

# AFTER MORGENTALER

## The Politics of Abortion in Canada

Rachael Johnstone



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Praise for *After Morgentaler*:

“*After Morgentaler* will quickly occupy benchmark status in the comparative health care and reproductive-rights policy literatures. Through case studies, Rachael Johnstone illuminates the strategies of pro- and anti-choice groups, and health-professional organizations, by situating them in Canadian institutional, legal, and political history. The result is a clear argument for why shifting to a positive-rights understanding of the Charter is needed to safeguard women’s constitutionally protected access to reproductive health care.”

—Melissa Haussman, professor, Department of  
Political Science, Carleton University

“In addition to making a strong case for reconceptualising abortion as a right of citizenship for women, this book offers a useful study of comparative provincial politics and health care more generally.”

—Francesca Scala, associate professor of  
political science, Concordia University

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## Introduction

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Canada has no law governing abortion. This is the legacy of the Supreme Court ruling in *R. v. Morgentaler* (1988), the landmark case that decriminalized abortion in Canada by striking down the section of the Criminal Code that restricted legal abortions to those approved by a panel of physicians. Although the decision is often touted as affirming a woman's right to abortion, *Morgentaler* did not establish a legal right entitling women to access abortion services; rather, it struck down the existing law on the grounds that it violated women's rights to life, liberty, and security of the person guaranteed by the 1982 Charter of Rights and Freedoms, while also emphasizing the role of Parliament in legislating abortion. However, despite attempts by the federal government in the wake of the decision, no new abortion law has since been successfully passed in Canada. In the absence of a new law, abortion is now recognized as a matter of health care, an area that falls predominantly under provincial and territorial jurisdiction. Ironically, the various responses by provincial governments that were expected to facilitate access to the procedure have resulted in disparities in access that mimic those deemed unconstitutional by the Court almost thirty years ago.

Although the actions of many provincial governments suggest a reliance on nonmedical considerations in the regulation of access to abortion services, a medical rhetoric has nonetheless been widely embraced in the regulation of the procedure. This reliance on a medical discourse in virtually all official dealings with abortion policy has had mixed effects, creating inroads for improved access in some cases while also allowing for the creation of

barriers in others. Politicians, for instance, have largely divested themselves of the responsibility to facilitate access by accepting a strictly medical discourse, crowning physicians as the only appropriate actors in the abortion debate, which has had the dual effect of stifling rights discourse on abortion while simultaneously silencing women's voices (Thomson-Philbrook 2014, 237). However, embracing abortion as a matter of health care has also situated the procedure within a clear regulatory framework, offering new mechanisms to challenge restrictive policies.

The path that led from abortion as a criminal matter to abortion as a routine medical procedure is complex and has been manipulated by numerous actors, with many competing motivations. This book maps the evolution of abortion access in the provinces following the *Morgentaler* decision. In so doing, it also situates larger claims about the continued value of rights claiming as a means to improve access. The involvement of both state and nonstate actors in the provision of abortion complicates its regulation. What is apparent in all cases is that the complete medicalization of abortion obscures the profound sociopolitical impacts of the procedure for women. Even as access to abortion improves in many provinces, these changes are themselves unstable, rooted as they are in a logic that prioritizes health outcomes over women's rights.

By plotting out numerous disparate policy actions undertaken across Canada in the policy void after *Morgentaler*, this book considers the continued value of rights as a tool for the substantive recognition of women's equality. Even amid a determined focus on medical rationales to regulate abortion in most official contexts, rights claims continue to inform the nature of the abortion debate in Canada – exactly whose rights, and who is responsible for recognizing them, however, remains unresolved. These rights disputes have contributed to the barriers women must negotiate in order to receive access to a safe and legal service. Although rights, both as legal mechanisms and as discursive strategy, will continue to play a pivotal role in the realization of women's reproductive equality by providing much-needed legitimacy, compelling government action, and shifting public perception, legal rights should not be seen as resolving complex social issues. Substantive solutions require a more holistic understanding of abortion and its impact on women's citizenship.

### **Abortion Access in Canada**

Today, abortion services in Canada vary significantly from province to province, though many recent changes have helped bridge some of the starkest

divides. A complex network of regulations governs abortion access both within and between provinces, and the particulars of these relationships are not always easily discernable. Information about what facilities are available in a given province, whether residents of one province can access services outside their home province, and what services are covered under their provincial health insurance is not always readily available. The reality that the regulations in some provinces are still in flux further complicates the negotiation of access.

A sizable literature has followed these changing policies and approaches to abortion politics. In the decades after the decriminalization of abortion in Canada, several influential books explored the nature of abortion politics in Canada (e.g., Brodie, Gavigan, and Jenson 1992; Haussman 2005; Tatalovich 1997), both leading up to and in the aftermath of *R. v. Morgentaler* (1988). Much of this research has been comparative, looking at the role of federalism and its influence on the nature of services (Haussman 2005; Palley 2006; Vickers 2010; White 2014), as well as the role of the courts and the federal government (Brodie, Gavigan, and Jenson 1992; Kaposy and Downie 2008; Morton 1992). More recent work has focused on the changes in social movement activity in Canada (Saurette and Gordon 2013, 2016), as well as the continued inequalities that result from extra-legal barriers to abortion access, which include travel costs (Sethna and Doull 2013), stigma and violence (Cook and Dickens 2014), and barriers erected by physicians (Kaposy 2010; Thomson-Philbrook 2014) and by governments (Brown, Ehrlich, and MacQuarrie, forthcoming). Each of these pieces offers insight into the evolution of Canadian abortion politics. Cumulatively, these works point to the impact of both state and nonstate actors in shaping levels of abortion access in Canada.

The role of state actors is perhaps the most apparent. Government action and legal decisions on abortion have discernable impacts on levels of access, though the limitations of each are not always apparent. The realities of federalism in Canada have produced jurisdictional disputes over certain aspects of health care. Health care is primarily a provincial responsibility, but is partially funded by the federal government, which may choose to pursue action against provinces that fail to adhere to the standards set out in the Canada Health Act. In addition, subject to the Charter, the federal government is able to create new restrictions on abortion access at any time by recriminalizing the procedure, in whole or in part.

To add to this complexity, court rulings at both the provincial and federal level have further clarified the rights and responsibilities of governments



relating to abortion care. A close reading of these decisions, however, reveals a reluctance by the courts to recognize positive rights claims that would mandate state action. Instead, the courts have restricted their scope to the realm of negative rights claims, which protect individuals from state interference. The creation of positive rights has stayed within the purview of governments, which are often reluctant to raise the “extremely divisive” issue (Do 2014). Consequently, achieving progress on abortion rights through either legal or political venues remains difficult.

State actors, however, are not alone in their ability to influence access. Indeed, the way they treat abortion is, in many ways, the result of concerted efforts by social movement activists. Because the taboo nature of abortion has made governments reluctant to raise the matter, the activities of social movements are important catalysts to bring these debates into public forums. Indeed, activists have done more than merely bring the debate to the fore; they have influenced the very words and concepts we use to comprehend abortion.

The approaches of activist groups have changed over time, reflecting the opportunities presented by the systems in which these groups operate, as well as evolving notions about how abortion ought to be understood. Today, abortion rights activists in Canada commonly frame abortion as an equality right, entrenched in the Charter of Rights and Freedoms (ARCC 2015a; NAF 2013). The difficulties in realizing such a right, however, are not only grounded in potential legal and political resistance but in the realities of service provision.

The classification of abortion as a matter of health care was followed by several complexities in its implementation. Disputes between the federal and provincial governments about funding and jurisdiction over health care have compromised the provision of abortion services in particular. Since abortion is so often treated as controversial, many provincial governments have attempted to use their jurisdiction over the procedure to completely block access without any medical justification. Resistance to performing abortions has also been a problem at the level of providers, many of whom fear harassment or violence if they provide services. Although many physicians have worked tirelessly as advocates for abortion access and helped facilitate services for women in spite of these concerns, other physicians have claimed the right to refuse to perform procedures to which they conscientiously object. Despite their training being subsidized by public funds, the professional regulation of physicians is undertaken by largely nongovernmental bodies, as is their medical school training, which has a poor track

record of including abortion in its curricula. As such, even when access to abortion is sanctioned and funded by government, access on the ground has the potential to differ dramatically from provider to provider.

Understanding access, then, is not as straightforward as counting the number of available facilities or recognizing restrictive provincial policies. Accounts from women seeking access to abortion suggest that the way individuals experience these attempts varies both within and between provinces, depending as much on the gatekeepers they encounter as on the regulations governing the procedure (Arts4Choice 2015; Shaw 2006; Sovereign Uterus 2015). The procedure itself also takes various forms, dependent on the services available and the length of gestation. Generally, references to abortion in Canada refer to a range of surgical procedures, but with the recent approval of a new abortion pill by Health Canada, medical abortions (drug induced, nonsurgical) are poised to become a more common alternative. Consequently, mapping access is no easy task. Recognition of the interplay between the political, legal, social, and medical dimensions of abortion today, especially the ways in which the different groups view their rights, is therefore crucial.

## Methodology

The ways in which individual actors, social movements, and institutions have helped shape abortion access in Canada is not generalizable across the country. Such significant differences in access are in no small part owing to the dynamics of Canadian federalism (Vickers 2010; White 2014). Although the Supreme Court legalized abortion in 1988, and subsequent federal governments abstained from introducing new restrictions on the procedure, the implementation of abortion services occurs at the provincial level. Linda White (2014) explains that

because a federal system of government provides for two loci of authority and thus two levels of government acting on behalf of the people, and neither level of government is able to authoritatively coerce the other, legislative compliance with the wishes of the people as interpreted by the Supreme Court becomes difficult to ensure, even if one level of government is agreeable. (158)

When cooperation cannot be achieved in this system, as has often been the case with the regulation of abortion services, serious problems arise. When assessing these issues, there is a need, as White (2014, 158) suggests,

to examine the more subtle ways in which the state avoids implementation that moves beyond analysis of formal legal or regulative responses postjudicial review to uncover a broader range of regulative practices by state and nonstate agents. Studies of implementation also need to pay attention to the complexities and challenges posed by divided jurisdiction in ensuring implementation of equality principles in law and policy.

The goal of this book is to provide precisely such an analysis. To do so, I outline provincial regulations and relevant court cases, and investigate and analyze the motivations behind, as well as significance and impacts of, legislative and judicial actions that influence access to abortion.

One important feature of my analysis is that I integrate a strong emphasis on the role of nonstate actors in the creation of access. Social movement activists help shape access by doing more than advocating for legal and policy changes. Social movements have actively structured the language we use to think about abortion in Canada, language that appears in legislatures and courtrooms, as well as in homes across the country, language that shapes not only how the public understand abortion but also how women seeking abortion services understand their decisions.

In addition to social movement activists, the medical profession plays a fundamental role in shaping Canadians' access to abortions. Although health care falls under provincial jurisdiction, medical professionals – whose practices are regulated independent of the government – are responsible for the administration of services. What training, if any, physicians receive in medical school and residency is at the discretion of independent bodies and often fails to include abortion. Even if physicians are taught the necessary material, the specifics of their practices are left largely to them, with provincial colleges stepping in only to discipline in specific cases. Although health care is often talked about as a right, the way it is practised, and who is qualified to provide it, continues to fall largely outside government control, though it does not escape state influence.

To fully understand these intersections, it was necessary to employ multiple methods. This was particularly important given the still taboo nature of abortion in much of Canada, coupled with an aging literature addressing its continued political and social salience in the country. Although secondary-source research provided a crucial starting point, relatively little academic research on abortion politics has been conducted since the 1990s. As such, the use of a range of primary sources, including *Hansard* transcripts, acts and regulations, court cases, and media coverage, allowed me to explore the means by which different groups and institutions have shaped access via

traditional state-based mechanisms and by influencing public perception of abortion and abortion services.

Public perception, however, is difficult to assess when it comes to uncomfortable subjects. When the profound role of abortion in women's equality is considered, the stakes of its treatment become all the more contentious, and the sentiments expressed by advocates are likely to be carefully considered and strategic, and may not reflect their actual views. Moreover, the kinds of questions asked in polls can easily skew perception. For instance, asking whether abortion should be legal under all, certain, or no circumstances can yield dramatically different results than asking people whether they would like to see abortion regulated by the state, or asking if they identify as pro-choice or anti-abortion. Despite their potential deficiencies, these types of questions are often used to make larger claims about social attitudes. Although inferences can be drawn using polling data and primary sources, these data and sources are not definitive. Still, I felt it was important to try to capture some of the nuances of how different actors perceive abortion politics in Canada. Whether or not, for example, physicians providing abortion care tend to see abortion as safe and accessible likely reflects the manner in which it has been regulated in medicine more broadly. In this way, the views offered by relevant actors offer important hints about the evolution of abortion politics, especially the implications of existing regulations in their fields.

To offer additional context, I conducted twenty-eight in-depth interviews with a diverse sample of voices in the abortion debate, at both the federal and provincial levels, including politicians, lawyers, social activists, and physicians. I began by identifying key figures through secondary sources and contacting them via email. This process was not always easy, as many actors involved in the abortion debate are accustomed to stigma and wary of being identified to the public or having their views misrepresented. As such, once I was fortunate to secure a few interviews, I employed a snowball sampling technique, concluding each interview by asking for the names of other people the interviewee felt could offer insight relevant to my research. In so doing, I amassed a longer list of potential interviewees. Many interviewees were kind enough to allow me to reference them when making contact with people they had suggested I speak with, which seemed to encourage those individuals to accept my interview requests. This was particularly important when it came to interviewing abortion providers, as they are often faced with threats of violence and are careful to safeguard their identities.

The perspective of actors who have been deeply entrenched in these issues helps to provide a clear picture of key events as they took place on

the ground and to identify areas of immediate and future concern. In many instances, these accounts provide insight into the motivations for, and consequences of, activity in the provinces that may lack formal documentation. Using interviews to shed light on government policy, legal decisions, demonstrations, and the activities of the medical profession, both historically and today, I am able to provide a more nuanced and complete picture of abortion access in Canada than through using secondary source material alone. In so doing, the motivations and tactics of the relevant actors become clear, affording me the opportunity to make what I hope are compelling claims about the continued value of framing abortion as an equality right. Importantly, as a result of the continued stigma surrounding abortion in many parts of Canada, many of my interviewees elected to remain anonymous.

I completed two rounds of interviews, one in 2011 and another in 2015. This time frame is especially pertinent given the many changes to abortion policy in Canada that have taken shape since 2015 – Mifegymiso, a new medical abortion pill, was approved by Health Canada; New Brunswick liberalized its abortion law; Prince Edward Island promised to provide access to services on the Island; and the newly elected federal Liberal government under Prime Minister Justin Trudeau has been vocal about its pro-choice platform. Some of these shifts were noted in my final round of interviews, whereas others had not yet taken place. I have nonetheless endeavoured to engage with each of these changes in turn, ending my study with the announcement by the government of Prince Edward Island that abortion services are now available in the province. It is my hope that the framework I have provided will help inform the discussion surrounding abortion politics in Canada as the details and implications of these shifts continue to unfold.

Only when the unique challenges of Canadian federalism are considered alongside the powers of both state and nonstate actors in shaping services can a relatively complete understanding of abortion access in Canada be achieved. The variation in access between the provinces, however, renders generalizations about abortion access in Canada difficult. Thus, in order to provide the detail necessary to capture what access really looks like in Canada today, I employ case studies of three provinces: New Brunswick, Ontario, and Quebec. These cases provide depth to assessments of the roles different institutions and actors have played in shaping access in Canada as a whole, while highlighting the strategies employed and the values embraced by the institutions and individuals who created and maintain them. These provinces were selected not only because they each possess notably different

levels of access to abortion services but also because the pathways they took to influence access were distinct, making them useful to showcase the ways in which relevant actors have used institutional and social opportunity structures. I use these case studies to show what access can and does look like in Canada as a result of its current classification as a health care issue. In so doing, I am able to make a case for the need to classify abortion access as a right.

Ultimately, these provincial case studies provide the empirical foundation for this book's exploration of the actors and institutions that influence abortion access in Canada. Cumulatively, these cases reveal the fragility of abortion access and demonstrate the inherent problems in restricting abortion access to the realm of health care. Although I was not able to conduct interviews in every province, my findings uncover the need to recognize abortion as an equality right for all Canadian women.

### A Right to Abortion

In many respects, the *Morgentaler* decision was a victory for rights claiming. Morgentaler's earlier attempts to dispute the constitutionality of restrictions on abortion access failed on jurisdictional grounds; it was the enactment of the Charter of Rights and Freedoms that finally afforded him the necessary tools to have the law struck down. Indeed, since *R. v. Morgentaler* (1988), extensive litigation has demonstrated the value of Charter guarantees in shaping abortion access across the country. Morgentaler's Supreme Court victory clearly established the power of Charter rights as a tool to challenge government policy, and social activists took note. Both pro-choice and anti-abortion social movements in Canada have embraced a rights-based rhetoric to advance their respective agendas through the courts, the government, and public opinion. This approach demonstrates the power of individual rights protections to not only shape legislation but also to influence the manner by which individuals understand their rights. Supreme Court Chief Justice Beverley McLachlin (2001) explains that the Charter has done more than provide new means to influence policy; it has fundamentally "changed the way Canadians think and act about their rights":

The Charter has made Canadians realize on a profoundly personal level what perhaps they had formally recognized only in a detached, intellectual sense: that their rights belong to them, that these rights are a precious part of their personal inheritance, and that they must exercise them and vigilantly protect them if they are to keep them healthy and strong. (67)

Since the enactment of the Charter, Canadians have put greater store in the courts and, more broadly, in the significance of rights recognition, a confidence echoed in social movement activism (ARCC 2015a; McLachlin 2001; NAF 2013).

Taking advantage of rights claiming, pro-choice and anti-abortion social movements have overwhelmingly shaped perceptions of abortion since 1988. More recently, reproductive justice activists have also played a part in shaping views on abortion politics. Because of its relative infancy in Canada, reproductive justice, an approach that seeks to link reproductive rights with more expansive social justice activism, is by no means yet a full-fledged social movement, though pro-choice activists have gradually begun to reflect its principles. The diverse views endorsed by these (often conflicting) social movements have worked their way into the reasoning that politicians, physicians, and judges have adopted in their attempts to regulate the procedure, in turn shaping the nature of debates and interpreting outcomes for public consumption. Importantly, in the Canadian context, all these groups, whether working in support of abortion or in opposition to it, have embraced a language of rights. This is understandable, as the concept of rights holds significant legitimacy in Canada. By providing a powerful, well-respected platform for the often controversial topic of abortion, individual rights recognitions have contributed to substantial improvements in access across the country, as well as creating support for anti-abortion advocacy. However, a deeper consideration of the history of abortion access in Canada provides a cautionary tale about the risks inherent in an overreliance on rights claims.

The specific rights violations that were considered by the Court in *Morgentaler* did not necessarily cohere with the understanding of abortion advanced by feminist groups at the time. Although it was a momentous decision that paved the way for further reforms, including many improvements to access in the provinces that have ensued as a result of provincial rights litigation, supported by Charter guarantees, these changes typically came about without undermining the official medical discourse on abortion or offering any positive rights guarantees to safeguard women's equality. As tools for litigation, this strategic use of rights has contributed to distrust of the concept of rights for larger emancipatory projects. Although framing issues in term of rights is sometimes useful to achieve a means to an end, there is concern that doing so risks distorting the core messages of movements.

Despite the success of Charter rights recognitions in decriminalizing abortion in Canada, there are compelling criticisms of the rights paradigm on these grounds:

On the one hand, scholars hail the empowering effects that rights review has on citizens, particularly for historically disadvantaged groups and individuals. On the other hand, some view as problematic the capacity for rights claiming to harm political discourse by rendering it absolutist, divisive, and uncompromising. (Macfarlane 2013, 3)

Understood in this way, rights have impacted not only the nature of social movement organization but the very character of democratic debate. As later chapters demonstrate, this is a serious concern. Despite the important role courts play in interpreting the Charter, rights claims are not comprehensively defined by the courts but are inherently political.

Governments, both provincial and federal, are the only bodies that possess the democratic legitimacy to recognize rights claims, in addition to having the means and ability to create the infrastructure to protect and promote these rights. Although courts do have an important role to play in hearing rights claims, they have generally been wary of infringing on the role of government in their interpretations of such claims, particularly through the recognition of positive rights, which would require state action (Macfarlane 2014). This wariness is appropriate but has unfortunate implications when governments distance themselves from debating rights claiming, preferring to leave potentially divisive decisions to the courts. If courts are normalized as the appropriate venue for rights claiming but generally do not wish to pronounce on positive rights claims, and governments avoid these claims altogether, then no body is seemingly available to hear these claims. This is one reason some groups are skeptical of the value of rights in securing access. Even those that do support these claims recognize that the nature of the rulings may not be ideal. Others may support litigation because they feel that, even when imperfect, the outcomes for their cause in court have been favourable. Of course, the belief that these decisions were, in fact, made in clear support of their cause often neglects the context in which these decisions were made.

When considering the value of rights in shaping abortion access, it is important to acknowledge that the mere recognition of individual rights in the Charter did not guarantee the outcome of the *Morgentaler* decision or



related cases, such as *Tremblay v. Daigle* (1989), which ruled that a fetus has no legal status in Canada. The lack of federal law on abortion was the product of several factors, including social mobilization and fortuitous timing. In essence, although rights recognitions in provincial and federal courts have generally produced favourable outcomes for women's reproductive rights to date, they have not done so without substantial social backing. Indeed, although rights played a pivotal role in striking down the existing law, current levels of access were shaped in a policy vacuum, with few provinces taking a clear stance on the issue. To be effective, rights also require public understanding and support. Advancing claims to abortion rights, then, not only means demonstrating that women's equality necessitates access to abortion services in court and in the public eye but also requires that the public hold governments accountable for validating these claims.

Keeping in mind the perceived limitations of this framework, I contend that rights still offer an important tool to advance emancipatory claims. That said, it is problematic to interpret legal rights as resolving complex social issues. Substantive solutions require a more holistic understanding of abortion and its impact on women's lives, of which rights recognitions are one component. The enforcement of constitutional rights guarantees are especially powerful for issues that have a history of being treated as controversial. Even if members of the public are unable to agree on their own views of such a subject, the acceptance of individual rights as a primary social good in Canada makes claims articulated in this language persuasive. In time, formal recognition of rights has also been shown to shift public opinion (Matthews 2005).

Despite laudable guarantees of women's equality in the Charter, it seems that the political reality lags behind. Rights protections exist in the constitution, but whether specific issues are recognized as implicating rights, and what actions, if any, this recognition requires, involves legal or, preferably, political action. No Supreme Court case has yet considered whether abortion constitutes an equality right,<sup>1</sup> and neither has any federal government yet recognized abortion as an equality right through formal statutes.

Even though abortion rights have yet to be recognized by either the Court or in the House of Commons, the rights protections afforded to citizens through the Charter suggest a path forward toward such recognition. The ultimate goal is a society in which women are not only "perceived as full members of society, but believe themselves to be" (Erdman 2007, 1155). After all, the abortion debate raises fundamental questions about women's equality, bringing them into public and political discourse in the hopes that links between reproductive autonomy – that is, the ability of women

to make decisions about their reproductive lives independent of external forces – and the belief that women should be equal members of society, a belief that already informs the Canadian constitution, will be recognized.<sup>2</sup>

## Citizenship

It is no coincidence that the first countrywide action undertaken by the Canadian women's movement concerned access to abortion (Rebick 2005, 35).<sup>3</sup> The fight for access to safe, legal abortion services implicates all women, regardless of their reproductive choices. In their seminal work, written shortly after the *Morgentaler* verdict came down, Janine Brodie, Shelley Gavigan, and Jane Jenson (1992, 14) caution against reductive treatments of abortion, saying, "Now more than ever the politics of abortion contest the social meanings attached to gender and representation as well as women's access to social equality and self-determination. We ignore this crucial dimension of the abortion debate only at great costs to ourselves and our daughters."

Indeed, the treatment of abortion as a hot-button or stigmatized topic serves an important purpose for the anti-abortion movement. By artificially separating abortion from more expansive discussions of women's equality and their roles as citizens, it seems possible to reduce the abortion debate to one concerning morality, or the nature of services – a matter of health, best dealt with between a woman and her doctor. But abortion is precisely such a controversial and deeply held issue because it implicates the nature of women's membership in their communities. Although the *Morgentaler* decision did not engage with substantive issues of women's equality, Justice Bertha Wilson's judgment demonstrates an awareness of the sociopolitical context in which women exercise the choice to have an abortion:

This decision is one that will have profound psychological, economic, and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied, and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person. (171)

This book starts with the premise that abortion is not a stand-alone topic but a procedure inextricably tied to the status of women citizens. Whether a state provides access to abortion services, and how those services are

framed, is a direct reflection of the status of women in that state. Although abortion is only one issue on a spectrum of reproductive rights, and substantive equality for women extends far beyond access to abortion care, long-held stigma against the procedure means that recognition of its significance to women's equality would be an essential symbolic victory.<sup>4</sup> But what, exactly, does it mean to think of abortion as a right of citizenship?

The force of citizenship comes predominantly from its inclusive narrative. As citizens, all members of a given society are bestowed a status that gives them equal membership, and all the rights and obligations that status entails (Marshall 2006, 34). Of course, not all models of citizenship are created equal. Since different societies will work to develop their own ideals, there are no comprehensive guidelines outlining what the rights and obligations of citizens in a given state ought to comprise (*ibid.*, 18). Nonetheless, the universality of this status, at least within a given society's borders, remains a defining characteristic of citizenship theory. Ruth Lister (2010, 195) captures this idea when she asserts that citizenship "represents an abstract, universal concept," the reality of which varies depending on the context in which it is articulated. Even today, in relation to a rich literature on citizenship theory and a substantial body of applied examples, the weight of the concept continues to be tied to its promise of universality.

It is, however, on these very grounds that citizenship has become a contested concept. There is continued disagreement over the nature and extent of the rights and obligations in theory and its limitations in practice, in which the rights and obligations of citizenship have never been accessible to everyone. Nonetheless, a growing body of feminist scholarship suggests that, properly conceived, citizenship can provide a helpful tool to promote women's equality rights (Abraham and Ngan-ling Chow 2011, 9).<sup>5</sup> Indeed, the contention that citizenship is a concept that can be reimagined in profound ways led John Hoffman (2004, 138) to characterize it as a "momentum concept," that is, a concept that we can continuously rework in order to realize "more and more of [its] egalitarian and anti-hierarchical potential."

In order to reimagine citizenship in this way, it is useful to first engage with some of the most serious shortcomings of the concept. Feminist critiques of citizenship are linked by the shared perception that the concept is limited, often relying on objectionable membership criteria and proscribing what aspects of life fall under the umbrella of citizenship in troubling ways. Looking at each of these critiques in more depth helps identify which elements of citizenship must be rethought in order for the concept to remain applicable.

The first line of argument concerns who is recognized as a citizen, and what this membership includes. Over time, “inclusive citizenship” has come to signify recognition as much as it does access to formal rights (Lister 2007, 51). Implicit in the realization of full citizenship is therefore the ability to pursue these rights without fear of discrimination or retaliation (Nossiff 2007, 62).<sup>6</sup> As both a legal and social status, the concept of citizenship fundamentally implicates a delicate balance between inclusion and exclusion (Abraham and Ngan-ling Chow 2011; Ackelsberg 2005; Lister 2007, 2010). Historically, women have been overwhelmingly excluded from this category. Throughout most of human history and in all regions of the globe, women of all classes, races, ethnicities, and religions were, and in some instances continue to be, denied state citizenship of even the lowest rank. So exclusively male has this status been for nearly all of human history that it is a singular development of women’s movements in the twentieth century to have ended this exclusion in many places (Friedman 2005, 4). Moreover, even when women are recognized as citizens, they are not necessarily recognized as having the same standing as men.

In its real-world iterations, citizenship has been criticized for its adherence to a masculine norm (*ibid.*, 93) that creates barriers that make it difficult for women to exercise the rights associated with this status (*ibid.*, 4).<sup>7</sup> Because only men have traditionally had access to the category of citizenship, this apparently universal category has often failed to address concerns faced only by women. After all, if personal agency and autonomy are necessary for full citizenship, as Rosemary Nossiff (2007, 62) contends, “few issues affect women’s rights to self-determination more directly than access to abortion,” yet reproductive rights are often excluded from citizenship frameworks. Looking to the impetus for restrictive abortion laws, she further contends that the assumptions about women on which these laws are necessarily based inhibit the ability of women to participate as full citizens by not only removing their autonomy and a host of basic rights but also by challenging their standing in sociopolitical matters. Indeed, the United Nation’s Platform for Action shares this perspective, stating that “the ability of women to control their own fertility forms an important basis for the enjoyment of other rights” (United Nations 1995).

The continued force of these norms is especially evident in restrictive abortion laws, which are often based on religious beliefs that life begins at conception and that abortion is therefore tantamount to murder. These beliefs are shaped by traditional attitudes about women in their roles as wives and mothers, which reveal two interrelated assumptions. The first is

that women are incompetent to make decisions and are unaccountable for their actions. The second is that, once a woman is pregnant, her citizenship can be abridged and her right to privacy and equality shared with her physician, the state, and the fetus she is supporting. She is a patient and future mother first, and an individual with constitutional rights second (Nossiff 2007, 61–62). Lister (2003, 126) supports this idea when she argues that “without such rights [to contraception, abortion, and reproductive health] women cannot take control of their bodies or their lives; their agency, and hence their citizenship, is profoundly compromised.”

These problems reveal two key issues with citizenship. The first is that a workable definition of citizenship must move beyond the assumption of a universal, male citizen to take into account the unique relationship of women to the state. Reproductive politics is an obvious example of such a relationship, though the limitations relating to deep-seated assumptions about the value of women must also be addressed if equality is to be realized. The second concerns the shortcomings of a legal definition of citizenship. Even though, as this book contends, rights continue to have a significant role to play in securing women’s equality, despite the power of citizenship to legitimize certain rights claims, “it neither consists of a prerequisite for the acquisition of social rights nor does it constitute a sufficient guarantee for the protection of social, cultural, political and economic rights of all citizens” (Abraham and Ngan-ling Chow 2011, 1). Legal rights alone go only so far. One of the main challenges from feminist scholars to the widespread inclusion of women as citizens stems from frustration that, even after securing formal rights, women continue to be poorly represented in the top positions of both business and government (Jaggar 2005, 93). As such, in order for citizenship to be a relevant framework, it must extend beyond legal in order definitions to include a more substantive interpretation of community membership.

The second critique of citizenship concerns its reach within individuals’ lives and clearly ties back to the problems of exclusivity discussed above. Substantive definitions of citizenship often limit the importance of engagement by citizens to the public or political domains, which have traditionally excluded women. Martha Ackelsberg (2005) explains that,

while the public realm is presented as one where free and equal citizens engage together in striving for some common good, that arena depends on a private/domestic realm that is characterized by relationships of *inequality* and dependence, and is focused on meeting life’s necessities. (69, emphasis in original)

The implications of this divide are weighty, impacting not only what issues are considered public or political, but also influencing who is able to participate, and to what effect, in politics broadly conceived (Ackelsberg 2005, 70). Abortion and other reproductive health concerns are a clear casualty of this divide. Reproduction, and the responsibilities central to it, though essential to human survival, are also markedly undervalued and considered distinct from public concerns (Luxton 2006, 32). Sue Ferguson (1999, 6) maintains that “reproductive activities, in which women have historically played a central role, have been neglected as sites for political struggle.” Bryan Turner (2008) further reinforces this contention, but complicates the relationship of reproduction to politics:

Because reproduction is regarded by the law as an activity that takes place privately in the domestic sphere, the contributions of women to civil society and the reproduction of the nation have often been ignored, insofar as women are ascribed to the private sphere. By contrast, because reproduction is crucial to the survival of the nation and hence the state, women's reproductive choices are typically controlled by men through the regulatory institutions of the state and religion. (47–48)

The precarious placement of reproduction between public and private spheres has been a central focus of feminist activism for decades.<sup>8</sup> Even with this long-standing attention, however, the perception of this divide remains strong. Its continued rhetorical power goes a long way to explain why, despite a long history in the feminist movement, calls for reproductive autonomy are not a core issue in the study of citizenship (Roseneil et al. 2013, 901).

By way of challenges to the notion of a defined public-private divide (Abraham and Ngan-ling Chow 2011; Lister 2007), expanding the terrain and methods on and via which citizenship is practised and internalized (Jaggar 2005; Kershaw 2005; Lister 2007), and going beyond purely legal conceptions of citizenship to recognize that it is a process rather than a static framework (Abraham and Ngan-ling Chow 2011; Bakan and Stasiulis 2005; Turner 2008), citizenship can serve as a compelling lens with which to understand abortion politics. Recognizing abortion as inextricably tied to women's equality, and their equal citizenship, not only situates the denial of abortion access in broader denial of women's equality but ties these issues to women's experiences as members of a political community, opening the door for broader considerations of how reproduction implicates women's equal citizenship. The concept of citizenship, then, is a useful frame through

which to understand abortion because it puts the procedure in the larger context of women's participation in Canadian society.

Perhaps unsurprisingly, framing abortion access as a right, particularly a right necessary for equal citizenship, has been met with resistance in Canada. As an overtly gendered right without any clear analogous grounds, abortion poses difficulties for traditional conceptualizations of citizenship. Indeed, abortion is, arguably, the only human right to date that did not originate as a right granted solely to men (Asal, Brown, and Figueroa 2008, 280). In political discourse today, abortion is commonly positioned as a hot-button topic or women's issue, rather than as a procedure necessary to allow women to control their own health and, further, to protect their economic, social, and political lives.

Although not all women can or will become pregnant, all women are nonetheless characterized by gendered stereotypes relating to their reproductive capacity in both official and private discourse, which have traditionally placed them, as well as their struggles relating to reproduction, outside the political sphere – although, as Turner (2008) explains, this has not stopped governments from legislating women's reproductive rights and obligations. When women's rights claims are located outside politics, women's standing to legitimately advocate for themselves in politics, and even within their communities, is likewise diminished. In essence, to deny the significance of abortion to women's equal citizenship is to effectively deny women a place at the table.

Abortion politics are the focus of this book, but I want to be clear that a positive right to abortion access cannot alone guarantee women's equality. Such recognition would be a major and deeply symbolic step in a larger project of equality, but it is important to situate abortion, as a deeply contested and emblematic issue, in a broader social context. During the second wave of feminism, Western feminists focused on issues of body politics, of which abortion rights activism was a major component. Although this focus on women's bodily rights is still important, current research does not operate in the same marginalizing discourses for which the second wave was criticized; it has moved to a more intersectional approach, which recognizes that substantive equality is elusive for many demographics.<sup>9</sup> To this end, I adopt a view of citizenship as a dynamic concept, experienced by individuals in unique ways depending on myriad factors, including gender, race, class, and location.

Citizenship is best thought of as existing “on a spectrum, involving a pool of rights that are variously offered, denied, or challenged, as well as a set of obligations that are unequally demanded” (Bakan and Stasiulis 2005, 2).

Recognizing the “complex and multifaceted relationships of individuals to territories, nation-states, labour markets, communities and households” problematizes simplistic legal categories and extends understandings of citizenship beyond the public sphere (ibid., 11). The way women experience attempts to terminate unwanted pregnancies is, after all, the result of interactions between state and nonstate actors, mitigated by their own position and status in society. Such an approach also challenges critiques of the false universalism of citizenship. Recognizing the different ways individuals experience or are denied their citizenship, we are able to utilize citizenship as a theoretical tool to assess women’s marginalization and subordination, and as an instrument to challenge these inequalities, all the while shining “a searching light on difference” (Lister 1997, 195).

Although I do not attempt to suggest that creating a positive right to abortion access will impact all women in the same way, I do contend that such a move would create some benefit for all women. Moreover, recognition of these rights in context provides a platform for future challenges, in no small part by validating women’s reproductive lives as central to their experiences as citizens.

### Chapter Organization

In the chapters that follow, I pursue three questions: What forms of access have appeared in the provinces since *R. v. Morgentaler* (1988)? What roles have state and nonstate actors played in the creation of this access, or barriers to it? And what role has and should Charter rights play in the future regulation of abortion in Canada? I explore these questions using a thicker definition of access than the simple existence of nearby facilities that are able to perform the procedure. Although accessible facilities are still necessary for women to exercise their rights to terminate unwanted pregnancies, the nature of these facilities also matters, as does the personnel working there, the woman’s ability to enter the facility, and her overall sense of safety. The realization of substantive access requires that we question not only which women do and do not have access but also how we can remove existing barriers. Must women negotiate with demonstrators when entering medical facilities? Will they face harassment or a loss of anonymity if they seek abortion services? How will the staff at the facility, including the physician, interact with them? Moreover, will women be able to speak openly about their experiences in their communities without fear of stigma or violence?

This view of access requires a comprehensive approach to abortion, which recognizes the procedure not as a single moment in a woman’s life



but as a decision rooted in a larger social structure, with real implications for her familial, social, economic, and political life. Questions about the implications of abortion for women's lives informs social movement activism surrounding the issue – championed by pro-choice, reproductive justice, and anti-abortion activists – which, in turn, inform social rhetoric that is reflected in the treatment of abortion by the medical profession, politicians, and the courts. In order to situate the parameters of the debate, [Chapter 1](#) explores the motivations and evolution of these social movements in Canada.

Social movement activity surrounding abortion in Canada has long been presented as two-sided: between the pro-choice movement and anti-abortion movement. This view represents a dramatic oversimplification of the complex issues at stake in the debate. Although the pro-choice movement wishes to ensure the continued legality of abortion and improved access, and the anti-abortion movement continues to push for a return toward restricting or prohibiting access entirely, important nuances influence the nature of these claims in different contexts. Moreover, even groups operating under the same movement banner do not necessarily adopt identical viewpoints and strategies. The relationship between these groups is further complicated by the emergence of the reproductive justice movement in Canada. Through a careful unpacking of all three movements, I explore the role rights play in their strategic activities. In so doing, I show that the divisions between the pro-choice and reproductive justice movements in the Canadian context, particularly their views of rights, are not as exaggerated as the literature (which generally focuses on the United States) suggests. I therefore suggest a more contextualized understanding of abortion that might help to bridge these two movements, treating them as allied. This more holistic treatment of abortion grounds my arguments about the nature and relevance of access going forward.

[Chapters 2](#) through [5](#) consider the roles of both state and nonstate actors in the regulation of abortion access in Canada – including the federal government and the Supreme Court, provincial governments and provincial courts, the medical community, and social movement activists – each of which has played a central role in the regulation of abortion, be it through legislation, clinical guidelines, the training of providers, or ethical and moral debate.

[Chapter 2](#) looks at the regulation of abortion at the federal level. Before 1988, the availability of abortion was dictated by the Criminal Code and was thus under federal jurisdiction, and attempts to challenge the existing

abortion law ran up against a jurisdictional wall until the implementation of the Charter of Rights and Freedoms. On the Charter's enactment, the Supreme Court was given increased discretionary power in its application, because it was designed to be interpreted as a living tree; that is, to adapt to changes in the social landscape. The landmark decisions that came after, such as *R. v. Morgentaler* (1988), would change the perceived role of the courts in the public eye and, in many cases, elevate its perceived legitimacy. Litigation came to be understood as an important tool for social change, often above engagement with the federal or provincial governments. This shift afforded more power to social activists, but it may have done so at the cost of engagement with formal political institutions. Through an exploration of the federal regulation of abortion over the last quarter century, alongside relevant Supreme Court rulings, this chapter questions the role that the federal government and the Supreme Court took in shaping the current landscape of abortion access in Canada, and what role they should be expected to play in future. Although this chapter demonstrates that rights played a crucial role in the decriminalization of abortion, it also attempts to show that the path toward decriminalization was by no means guaranteed.

**Chapter 3** turns to the regulation of abortion by provincial governments after 1988, when abortion was reclassified as a health care issue. In each case, I explore the responses of provincial governments to this new jurisdiction, including their interactions with the courts. I also investigate the motivations for different approaches to the regulation of abortion access, observing the rhetoric of various social movements echoed in each institution. This discovery demonstrates the value of rhetoric and social perception in the regulation of abortion, and the need to influence these attitudes to realize change. In addition, it showcases how a language of rights, or the avoidance of such a language, is reflected in the nature of access to services.

According to Canada's constitution, health care falls under the jurisdiction of the provinces, though the medical community dictates many aspects of the way services are provided. The nature of physician training and licensing, as well as what is deemed to be ethical and professional conduct, are set out by provincial colleges of physicians and surgeons. Surveying the ways in which the medical community has regulated abortion after its decriminalization, **Chapter 4** explores the implications of the classification of abortion as a health care issue in the provinces. Exploring how abortions are, and can be, provided, it offers a nuanced picture of what abortion provision does, as well as could, look like in Canada. Indeed, the emergence of improved medical abortion in the Canadian market in January 2017 marks the first major

shift away from a focus almost exclusively on surgical abortions. Given the important role nonstate actors, like those in the medical profession, have played in shaping access, it is necessary to understand the way the medical community itself is regulated, both internally and by external forces, in order to better grasp what access provision looks like across the country, and to suggest potential avenues to influence it. Ultimately, this chapter reveals the drawbacks of treating abortion as a purely medical issue, highlighting the need to create a solid foundation to improve access in Canada – a foundation I believe can be aided through rights recognitions and realized through social change.

The role of social movements comes to a head in a broader discussion of the nature of provincial social climates in [Chapter 5](#). Here, I argue that a province's social climate is influential both in the regulatory decisions of institutions and in the experiences of individuals seeking abortion access. Ultimately, the realization of substantive abortion access is not only a political and legal question, it also relies on social acceptance of the procedure as necessary to women's equality.

In the final chapter, I turn to one last case study, with the aim of drawing together the actors impacting the landscape of access in Canada's most staunchly anti-abortion province: Prince Edward Island. Although largely stagnant during the time most of this book was written, the province has recently undergone major changes to the way it regulates access to abortion care, from an effective prohibition to accessible care in one of its urban centres. By looking to the rationale for changes in the province, this chapter affirms the role of rights in realizing women's equality, while reflecting on the potential of the Trudeau government to affect change federally going forward. Importantly, although rights recognition will certainly help provide abortion with much-needed legitimacy in the political sphere, and further challenge its treatment as taboo, they should not be thought of as an end point in the quest for equality. Rather, in advancing an argument for the recognition of reproductive rights as essential to women's equal citizenship, I recognize specific rights protections as important stepping-stones toward broader recognition of the role of reproduction in women's lives.