready to have a child, when women conceive following rape or incest, when

pregnant women develop serious medical problems that require pregnancy termination, and when severe fetal abnormalities are detected.

Abortion undoubtedly is a complex, important, highly personal issue—often a difficult and painful decision with which many women struggle. But describing any and all abortions as terrible tragedies stigmatizes women who have abortions. To be sure, some abortions involve tragic circumstances and many women do consider abortion a personal tragedy. But many do not, especially when the abortion is performed early in pregnancy, as about 90 percent are. Certainly, many rape and incest victims would consider a government-compelled childbirth a much greater tragedy than terminating the criminally caused pregnancy.

The tragedy label also promotes shame and silence, while protecting choice critically depends instead upon women’s willingness to talk about their personal experiences. Stigmatizing abortion also feeds increasing antichoice efforts to portray women as victims who are harmed by terminating pregnancies and who make such deeply tragic and wrong choices only because they are misled by physicians, clinics, and laws that promote abortion—a view irresponsibly promoted by the Supreme Court in *Carhart*.

Progressives also should oppose inaccurate and incomplete abstinence-only sex education and other treatments of sexuality issues that instill negative attitudes about sexuality itself. A century ago, Margaret Sanger, in opposing government restrictions on contraception for married couples, proclaimed that a “mutual and satisfied sexual act is of great benefit to the average woman.”¹⁶ Such frank recognition of the natural, healthy, and valuable role of sex in a loving relationship rarely is heard in today’s public debate over issues of sexuality. Instead, what we teach our young people in sexuality education courses often can be summarized as “Sex is dirty, nasty, and dangerous. Save it for the one you love and marry.” When nonprocreative sex, even within marriage, is not valued as one of humanity’s gifts, government-compelled pregnancy and childbearing can seem more reasonable. Progressives should affirm Planned Parenthood’s first-listed value: “Sexuality is a natural, healthy, lifelong part of being human.”¹⁷

Conclusion: Reproductive Justice for All

None of the recommendations outlined above is a silver bullet or a prochoice version of the wildly successful—and intentionally deceptive—partial birth abortion ban. Far from it. Effective advocacy and

reform inescapably will require hard work over time, in the face of great challenges. Nor do my suggestions directly address many of the women most devastated by antichoice policies in many places across the globe, where contraception and abortion services are illegal or unavailable, health care is nonexistent, AIDS is rampant, and rape is routine. More than a half million women die each year because of unsafe abortions and childbirth practices. To conclude, I offer a final recommendation for beyond U.S. borders. Progressives must address the harms inflicted by our nation's foreign policy and support the important work of non-governmental organizations abroad, even as we struggle to avert similar tragedies here at home. Wherever they call home, women's ability to participate fully and equally in public and private life and even their very health and lives depend on being able to control when and whether to have children to raise and to love.

Notes

1. *Roe v. Wade*, 410 U.S. 113 (1973).
2. Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* (1988).
3. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).
4. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
5. *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992).
6. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).
7. *Casey*, 505 U.S. at 954 (Rehnquist, C.J., dissenting).
8. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).
9. *Id.* at 1653 (Ginsburg, J., dissenting).
10. See, e.g., *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 428 U.S. 132 (1976).
11. *Gonzales v. Carhart*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting).
12. Kurt Andersen, *The Gay-Wedding Present*, New York Magazine, July 24, 2006.
13. Frontline: *The Last Abortion Clinic* (PBS television broadcast, Nov. 8, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/clinic>.
14. *Planned Parenthood at a Glance*, available at <http://www.plannedparenthood.org/about-us/who-we-are/pp-services-5552.htm>.
15. Senator Hillary Rodham Clinton, *Remarks to the New York State Family Planning Providers* (Jan. 24, 2005), available at <http://clinton.senate.gov/~clinton/speeches/2005125A05.html>.
16. Margaret Sanger, *Family Limitation* 6 (1914).
17. Planned Parenthood Federation of America, *We Believe* (2003).