Backlash to the Future? From Roe to Perry

Linda Greenhouse1 and Reva B. Siegel2


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. Perry4 and United States v. Windsor5 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

1 Joseph Goldstein Lecturer in Law, Yale Law School.
2 Nicholas deB. Katzenbach Professor of Law, Yale Law School.
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.).
impert? And why should we care, on Roe’s 40th anniversary, the tenth anniversary of Lawrence v. Texas, 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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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 Lane, 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.
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. 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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