Backlash to the Future? From *Roe* to *Perry*

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Can we really avoid conflict by avoiding courts? Does litigating produce conflict that legislating would not?

In June 2010, as the Proposition 8 trial was wrapping up in a San Francisco courtroom, the Federal District Judge, Vaughn Walker, put this question to Ted Olson, who was about to make his closing argument on behalf of the two same-sex couples seeking the right to marry:

> "Isn't the danger . . . to the position that you are taking . . . not that you're going to lose this case, either here or at the Court of Appeals or at the Supreme Court, but that you might win it? And, as in other areas where the Supreme Court has ultimately constitutionalized something that touches upon highly-sensitive social issues, and taken that issue out of the political realm, that all that has happened is that the forces, the political forces that otherwise have been frustrated, have been generated and built up this pressure, and have, as in a subject matter that I'm sure you're familiar with, plagued our politics for 30 years – isn't the same danger here with this issue?"

Ted Olson replied: "I think the case that you're referring to has to do with abortion."

"It does, indeed," said the judge.[3]

Running through commentary on the cert grants in *Hollingsworth v. Perry*[4] and *United States v. Windsor*[5] are continual references to *Roe v. Wade*.[6] "Watch out! Don't go there! Look what happened 40 years ago when the Supreme Court granted women the right to abortion." The *Roe*-centered backlash narrative, it seems, is the trump card in many discussions of the marriage cases.[7] But what do we mean by "backlash" in the context of a Supreme Court decision? What might an *accurate* account of what occurred before and after *Roe v. Wade* actually have to

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[3] Transcript of Record at 3095, Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Cal. 2010) (No. C:09cv02292).
[4] Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom* Hollingsworth v. Perry, 2012 WL 3134429 (U.S. Dec. 7, 2012) (No. 12-144).
[5] Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *cert granted sub nom* United States v. Windsor, 2012 WL 4009654 (U.S. Dec. 7, 2012) (No. 12-307).
[6] 410 U.S. 113 (1973).
[7] Among numerous examples, see, *e.g.*, Charles Lane, *Pushing Same-Sex Marriage Ahead*, WASH. POST, Dec. 10, 2010, available at http://articles.washingtonpost.com/2012-12-10/opinions/35745714_1_gay-marriage-gay-rights-lawyers-states-ban (warning those litigating in favor of same-sex marriage that *Roe* "stirred the pro-life movement, subjected the court to withering scholarly attack and forever politicized judicial nominations." As we argue below, the first and third of these assertions are open to serious question. The second has little meaning outside its particular context.).

impart? And why should we care, on *Roe*'s 40th anniversary, the tenth anniversary of *Lawrence v. Texas*,[8] and on the eve of *Perry* and *Windsor*, about getting this story right?[9]

The premise of the *Roe* backlash narrative is that there is something distinctive about backlash when it comes to courts, something about the judicial declaration of minority rights that produces an especially virulent and polarizing reaction among losers who would not respond in similar fashion to legislative defeat. On this view, court decisions that vindicate minority rights or that pick winners of vigorously contested claims have the harmful effect of shutting down ordinary politics and giving birth to a new, deformed politics: "*Roe Rage*," as one of us has labeled it.[10] Winning, in other words, can be even worse than losing. The message is: minority claimants should stay away from courts.

But is that the right message?

With specific respect to the role that *Roe v. Wade* has come to play in the backlash narrative, we refer readers to the *Yale Law Journal* article we published in 2011, *Before (and After)* Roe v. Wade: *New Questions About Backlash*.[11] We have added the article as a new Afterword to the second edition of our 2010 book, *Before* Roe v. Wade: *Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling*.[12]

In this work, we ask what conflict over abortion before *Roe* might teach about the logic of conflict after *Roe*. Examining the period before the Court ruled allows us to perform something of a "natural science experiment"—to investigate what forces were capable of generating political conflict over abortion, in the absence of judicial review. We found facts absent in most discussions of "*Roe*" and "backlash."

(1) Before *Roe*, there was escalating conflict over abortion, driven by social movements, religious institutions—and by political parties.[13]
(2) Before *Roe*, there was broad popular support for liberalization of abortion law. Polling on the eve of the decision showed that substantial majorities of Americans favored decriminalizing abortion: more Republicans than Democrats -- more than

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[8] 539 U.S. 558 (2003).

[9] "Backlash," of course, is not limited to courts. A December 26, 2102, front-page *New York Times* article on the weakening Tea Party movement, for example, cites a former Republican Party chairman in New Hampshire for the view that "a backlash against 'tinfoil hat' issues pushed by the Tea Party-dominated legislature" there had led to the loss of the Republican majority in one house and its near loss in the other. *See* Trip Gabriel, *Sidestepping Fiscal Showdown, Weaker Tea Party Narrows Focus*, N.Y. TIMES, Dec. 26, 2012, at A1, *available at* http://www.nytimes.com/2012/12/26/us/politics/tea-party-its-clout-diminished-turns-to-fringe-issues.html?pagewanted=all. This is conventional talk in politics.

[10] Robert Post & Reva B. Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C-R.-C.L. L. REV. 373 (2007).

[11] Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade: *New Questions About Backlash*, 120 YALE L. J. 2028 (2011), *available at* http://yalelawjournal.org/images/pdfs/987.pdf.

[12] Linda Greenhouse & Reva B. Siegel, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (2d ed., 2012) [hereinafter BEFORE *ROE V. WADE*], *available at* http://documents.law.yale.edu/before-roe.

[13] *See generally* BEFORE *ROE V. WADE*, *supra* note 12, particularly pages 81-115 and 212-220 (documenting pre-*Roe* conflict and Republican Party intervention).

two-thirds of self-identified Republicans and 56 percent of Catholics told Gallup that "The decision to have an abortion should be made solely by a woman and her physician." [14] (Three major surveys conducted in the immediate aftermath of *Roe* – Harris, Field, and NORC – all showed that the decision did not reduce but rather consolidated these broad levels of popular support.[15])

(3) Before *Roe*, despite broad popular support, liberalization of abortion law had all but come to a halt in the face of concerted opposition by a Catholic-led minority. It was, in other words, decidedly not the case that abortion reform was on an inevitable march forward if only the Supreme Court had stayed its hand.[16]

(4) Before *Roe*, Catholic opposition to abortion was amplified by the Republican Party as the Republicans began to employ attacks on abortion to recruit Catholic voters who historically had voted with the Democratic Party. Our article draws on evidence from the 1972 presidential election to show how the Republican party used the abortion issue in the service of party realignment in the period before *Roe*, and shows the expansion of this strategy during the 1980 election, in the creation of the coalition of conservative Catholics and evangelical Protestants who helped vote Ronald Reagan into office.[17]

(5) After *Roe*: The entanglement of abortion in party realignment explains how, over time, Republicans and Democrats came to switch position on the abortion issue, leaders before base, and assume their current polarized positions on abortion, an evolution that took nearly twenty years after the Court handed down *Roe*. Our paper argues that when you line up the evidence, political realignment better explains the timing and shape of political polarization around abortion than does a court-centered story of backlash.[18]

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[14] *Id.* at 207-210.

[15] William Ray Arney & William H. Trescher, *Trends in Attitudes Toward Abortion, 1972-1975*, 8 FAM. PLAN. PERSP. 117 (1976). Arney and Trescher review post-*Roe* polling data and observe: "It is notable that the 1973 NORC [National Opinion Research Center] survey, fielded just two months after the 1973 Supreme Court decisions, showed a remarkable liberalization of abortion attitudes on the part of all groups and subgroups of American society . . . Very little change occurred in the years following the decisions . . . ." *Id.* at 124. The authors further suggest that the Court's action may have had "an immediately legitimating effect on public opinion." *Id.*

[16] Perhaps the most striking example of political and interest group driven backlash, in the absence of any court ruling, was the New York Legislature's 1972 repeal of the liberal abortion law it had enacted two years earlier. The repeal vote, which Governor Nelson A. Rockefeller vetoed, was in direct response to the campaign by an energized Catholic Church, assisted by President Richard M. Nixon, campaigning for re-election and seeking the traditionally Democratic Catholic vote. On May 16, 1972, Nixon wrote a letter to New York's Terence Cardinal Cooke endorsing the church's efforts. *See* BEFORE *ROE V. WADE*, *supra* note 12, at 157-160. Corinna Barrett Lane observes in a recent article that an accurate understanding of *Roe* in its historical context "turns the conventional understanding of the decision on its head." Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L. J. 113, 134 (2012). She argues that "[r]ather than a Supreme Court thwarting majority will, *Roe* shows a Supreme Court vindicating it – again responding to, and reflecting, deep shifts in public opinion when change through democratic process was blocked." *Id.* at 135.

[17] Greenhouse & Siegel, *Before (and After)* Roe v. Wade, *supra* note 11, at 2052-67.

[18] Political scientists Edward G. Carmines and James Woods argue persuasively in an important article that party realignment on abortion – the "issue evolution process" – was largely the work of party elites and activists, in other words, the result of top-down strategy rather than a bottom-up response. They further observe that "it is not until 1992 that the new alignment of abortion attitudes and partisanship becomes a permanent feature of American party politics" – hardly evidence of the spontaneous popular uprising that *Roe* is so often credited with having induced.

Of course, judicial decisions, like *Roe* and *Brown*, provoke conflict. *The question is whether judicial decisions are likely to provoke more virulent forms of political reaction than legislation that vindicates rights.* There was, is, and will be conflict over abortion, same-sex marriage, and indeed, the very meaning of equality. When minorities seek to unsettle the status quo and vindicate rights, whether in legislatures, at the polls, or in the courts, there is likely to be conflict and, if the claimants prevail, possibly backlash too. To the question of whether one can avoid conflict over such issues by avoiding courts, the answer from an accurate pre-history of *Roe v. Wade* is: no. The abortion conflict escalated before the Supreme Court ruled.

To the question of whether one *should* avoid asserting claims of right for fear of igniting conflict, the answer must be: it depends. Bringing about change is hard work, including the hard work of deciding when, costs and benefits considered (including norm and meaning creation), litigation and/or legislation are worth pursuing in the first place. Even litigation losses have produced gains for marriage equality, as Doug NeJaime and others have shown us.[19] In every case, a contextual judgment should drive the decision whether to make rights claims—not the assumption that progressives will surely get punished if they go to court seeking rights out of turn.

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Edward G. Carmines & James Woods, *The Role of Party Activists in the Evolution of the Abortion Issue*, 24 POL. BEHAV. 361, 371-372 (2002). *See also* Daniel K. Williams, *The GOP's Abortion Strategy: Why Pro-Choice Republicans Became Pro-Life in the 1970s*, 23 J. OF POL'Y HIST. 513 (2011).

[19] Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).