REVIEWS

ROE AS WE KNOW IT

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AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE. By *Mary Ziegler*. Cambridge: Harvard University Press. 2015. Pp. xxiv, 367. $39.95.

INTRODUCTION

The petitioners in last year's historic same-sex marriage case cited most of the Supreme Court's canonical substantive due process precedents. They argued that the right of same-sex couples to marry, like the right to use birth control[1] and the right to guide the upbringing of one's children,[2] was among the liberties protected by the Fourteenth Amendment. The Court in *Obergefell v. Hodges* agreed, citing many of the same cases.[3] Not once, however, did the petitioners or the majority in *Obergefell* cite the Court's most famous substantive due process decision. It was the dissenters in *Obergefell* who invoked *Roe v. Wade*.[4]

To understand why both sides in *Obergefell* treated *Roe* as a negative precedent for judicial recognition of same-sex marriage, it is necessary to look beyond *Roe* itself to the familiar narrative—about judicial activism, countermajoritarianism, and backlash—in which it is embedded. As Chief

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1. *See, e.g.*, Brief for Petitioners at 56, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556) (citing Griswold v. Connecticut, 381 U.S. 479 (1965), which recognized as fundamental the right of married people to use birth control).

2. *See, e.g.*, Brief for Petitioners at 18, Tanco v. Haslam, *sub nom* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Feb. 27, 2015) (No. 14-562) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923), which recognized the right to "establish a home and bring up children" as a constitutionally protected liberty interest).

3. *See, e.g.*, 135 S. Ct. at 2598 (first citing Griswold v. Connecticut, 381 U.S. 479 (1965); then citing Meyer v. Nebraska, 262 U.S. 390 (1923)); *see also id.* at 2598–600 (first citing Lawrence v. Texas, 539 U.S. 558 (2003); then citing Turner v. Safley, 482 U.S. 78 (1987); then citing Zablocki v. Redhail, 434 U.S. 374 (1978); then citing Loving v. Virginia, 388 U.S. 1 (1967); then citing Pierce v. Society of Sisters, 268 U.S. 510 (1925); and then citing other canonical substantive due process precedents).

4. *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting) (invoking *Roe v. Wade*, 410 U.S. 113 (1973), by name); *id.* at 2626–31 (Scalia, J., dissenting) (alluding to *Roe*).

Justice Roberts recounted in his *Obergefell* dissent: by intervening in the debate over abortion in 1973, the Court got out ahead of the American people and short-circuited the democratic process.[5] In the early 1970s, "[t]he political process was moving"[6] on abortion; states were beginning to repeal statutory bans. But just as this process was getting underway, the Court stepped in, finding in the Constitution a right to abortion not previously recognized there. The Chief Justice, quoting his colleague Ruth Bader Ginsburg, explained that such "[h]eavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[7] That is a mild version of the claim. Here is a stronger one: "Justice Harry Blackmun did more inadvertent damage to our democracy than any other 20th-century American. When he and his Supreme Court colleagues issued the Roe v. Wade decision, they set off a cycle of political viciousness and counter-viciousness that has poisoned public life ever since . . . ."[8]

One can understand, in light of this story, why proponents of same-sex marriage might have wanted to distance their case from *Roe*. *Roe* functions today, for the Left as much as the Right, as a cautionary tale—a parable about what happens when the Court steps in too soon, does too much, and shuts down democratic debate on an issue about which Americans are deeply divided. Many on the left have concluded that *Roe* was in fact counterproductive because it "spawned a right-to-life opposition which did not previously exist."[9] This oppositional movement is credited with fueling the rise of the New Right and paving Ronald Reagan's path to the White House.[10] The moral of this story, many have concluded, is that progressives should proceed with caution where courts are concerned.[11] Better to pursue

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5. *Id.* at 2625 (Roberts, C.J., dissenting).

6. *Id.* (quoting Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 385–86 (1985)).

7. *Id.*

8. David Brooks, Opinion, *Roe's Birth, and Death*, N.Y. Times, Apr. 21, 2005, at A23.

9. Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 Fordham L. Rev. 1739, 1751 (1997) (describing this as the "conventional understanding" of *Roe v. Wade*); *see also* Cynthia Gorney, *Imagine a Nation Without Roe v. Wade*, N.Y. Times, Feb. 27, 2005, at C5 ("Indeed, Roe created the national right-to-life movement, forging a powerful instant alliance among what had been scores of scattered local opposition groups."); Benjamin Wittes, *Letting Go of* Roe, Atlantic Monthly, Jan./Feb. 2005, at 48, 51 ("One effect of *Roe* was to mobilize a permanent constituency for criminalizing abortion . . . .").

10. *See, e.g.*, Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. Chi. L. Rev. 759, 797–98 (2006) (reviewing Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (1st ed. 2005)) ("Politically, the Court's decision to declare abortion to be a national right served as a catalyst for the Right to Life movement. That movement, in turn, played a major role in realigning the party loyalties of millions of Americans. . . ."); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 Calif. L. Rev. 751, 766 (1991) ("[*Roe*] may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents."); Wittes, *supra* note 9, at 51 (arguing that, as a result of *Roe*, "the pro-life sense of disenfranchisement has been irremediable—making it all the more potent," and that this "constituency . . . has driven much of the southern realignment toward conservatism").

11. *See infra* notes 91–95 and accompanying text.

progressive ends through the legislature, where victories are democratic and the risk of backlash is lower. As *Roe* shows, winning via judicial fiat is often not worth the cost.

This story about *Roe* is so well ingrained in popular and scholarly discourse that it has persisted despite increasingly compelling evidence that it is not true. Take, for example, the claim that *Roe* triggered a major backlash because the Court got out ahead of the American people. Polls in the decade before the decision show a dramatic increase in support for the legalization of abortion.[12] By the time the Court entered the fray, a solid majority of Americans believed abortion should be legal; a Gallup poll taken six months before the decision reported 64 percent in favor of legalization.[13] Polling after *Roe* indicated that the Court's decision did nothing to reduce support for this position.[14] Noted pollster Louis Harris concluded in 1975 that "[t]here is no doubt that the U.S. Supreme Court decision solidified public support for legalizing abortions."[15]

Furthermore, many of the constituencies associated with the pro-life backlash *Roe* purportedly caused were far from uniformly anti-abortion at the time of the Court's decision.[16] Until the end of the 1970s, Republicans in Congress voted pro-choice more often than their Democratic colleagues;[17] among the American people, Republicans did not become more pro-life

12. For a discussion of such polls, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 260–62 (2d ed. 2008). Researchers relying on data from the National Opinion Research Center found a substantial increase in support for elective abortion between 1965 and 1972, with an average of 41 percent of respondents approving of abortion in 1965 and 63 percent approving in 1972. *Id.* at 260–61. Much of this increase occurred in the years right before *Roe*. *Id.* at 261.

13. George Gallup, *Abortion Seen Up to Woman, Doctor*, WASH. POST, Aug. 25, 1972, at A2. Even a majority of Catholics agreed "with the statement that 'the decision to have an abortion should be made solely by a woman and her physician.' " *Id.*

14. ROSENBERG, *supra* note 12, at 238; William Ray Arney & William H. Trescher, *Trends in Attitudes Toward Abortion, 1972–1975*, FAM. PLAN. PERSP., May/June 1976, at 117, 124; Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2081 n.183 (2011). In fact, Greenhouse and Siegel note that a number of polls showed that support for abortion rights continued to rise after *Roe*. Greenhouse & Siegel, *supra*, at 2081 n.183 (noting that "[m]ore than two years after *Roe*, the Harris Survey reported that approval of permitting access to abortion during the first trimester of pregnancy had reached 'the highest level of support the Harris Survey has ever recorded for legal abortion' " (quoting Louis Harris, *Majority Supporting Abortion Laws Grows*, CHI. TRIB., May 26, 1975, at 7)).

15. Louis Harris, *Majority Supporting Abortion Laws Grows*, CHI. TRIB., May 26, 1975, at 7.

16. Gallup, *supra* note 13 (showing that in the months before *Roe*, 68 percent of Republicans supported the idea that "the decision to have an abortion should be made solely by a woman and her physician").

17. Upon examining abortion-related votes in Congress in the two decades after *Roe*, political scientist Greg Adams concluded that it was not until 1979 that congressional Republicans began to vote against abortion at a higher rate than their Democratic colleagues. Greg D. Adams, *Abortion: Evidence of an Issue Evolution*, 41 AM. J. POL. SCI. 718, 723 (1997).

than Democrats until a decade later.[18] The Republican Party's critique of the Court in its 1976 platform was mild and called for a continuation of public debate on abortion, apparently recognizing that the party was not united behind a pro-life position.[19] Nor were conservative Protestants—including Southern Baptists and other evangelicals—committed to, or even particularly involved in, the pro-life cause in the years immediately following *Roe*.[20] Jerry Falwell, founder of the Moral Majority, did not begin preaching on abortion until the late 1970s,[21] and the Southern Baptist Convention did not profess categorical opposition to abortion until 1980.[22]

If *Roe* did not spark these developments, what did? Over the last few years, in a series of articles[23] and a book entitled *Before Roe v. Wade*,[24] Linda Greenhouse and Reva Siegel have argued that abortion-related backlash predated *Roe* and was a response to the actions of state legislatures rather than the Court. In the late 1960s, a small handful of states repealed their abortion statutes and in so doing mobilized an embryonic but determined pro-life movement. This movement brought the trend toward the liberalization of abortion laws to a swift halt, even though opposition to abortion remained concentrated among Catholics and most Americans continued to support increasing access to the procedure. The movement's success attracted the attention of Republican strategists on the lookout for issues they could use

18. *Id.* at 730–31; Greenhouse & Siegel, *supra* note 14, at 2070 (discussing Gallup polling data showing that Democrats consistently supported access to abortion at higher rates than Republicans only after 1988); *cf.* Samantha Luks & Michael Salamone, *Abortion*, *in* Public Opinion and Constitutional Controversy 80, 98–99 (Nathaniel Persily et al. eds., 2008) ("After 1985, attitudes diverged, with Republicans (and to a lesser extent, Independents) becoming increasingly opposed to abortion, while Democrats became somewhat more supportive of abortion.").

19. Greenhouse & Siegel, *supra* note 14, at 2068 n.147.

20. Laura Kalman, Right Star Rising, at 253 (2010) (noting that "[m]any evangelicals, including those in the Southern Baptist Convention, tolerated or even seemed supportive of abortion" in the period immediately following *Roe*); Robert Post & Reva Siegel, Essay, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.–C.L. L. Rev. 373, 413–14 (noting that in the first half of the 1970s, "[m]ainline Protestant groups generally approved of liberalizing access to abortion" and that "even [evangelicals] did not at the time of *Roe* view abortion as a categorical wrong").

21. Greenhouse & Siegel, *supra* note 14, at 2065; Post & Siegel, *supra* note 20, at 421 (quoting a long-time Catholic leader in the pro-life movement who scoffed in 1982 that "Jerry Falwell couldn't spell abortion five years ago").

22. Post & Siegel, *supra* note 20, at 414 n.199. The year after *Roe* was decided, the Southern Baptist Convention reiterated its commitment to "a middle ground between the extreme of abortion on demand and the opposite extreme of all abortion as murder." *Resolution on Abortion and Sanctity of Human Life*, Southern Baptist Convention (1974), http://www.sbc.net/resolutions/14/resolution-on-abortion-and-sanctity-of-human-life [http://perma.cc/9KQZ-3TB3].

23. *See, e.g.*, Linda Greenhouse, *Democracy and the Courts: The Case of Abortion*, 61 Hastings L.J. 1333 (2010); Linda Greenhouse & Reva B. Siegel, *Backlash to the Future? From* Roe *to* Perry, 60 UCLA L. Rev. Disc. 240 (2013); Greenhouse & Siegel, *supra* note 14; Post & Siegel, *supra* note 20.

24. Linda Greenhouse & Reva B. Siegel, Before *Roe v. Wade* (2d ed. 2012).

to entice traditional Democratic voters—particularly Catholics—to switch their party affiliation. By 1972, Greenhouse and Siegel argue, these strategists had already made abortion a national political issue. Within a decade, through the skillful deployment of abortion and other issues, they had fostered one of the greatest political realignments in American history.

Part I of this Review focuses on common assumptions about *Roe* and abortion-related backlash that Greenhouse and Siegel upend. They show, for instance, that *Roe* was not countermajoritarian—that, in fact, the Court's decision brought about majoritarian change that could not occur in state legislatures because lawmakers had grown reluctant to oppose a passionate, well-organized, minoritarian interest group.[25] They also show that the real backlash—the backlash that gave rise to the pro-life movement and inspired a political strategy that put abortion at the center of American politics—came in reaction to changes made by democratically elected state officials, not by courts. This backlash occurred before and independent of judicial review of the abortion question.

Part II examines why and how, given this history, so many Americans have come to believe the story about *Roe* Chief Justice Roberts tells in *Obergefell*. For answers to this question, Part II turns to Mary Ziegler's new book, *After* Roe*: The Lost History of the Abortion Debate*.[26] As her title suggests, Ziegler focuses on the decade after the Court's decision. Greenhouse and Siegel have shown that the incentive structure that prompted Republican strategists to go after Catholic and other potential "values" voters, and to use abortion to do it, existed prior to *Roe* and was strong even without the decision. Ziegler's primary contribution to this history is to show how Republican strategists deployed accusations of judicial activism—not at the time the Court issued its decision, but years later—to link anti-abortion politics to other threads of New Right politics and thereby unite the various constituencies they were courting behind a new common enemy: the Court. Over time, and due to the remarkable success of this new brand of conservatism, the portrayal of *Roe* as countermajoritarian—a portrayal more ideologically driven than historically accurate—assumed the mantle of truth.

Part III examines the stakes of these new revisionist accounts of *Roe*. What if the backlash narrative, long taken for granted by people across the political spectrum, does not withstand historical scrutiny? What if, in fact, that narrative began life as a political construct—an ideological claim, an organizing tool—but came over time to be taken as a description of historical reality? At the very least, it would mean that this is not the only story we might tell about *Roe*—that there are other accounts of *Roe* that might cast the case and its implications in a different light. The only way to evaluate

25. For more on how the pro-life lobby thwarted majoritarian support for the liberalization of abortion laws in the early 1970s, see Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 139–40 (2012) (discussing the legislative tactics used by opponents of abortion in the states); *id.* at 141 (arguing that "*Roe* is a striking example not of the countermajoritarian difficulty, but of the key insight of public-choice theory—determined minorities can thwart majority preferences").

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these possibilities is to put what we think we know about *Roe* to one side and look again at the history. If progressives, in particular, are going to draw consequential lessons from *Roe* about the dangers of pursuing their aims in court, they had better be sure they've got the story right.

I. The New Scholarship

The notion that *Roe* triggered a substantial popular backlash has persisted for years in the face of evidence that would seem, at the very least, to suggest the need for a second look. Greenhouse, Siegel, and Ziegler are not the first to note that polling data from before and after *Roe* reveal strong majoritarian support for the decision and that abortion was not the polarizing issue in 1973 that it later became.[27] A quick glance at the opinion itself reveals that seven of the nine Justices on the Burger Court, including three Nixon nominees who were self-avowed supporters of judicial restraint, supported the outcome in *Roe*. As Justice Blackmun has noted, "*Roe* against *Wade* was not such a revolutionary opinion at the time."[28]

One reason the backlash narrative has retained its hold over the popular—and the scholarly—imagination despite countervailing historical evidence may be that it seems to fit, and to explain, what we know about abortion-related controversy in the 1970s. At the start of the decade, the country was not bitterly divided on the topic of abortion; by the end of the decade, it was. In between those two moments, the Court decided *Roe*. Americans have long assumed a causal connection. But Greenhouse and Siegel provide an alternative explanation for the polarization around abortion that occurred in this period. They argue that the primary cause of this polarization was not *Roe*, but party politics—more specifically, the competition for voters that attended the great party realignment of this era. One reason to be skeptical of the Court-centered backlash narrative, Greenhouse and Siegel argue, is that pro-life mobilization predated *Roe*. When state legislatures began to repeal their abortion statutes in the late 1960s, Catholic organizations mobilized in opposition.[29] This nascent pro-life movement scored a number of important victories at the state level[30] and began to

27. David J. Garrow argued these points forcefully in *Liberty and Sexuality*, his monumental work on the subject. David J. Garrow, Liberty and Sexuality 562 (1994) (discussing abortion-related Gallup poll taken just before *Roe* as well as commentary from the period predicting that the trend toward liberalization of abortion law would continue); *see also* Neal Devins, Shaping Constitutional Values 4 (1996) (noting that prior to *Roe*, "'imperfections in the political marketplace,' in the form of intense pro-life lobbying . . . 'thwart[ed] the vindication of majority preferences' " (alterations in original) (quoting Sullivan, *infra*)); Kathleen M. Sullivan, *Law's Labors*, New Republic, May 23, 1994, at 44 (reviewing Garrow's *Liberty and Sexuality* and finding persuasive his argument that *Roe* reflected the preferences of "a diffuse and silent majority" whose will had been thwarted by "[a] small but intense minority . . . exercis[ing] political influence disproportionate to its numbers").

28. Garrow, *supra* note 27, at 599 (quoting Justice Blackmun, who was interviewed by Bill Moyers on a PBS television broadcast on Apr. 26, 1987).

29. Greenhouse & Siegel, *supra* note 14, at 2046–52.

30. Lain, *supra* note 25, at 140–41.

organize against abortion at the national level.[31] Despite strong majoritarian support for abortion-law reform, efforts in that direction stalled in 1970[32]—a turn of events that was "more a testament to the power of an intensely committed right-to-life lobby than a reflection of majority will."[33] After 1970, the pro-life movement blocked legislative efforts to liberalize access to abortion in every state where such efforts were made.[34] Contrary to the conventional wisdom, "*Roe* did not kill legislative reform—by 1973, it was already dead."[35]

The spectacular success of this pro-life campaign attracted the attention of Republican strategists looking for a way to peel Catholic voters away from their traditional affiliation with the Democratic Party.[36] These strategists encouraged President Nixon to "divide the Democrats" by taking a stand against abortion,[37] and Republican talking points "increasingly deployed abortion as a symbol of cultural trends of concern to social conservatives distressed about loss of respect for tradition."[38] Strategists in the Nixon campaign played on this new association in the 1972 presidential election when they labeled his Democratic opponent, George McGovern, the "triple-A" candidate, linking him with amnesty (for antiwar protesters), acid, and abortion.[39] By the time *Roe* was decided, strategists on the right had already injected abortion into the national political arena and were already pursuing a political strategy that would, over time, make the pro-life position synonymous with Republican politics. *Roe* may have helped this process along, but it did not have the transformative effect almost uniformly attributed to it.

Republicans retired the "triple-A" slogan after the election, but the use of abortion as a symbol of the nation's broader moral decline—and the Left's complicity in that decline—persisted in the campaign against the Equal Rights Amendment. Phyllis Schlafly, the leader of that campaign, linked abortion with changing sex roles, daycare, divorce, homosexuality,

31. *See, e.g.*, Greenhouse & Siegel, *supra* note 14, at 2047–49 (describing the formation of the National Right to Life Committee by the National Conference of Catholic Bishops).

32. Lee Epstein & Joseph F. Kobylka, The Supreme Court and Legal Change 151–53 (1992) (arguing that "by 1970 it became apparent that pro-choice forces had reached an impasse; no other states were willing to repeal their restrictive laws" primarily because "by 1970 serious organized opposition to pro-choice forces began to emerge"); Garrow, *supra* note 27, at 578 (observing that by 1972, "[a]ntiabortion forces . . . had repeal advocates badly outgunned despite the countervailing national public opinion poll numbers"); Greenhouse & Siegel, *supra* note 14, at 2078 & n.175.

33. Lain, *supra* note 25, at 141.

34. Greenhouse & Siegel, *supra* note 14, at 2047 n.69 (noting that in 1971 and 1972, efforts to liberalize abortion laws failed in twelve states—Georgia, Illinois, Indiana, Maine, Massachusetts, Michigan, Missouri, North Dakota, Ohio, Oklahoma, South Dakota, and Texas—and that in 1972, the New York legislature voted to repeal its 1970 decriminalization measure (though Governor Nelson A. Rockefeller later vetoed the 1972 law)).

35. Lain, *supra* note 25, at 143.

36. Greenhouse & Siegel, *supra* note 24, at 215–18.

37. Greenhouse & Siegel, *supra* note 14, at 2054.

38. *Id.* at 2056.

39. *Id.* at 2057.

pornography, and limitations on religion in the public sphere.[40] Schlafly's claim that the Left was engaged in a systematic assault on "traditional family values" struck a chord with the architects of the New Right, who were seeking in the late 1970s to forge a new political alliance between Catholic and Protestant traditionalists.[41] Although the latter group was not historically active in the pro-life cause, talk of "traditional family values" appealed to them, and they became increasingly anti-abortion as they affiliated with, and adopted the political tenets of, the new Republican Party.[42] By the time of Reagan's presidential campaign in 1980, opposition to abortion was firmly ensconced in the Republican Party platform[43] and helping to unify constituencies that had been atomized or at odds for decades. As a result of its entanglement in national party politics, abortion had begun to occupy the central and contentious role it now plays in American life.

Greenhouse and Siegel argue that abortion's entanglement in the great political realignment of this era—an entanglement that predated 1973—provides an independent, and more historically grounded, explanation for polarization around abortion than the Court's decision in *Roe*. They note that the stakes in getting this story right are high, as the notion that *Roe* triggered a major backlash that set back the cause of reproductive rights, and progressive politics more generally, has led many on the left to conclude that looking to courts to vindicate rights is often counterproductive and that adjudication is to be avoided whenever possible.[44] Before we accept this grim analysis of the possibilities of judicial review, they argue, we need to understand better what actually happened in the years after *Roe*. For this, we need a history that does not simply reiterate the Court-centered backlash narrative, but "that attends to the different institutions that distinctively contributed to the abortion conflict—including the national political parties in a realignment contest."[45]

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40. Donald T. Critchlow, Phyllis Schlafly and Grassroots Conservatism 225 (2005); Kalman, *supra* note 20, at 71–73; Post & Siegel, *supra* note 20, at 418–19.

41. Post & Siegel, *supra* note 20, at 419–24.

42. Kalman, *supra* note 20, at 250–56 (noting that, as the 1970s progressed, more evangelicals and fundamentalists came to embrace political involvement and that these groups also became more receptive to forging alliances with other religious and political organizations); Post & Siegel, *supra* note 20, at 419–24.

43. Republican Party Platform of 1980, Am. Presidency Project, http://www.presidency.ucsb.edu/ws/?pid=25844 [http://perma.cc/6NPR-YM62] (pledging to "work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life").

44. Greenhouse & Siegel, *supra* note 23; Post & Siegel, *supra* note 20, at 373–74 ("[P]rogressives have become fearful that an assertive judiciary can spark 'a political and cultural backlash that may . . . hurt, more than' help, progressive values . . . . They fear that adjudication may cause backlash of the kind they attribute to *Roe v. Wade*, which they believe gave birth to the New Right. Stunned by the ferocity of the conservative counterattack, progressives have concluded that the best tactic is to take no action that might provoke populist resentments." (first omission in original) (footnote omitted) (quoting Mark S. Kende, *Foreward*, 54 Drake L. Rev. 791, 792 (2006))).

45. Greenhouse & Siegel, *supra* note 14, at 2034.

Ziegler's *After* Roe aims to provide such a history. In the course of her research, Ziegler interviewed one hundred participants in the conflict over abortion in the 1970s. The result is a book with richly textured and sometimes surprising stories from a formative period in the war over abortion. *After* Roe draws on these stories to show how various groups, with various political and religious commitments, contributed to polarization around the issue. Borrowing heavily from Greenhouse and Siegel, Ziegler further undermines Court-centered explanations for this polarization. It is not that *Roe* went unnoticed when it was decided, she explains. There was plenty of anger about the decision in 1973, particularly among Catholics already involved in the pro-life movement. But the decision itself did not catapult abortion to the top of the list of issues dividing the American people. When various groups in the late 1970s made *Roe* a centerpiece of their campaigns, they were not simply harnessing preexisting opposition to the decision; they were also generating it. Indeed, Ziegler's work suggests it is nearer the truth to say that polarization around abortion produced "*Roe*"—the decision we now know—than to say that *Roe* produced polarization around abortion.

The central thesis of Ziegler's book is that "non-judicial actors contributed at least as significantly to the escalation of abortion conflict as did the justices themselves" (p. xv) and that over time these nonjudicial actors profoundly shaped our understanding of *Roe*. This is surely correct, and it could hardly have been otherwise; constitutional meaning is constantly being made and remade in this way. Less clearly correct is Ziegler's repeated suggestion that "polarization resulted neither immediately nor inevitably from the Supreme Court's ruling" (p. xv). This is true as far as it goes, but Ziegler's focus on the noninevitability of abortion-related conflict in the decade after *Roe* tends to obscure Greenhouse and Siegel's key conclusion: the political incentives for the Right to exploit the abortion issue were already powerfully present before the Court issued its decision. These incentives made the polarization of abortion politics very likely, with or without *Roe*. By focusing almost exclusively on the post-*Roe* period, Ziegler sometimes makes it sound as if that is when all the relevant action occurred—as if feminists and religious leaders and pro-life activists in the years after *Roe* simply made various choices (such as the women's movement's decision to frame abortion as a "choice") that escalated abortion-related conflict and made compromise impossible.

In addition to distorting history in certain ways,[46] Ziegler's decision to begin her account of *Roe* in 1973 leads her to miss opportunities to build

46. Ziegler repeatedly asserts, for instance, that the conception of abortion as a women's rights issue did not drive abortion-rights activism before, or at the time of, *Roe*, and that the notion that *Roe* protected women's equality and reproductive autonomy postdated the decision by a number of years. *See, e.g.*, pp. 121–27 (arguing that in the mid-1970s, the abortion-rights movement began to "position[ ] its cause as a fight for women's rights" and that this "new movement identity" enabled feminists to "ma[ke] *Roe* a symbol of and argument for women's right to fertility control"). But other scholars have amply demonstrated the prominent association of the right to abortion with sex equality and women's reproductive autonomy in the years before *Roe*. *See, e.g.*, GREENHOUSE & SIEGEL, *supra* note 24, at 120 (showing

connections between her book and work that preceded it. Part II takes up one such opportunity. It focuses on Ziegler's illuminating discussion of how *Roe* came to be widely understood as a particularly egregious—even paradigmatic—example of judicial activism. *After* Roe shows that the charge of judicial activism—the notion that the Court exceeded its authority in declaring a fundamental right to abortion—was not central to pro-life politics in the years immediately following the decision. It became a prominent feature of pro-life rhetoric and ideology only later in the 1970s. The story of how and why this happened is very much a continuation of the story of *Before* Roe v. Wade. It is fundamentally a story of politics—a story about the outworking of a political strategy devised before the Court weighed in on the topic of abortion. As this strategy developed over the course of the 1970s, accusations of judicial activism—directed at *Roe* and elsewhere—served to bind together a new political alliance that became one of the most powerful in modern American history. This new political alliance shaped Americans' views about many things, including *Roe* itself.

II. The Making of "*Roe*"

The first time I read *Roe*, I had recently moved to England. Reading the decision reminded me of that experience. There is much in England that is recognizable, even familiar, to a New Englander. But the more closely one looks, the more unrecognizable things become. The same is true of *Roe*. Most people reading the decision for the first time probably already know the holding; they may even know that it was written by Justice Blackmun and that it constructed a trimester framework.[47] Reading the decision is disorienting nonetheless. Having become accustomed to the contemporary conflagration over abortion and the sharp conflict over *Roe* itself, one expects a sense of drama, an acknowledgement of the great philosophical clash between women's rights and fetal life. But the central figure in *Roe* is not the woman or the fetus, but the doctor. The opinion sometimes reads as if the

that in the years before *Roe*, proponents of the right to abortion "increasingly appeal[ed] to women's freedom and equality as citizens"); *id*. at 119–220 (reprinting numerous documents from the period 1970–1972 that demonstrate the prominence of the women's rights frame); Robert O. Self, All in the Family 135 (2012) (describing how the women's movement in the late 1960s "wrestle[d] the debate over reproduction away from the male physicians, clergy, and population control activists who dominated public discussion of abortion for much of the [decade]"); *id*. at 146 (describing the "surge of activism and institution-building nearly on par with the black freedom movement" in which the women's movement engaged in the late 1960s and asserting that "[t]heir energy and their numbers . . . changed the context in which Americans discussed abortion"); Lain, *supra* note 25, at 138 (noting that by 1970 advocates of women's rights were "pushing the country toward the prochoice position on abortion" and arguing that "[i]t is difficult to overestimate the impact of the women's rights movement in *Roe*"); *id*. (quoting a 1971 article in *Redbook* that described abortion as the most critical issue women faced, as "[t]he right to equality in jobs, educational opportunity and pay, or simply the right of a housewife to develop her individual potential, all pivot around her right of choice in childbearing through contraception and abortion"). For more on the importance of this history, *see infra* notes 101–110 and accompanying text.

47. Roe v. Wade, 410 U.S. 113, 163–65 (1973).

Court is primarily concerned with vindicating the right of physicians to practice medicine without undue interference from legislators.

This is not the frame that dominates debate about *Roe* today. Nor do we think of *Roe* as a decision about public health, population control, or the environment, though all of those concerns played an important role in the debate about abortion prior to 1973 (pp. 4–6). Over time, the frames through which we view the case have changed. This phenomenon is hardly unique to *Roe*, but *Roe* is a uniquely good example of it. Few decisions in American history have inspired such sustained debate, and few have been put to such extensive political use. Americans have not just argued about *Roe*; they have used *Roe* to advance political positions, to mobilize supporters, and to win elections. In so doing, they have constructed narratives that have powerfully shaped perceptions of the Court's decision.

The most influential of these post-*Roe* narratives has been the backlash narrative. Americans now treat it as axiomatic that *Roe* "short-circuit[ed] the democratic process"[48] and that this preemptive move left abortion opponents feeling "as though they had been disowned by this country."[49] The Court's decision ostensibly deprived pro-life Americans of a democratic forum in which to express and persuade others to adopt their views,[50] subjecting them to the dictates of an "Imperial Judiciary."[51] It is understandable that opponents of abortion should have revolted against such a regime. Justice Scalia argued that "by foreclosing all democratic outlet for the deep passions this issue arouses" and "banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight,"[52] the Court in *Roe* "did more than anything else" to inspire rage around abortion.[53] When Americans march on the Court every year on the anniversary of *Roe*, Justice Scalia asserted, they are protesting the Court's precipitous and unwarranted curtailment of popular debate and demanding that the Court return the issue to the people, where it belongs.[54]

One problem with this story, Ziegler contends, is that leaving abortion to the democratic process was not what most opponents of abortion wanted at the time *Roe* was decided. In the early 1970s, most pro-life advocates embraced the concept of unenumerated rights and believed the Court

48. Robert P. George, Opinion, *Gay Marriage, Democracy, and the Courts*, WALL ST. J., Aug. 3, 2009, at A11.

49. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312 (2005).

50. *Id.* at 1312.

51. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., concurring in part and dissenting in part).

52. *Id.* at 1002; *see also* Eskridge, *supra* note 49, at 1312 ("*Roe* essentially declared a winner in one of the most difficult and divisive public law debates of American history. Don't bother going to state legislatures to reverse that decision. Don't bother trying to persuade your neighbors (unless your neighbor is Justice Powell).").

53. *Casey*, 505 U.S. at 995 (Scalia, J., concurring in part and dissenting in part).

54. *Id.* at 999–1000.

should protect those rights (pp. 37–38). What angered most pro-life Americans about *Roe* in 1973 was not that the Court had intervened in the abortion debate, but that it had reached the wrong conclusion. Pro-life lawyers, professors, strategists, and activists argued in this era that the Constitution—particularly the Thirteenth and Fourteenth Amendments—and the Declaration of Independence guaranteed a right to life (pp. 38–40). The problem with *Roe* in their eyes was not that it decided an issue that should have been left to the legislature or that it protected an unenumerated right. The problem was that it protected the wrong right.

Roe did not shake the pro-life movement's conviction that the Constitution guaranteed a right to life. After the decision, many in the movement threw their support behind a right-to-life amendment that would correct the Court's mistake (p. 41). But when a Virginia congressman proposed an amendment in 1973 that would override *Roe* by returning the abortion question to the states, most pro-life leaders opposed the idea on the ground that a states' rights amendment would put "the right to live at the perpetual mercy of shifting legislative majorities."[55] A post-*Roe* brief submitted by the United States Catholic Conference echoed this concern, lamenting that the Court's decision had "'open[ed] a protected constitutional right to the workings of the popular will.'"[56] Leaders in the Church and other pro-life advocates frequently asserted in this period that the right to life was too important to leave to the political process (pp. 42–43).

This is not to suggest that allegations of judicial overreach were absent in the immediate aftermath of *Roe*. Justice White himself, in his dissenting opinion in *Roe*'s companion case *Doe v. Bolton*, described the Court's decision as "an improvident and extravagant exercise of the power of judicial review . . . ."[57] John Hart Ely argued in the *Yale Law Journal* in 1973 that the

55. P. 43 (quoting congressional testimony of Robert Byrn, law professor and lawyer for the National Right to Life Committee); *see also* Post & Siegel, *supra* note 20, at 413 n.196 (quoting *Nullification of Abortion Ruling Sought*, WASH. POST, TIMES HERALD, Mar. 27, 1973, at A14) (noting that "a proposed constitutional amendment 'to give states the unqualified right to make their own abortion laws' in 1973 went nowhere, while a proposed 'human life amendment' that would have completely banned abortion made its way into the platform of the Republican Party in 1980").

56. P. 29 (quoting Brief of the United States Catholic Conference as Amicus Curiae at 16–17, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (Nos. 75-1151, 74-1914)); *see also* Post & Siegel, *supra* note 20, at 413 n.196 ("In his 1974 testimony before Congress, a spokesperson for the United States Catholic Council declared: 'It is repugnant to one's sense of justice to simply allow as an option whether the states within their various jurisdictions may or may not grant to a class of human beings their rights, particularly the most basic right, the right to life.' " (quoting *Pro-Life Amendment for Unborn*, CHI. DEFENDER, Mar. 16, 1974, at 25)).

57. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting).

Court had overstepped its authority in finding a fundamental right to abortion,[58] and he was not the only legal scholar to make this argument.[59] Although the media almost uniformly responded to *Roe* with "overwhelming praise," the ever-contrarian *New Republic* argued that the decision should have been left to the political process.[60] Ziegler may understate the significance of this strand of criticism among academic and other elite critics of the Court's decision. But she makes a convincing case that accusations of judicial activism were not prevalent outside those circles in the first half of the 1970s and that the pro-life movement did not foreground claims of judicial activism when attacking *Roe*.[61]

Charges of judicial activism became central to the pro-life movement's campaign against *Roe* only later in the decade, and for strategic reasons (pp. 54–57). Attacks on the judiciary played a major role in the rhetoric and ideology of the political strategists trying to create a new Republican coalition in these years. In the 1950s and 1960s, accusations of judicial activism were often directed at decisions that directly or indirectly implicated race. Conservatives famously decried progressive rulings on school integration, voting, and criminal procedure as the illegitimate handiwork of activist judges. At the time *Roe* was decided, the focus of this criticism—at least in its popular incarnation—was not yet on the family.[62] But by the late 1970s, that had changed. New Right strategists had set their sights on cases involving sex, gender, and the family and had begun to argue that the Court was overstepping its bounds in those areas too. Focusing on the Court's antidemocratic tendencies helped to facilitate an alliance between various conservative constituencies: "By targeting judicial activism, the New Right could transform fragmented, single-issue groups"—such as those concerned with busing, criminal procedure, school prayer, or abortion—"into a powerful united front" (p. 54). Although the pro-life movement did not frame its claims in terms of judicial activism at the time *Roe* was decided, later in the 1970s the idea of a tyrannical Court that would stop at nothing to impose its liberal values on the nation provided a new and strategically appealing way of explaining the injury that had occurred when the Court decided to extend constitutional protection to abortion.

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58. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943 (1973) ("The problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court's business." (footnote omitted)).

59. *See, e.g.*, ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113–14 (1976); LOUIS LUSKY, BY WHAT RIGHT? 14–17, 20 (1975).

60. *See* GARROW, *supra* note 27, at 605, 605–07.

61. *See also* Post & Siegel, *supra* note 20, at 410–11 ("Americans who entered politics to oppose *Roe* were concerned primarily about the substantive law of abortion, not about questions of judicial technique or even about the proper role of courts in a democracy.").

62. *Id.* at 411 n.193 ("At the time of *Roe*, the political slogan of 'strict constructionism' was primarily coded in terms of questions of race and crime. It did not encompass the issues of gender, family, and religion that were to become salient by the decade's end.").

Not everyone in the pro-life movement was persuaded that attacking the Court was a smart way to go. Even after the movement forged an alliance with other groups on the right, some pro-life advocates expressed ambivalence about such attacks. This camp expressed hope, even into the late 1970s, that the movement could avoid "tak[ing] sides . . . [on] the question of how the judiciary may better function—with activism or restraint."[63] When a critical mass of pro-lifers began to adopt the New Right's anti-judicial-activist rhetoric, some in the movement reported having "pained feelings about . . . diminishing respect for the courts."[64] In the early 1980s, when the National Conference of Catholic Bishops reversed its stance on the states' rights amendment—now endorsing the idea that abortion should be taken away from the Court and left to the political process—Cardinal Medeiros of Boston, among others, claimed that he found the change "very painful."[65] The Cardinal fretted that he would not "be able to tell [his flock in the Archdiocese of Boston] why we've changed."[66]

The pro-life movement's embrace of the states' rights position reflected a growing belief in the value of pragmatism—an appreciation for incremental reforms that would chip away at the right to abortion without banning it absolutely. This incrementalist strategy coincided with, and was abetted by, the movement's increasing political alliance with the New Right. Joining the burgeoning political coalition on the right in these years meant working with a host of new constituents and elected officials who were, in many instances, willing to settle for less than a total ban on abortion. Pro-life absolutists were not happy with the change. But allying with the New Right granted the pro-life movement access to new sources of funding and to many more voters than it could reach when it remained predominantly Catholic and unaffiliated with a particular political party (p. 54). It also provided the movement with a powerful set of rhetorical tropes and increased solidarity with other political constituencies that embraced an anti-Court platform. As Ziegler puts it, "[i]nfluential pro-lifers gradually became convinced that they could achieve more in joining the new anti-Court coalition than they could on their own" (p. 54).

It was in this period—the late 1970s and 1980s—that the backlash narrative took hold. This narrative portrayed the vast expansion of the pro-life movement between 1970 and 1980 as the product of a spontaneous, grassroots uprising rather than New Right strategizing and new political alliances. But its purposes were not simply explanatory. Pro-life advocates used the backlash narrative to galvanize abortion opponents and build support for the cause. Jerry Falwell, for example, often claimed in the late 1970s that *Roe*

63. P. 52 (omission in original) (footnote omitted) (quoting noted pro-life law professor Robert Byrn in *Which Way for Judicial Imperialism?*, HUM. LIFE REV., Fall 1977, at 3).

64. P. 52–53 (omission in original) (quoting an activist in the Massachusetts anti-abortion movement).

65. Kenneth A. Briggs, *Bishops Debate Strategy on Abortion Battle*, N.Y. TIMES, Nov. 17, 1981, at A20.

66. *Id.*

had driven him into politics.[67] The story functioned as a call to action. It helped to rally conservatives around the idea that *Roe* had injured them and that part of that injury had been the Court's usurpation of the people's prerogative to decide matters relating to abortion. Senator Jesse Helms was responding to (and fomenting) this sentiment in 1981 when he introduced a bill that would strip lower federal courts of jurisdiction over abortion cases.[68] Chances of this bill passing were low, but that was almost beside the point. Simply proposing it fueled the meme that the courts were out of control and that it was high time for the American people to reclaim their rights. This meme put *Roe* at the center of a highly charged political debate—about abortion of course, but also about the role of the Court in American life.

It is not surprising, in light of these developments, that *Roe* began to play a central role in the judicial nomination process in these years. When the Senate held confirmation hearings for future-Justice John Paul Stevens in 1976, the topic of abortion did not even come up.[69] By contrast, when Reagan nominated Sandra Day O'Connor in 1981, there was a firestorm on the right about whether she was sufficiently conservative on abortion and what she thought about the Court's behavior in *Roe*.[70] Every nominee since 1981 has faced the same barrage of questions—about abortion, about *Roe*, and about judicial activism.[71] For the last thirty years, conservatives have focused intently on the courts, closely monitoring and organizing around the judicial nomination process to ensure the Court never again usurps the rights of the people in the way *Roe* ostensibly did.[72] Many progressives, surveying this

67. KALMAN, *supra* note 20, at 253–54 (noting that at other times Falwell "attributed his political engagement to homosexuality, the exploding divorce rate, erosion of family values, sex education in the public schools, the Supreme Court decision banning school prayer, liberal judges, or Soviet military and political successes"). "Many were the forces that this warrior said spurred him to battle," Kalman observes. *Id.* (footnote omitted); *see also* Greenhouse & Siegel, *supra* note 14, at 2062–67 (describing Falwell's lack of engagement with the issue of abortion prior to the late 1970s).

68. S. 158, 97th Cong., (1981); *see* 127 CONG. REC. S8420 (daily ed. July 24, 1981) (statement of Sen. Helms and text of proposed bill).

69. Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749, 751 (2010).

70. Linda Greenhouse, *Abortion Foes Assail Judge O'Connor*, N.Y. TIMES, Sept. 12, 1981, at A6 ("Leaders of the anti-abortion movement told the Senate Judiciary Committee today that Judge Sandra Day O'Connor should be disqualified from service on the United States Supreme Court because she had not promised to vote to overrule the 1973 Supreme Court decision that legalized abortion."); Steven R. Weisman, *Reagan Nominating Woman, an Arizona Appeals Judge, to Serve on Supreme Court*, N.Y. TIMES, July 8, 1981, at A1 (reporting that O'Connor's "record of favoring the proposed Federal equal rights amendment and having once sided against anti-abortion interests while she was a legislator provoked immediate opposition to her confirmation" among some segments of the Right).

71. Greenhouse, *supra* note 69, at 751 (noting that "the expectation is now built into the political system that the question of abortion will inevitably cast a long shadow over the nomination and confirmation process").

72. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE 313–14 (2009) (describing the beginning of this conservative scrutiny of the nomination process in the 1980s and quoting the

history, have concluded that the Left erred in seeking review of the abortion question and ought to avoid making the same mistake twice by steering clear of courts.[73] Nobody wants another *Roe*.

III. What We Should Make of *Roe*

In 2009, when David Boies and Ted Olson announced their intention to file a federal lawsuit on behalf of same-sex couples seeking marriage licenses, many in the gay rights movement feared their suit would do more harm than good.[74] A loss at the Supreme Court (the intended destination of Boies and Olson) could set back the cause for a generation; a win could saddle the movement with its very own *Roe v. Wade*. Supporters of same-sex marriage worried that Boies and Olson were pushing too far, too fast, and that if the Court imposed marriage equality on the nation, it could spark a major backlash that would impede further progress on gay rights. This concern about saddling the gay rights movement with a counterproductive, backlash-inducing legal victory was so prevalent that, on the day they argued *Hollingsworth v. Perry*[75] before the Supreme Court, Boies and Olson published an editorial in the *Wall Street Journal* insisting that their case was different from *Roe*.[76]

Chief Justice Roberts and his right-leaning colleagues were evidently not convinced. When the Court decided *Obergefell*, the Chief Justice and his fellow dissenters argued that by constitutionalizing the right to same-sex marriage, the Court had "remove[d] it from the realm of democratic decision."[77] As with *Roe*, Chief Justice Roberts claimed:

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head of Reagan's Office of Legal Policy who boasted in 1987 that the Administration had put "in place what is probably the most thorough and comprehensive system for recruiting and screening federal judicial candidates of any Administration ever" (quoting Stephen J. Markman in David M. O'Brien, *If the Bench Becomes a Brawl: Reagan's Legacy for U.S. Courts*, L.A. Times, Aug. 23, 1987, at 1)); Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 Ind. L.J. 363, 366–67 (2003) (discussing blueprints for conservative constitutional change produced by Reagan's Justice Department that have now guided Republican strategy for decades and arguing that the party has focused particularly on judicial appointments as the key means of implementing this strategy).

73. *See infra* notes 91–95 and accompanying text.

74. Adam Liptak, *In Battle on Marriage, the Timing May Be Key*, N.Y. Times, Oct. 27, 2009, at A14 (discussing objections to Boies's and Olson's suit from within the gay rights movement).

75. 133 S. Ct. 2652 (2013).

76. Theodore B. Olson & David Boies, Commentary, . . . *Gays Deserve Equal Rights*, Wall St. J., March 25, 2013, at A11 (noting that when they filed their case, "[p]eople spoke of the potential of a *Roe v. Wade* backlash, or even a culture war, if the courts ruled in favor of ending this harsh, unnecessary and demeaning form of discrimination," but arguing that "[t]his never made sense because, while *Roe* was perceived as creating a new constitutional right out of whole cloth, the Supreme Court has recognized at least 14 times that marriage is a fundamental right of all individuals").

77. Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

> [T]here will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.[78]

The majority in *Obergefell* contested most of these assertions, arguing both that the issue fell within the judicial purview[79] and that democratic processes in recent years had revealed growing support for same-sex marriage.[80] But the majority did not contest the Chief Justice's account of *Roe*. Like the plaintiffs in *Obergefell* (and their amici and Boies and Olson before them), the Court let that story stand.

The idea that *Roe* sparked a backlash that inflamed the abortion debate and fueled the rise of the New Right is one of the few things in this area about which nearly everyone, regardless of their substantive political views, agrees. The new writing on *Roe* aims to change this. None of this work claims that the Court's decision had no effect on abortion—or American—politics. The decision immediately angered many Catholics, invigorating those already involved in the pro-life movement and prompting others to join.[81] It helped to shape movement priorities. It spurred the pro-life movement, for instance, to seek a constitutional amendment protecting the right to life.[82] Ultimately, it provided a target that was useful to the organizers of the New Right, who used *Roe* to link the legalization of abortion to a constellation of related grievances with liberal courts and with liberalism in general. But the decision itself did not spark anything like the backlash we

78. *Id.*; *see also id.* at 2612 ("Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept."); *id.* at 2625 (discussing what gay rights advocates "have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause"). The reference to *Roe* is clear, if not always explicit, in such passages.

79. *Id.* at 2598 ("The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."); *id.* at 2605 ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter.").

80. *Id.* at 2596–97; United States v. Windsor, 133 S. Ct. 2675, 2689 (2013) (describing legislative change indicating that "[t]he limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, [had come] to be seen in New York and certain other States as an unjust exclusion").

81. Post & Siegel, *supra* note 20, at 412.

82. Pp. 38–44. Critics of *Roe* often blame the decision for "nationalizing" the fight over abortion, making compromise much more difficult. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in part and dissenting in part) (asserting that *Roe* "destroyed the compromises of the past [and] rendered compromise impossible for the future" by elevating the issue "to the national level where it is infinitely more difficult to resolve"). But historians have shown that conflict over abortion had already become national in scope prior to the Court's involvement. GREENHOUSE & SIEGEL, *supra* note 24, at 197–220 (collecting documents from 1972 showing the national character of the abortion controversy); *cf.* SELF, *supra* note 46, at 158 ("*Roe* and *Doe* did not fundamentally transform the abortion debate.").

customarily attribute to it. A growing body of evidence shows that the vast numbers of Republicans and conservative Protestants who would later become crucial champions of the pro-life position, swelling the ranks of the movement, were not generally moved to action by the Court's decision. *Roe*'s transformation into the highly controversial decision we know today was the product of a major national political realignment that was already in the works prior to the Court's intervention.

To say that popular outrage over *Roe* came later than we generally assume is not to imply that the anger, when it came, was not real. On the contrary, outrage over the Court's groundbreaking abortion decision was part of a much broader hostility toward the loosening of regulations regarding sex, gender, and the family. Part of the genius of the architects of the New Right was to knit these changes together and to attribute them all to the increased secularization of American society—a trend they blamed on liberals. Divorce, homosexuality, sex education in schools, children's rights, and changing sex roles: all were evidence, the New Right argued, of a fraying moral fabric. Conservative strategists, with the aid of direct mail technologies,[83] aimed to create a permanent home in the Republican Party for Americans who felt that their traditions and communities were being discounted and diminished, and that the structure of the family was being altered in ways both harmful and beyond their control. Compromise on abortion became impossible, and debate over the practice so angry and intractable, in part because by the late 1970s abortion had become, in the rhetoric and ideology of the New Right, a symbol of a much broader worldview.[84]

In 1979, when Jerry Falwell founded the Moral Majority at the instigation of New Right strategists,[85] the name they selected for the fledgling organization was intended to capture an overarching commitment to "traditional family values." The name also facilitated a key political contention of the New Right: that recent deleterious changes in American society were the work of a powerful few, an elite bent on imposing progressive values on a nation perfectly content with its old values.[86] In the late 1970s, when conservative concerns about changing sex and family roles emerged in

83. For more on the New Right's extensive use of direct mail fundraising strategies, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 212–14 (2008); *see also* CONNIE PAIGE, THE RIGHT TO LIFERS 130–53 (1983).

84. Much more than *Roe*, it was this entanglement of abortion with a slate of other social (and economic) issues that made compromise on the topic seemingly impossible by the end of the 1970s. *See* Post & Siegel, *supra* note 20, at 423 & n.230 (arguing that "it was not until the construction of abortion as a problem of secular humanism at the decade's end, and not until the infusion of antiabortion advocacy with the goals of the New Right, that abortion took on the conservative social meaning that we today take for granted," and asserting that this transformation marginalized an earlier Catholic association of "pro-life" politics with liberal conceptions of social justice shared by many supporters of abortion rights).

85. WILLIAM MARTIN, WITH GOD ON OUR SIDE 200 (1996) (describing the meeting at which New Right strategists proposed to Falwell that he create and lead a new organization of Protestant fundamentalists).

86. Justice Scalia, the Justice most closely associated with the ideals of the New Right, often wrote in this register. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2627, 2629 (2015)

full force, the New Right settled on *Roe* as the paradigmatic example of such usurpation of the people's prerogative by an unrepresentative elite. The tale they told about *Roe* cast the Justices as black-robed tyrants, seizing for themselves a question the Constitution leaves to the people. Opposed to this malevolent force, in the New Right's telling, was a freedom-loving public that had mobilized after *Roe* to restore the Constitution to its rightful owners. Just as abortion had come to be understood as more than simply the termination of a pregnancy, *Roe* had come to represent all that was wrong—in the eyes of the New Right—with the progressive turn in the Court's decision-making over the previous two decades.

By the end of the 1970s, that progressive turn was over, at the Court and in politics more generally. In recent decades, the Court has overturned or limited numerous precedents from the Warren Court and New Deal eras and has restricted the scope of multiple landmark civil rights statutes.[87] The Republican Party has shifted to the right and brought to fruition an impressive portion of the agenda outlined by New Right strategists. Abortion has not been immune to these trends. Since the mid-1970s, federal funding for the procedure has been drastically curtailed,[88] the Court has replaced *Roe*'s trimester framework with an undue-burden standard[89]—a standard that has become exceedingly difficult for those challenging abortion restrictions to meet—and, more recently, state legislatures have passed hundreds of new laws that have closed hundreds of women's health clinics.[90]

(Scalia, J., dissenting) ("Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. . . . [T]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation."); Lawrence v. Texas, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda. . . . So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream'. . . ."); United States v. Virginia, 518 U.S. 515, 567, 601 (1996) (Scalia, J., dissenting) (criticizing the Court for inscribing "the countermajoritarian preferences of the society's law-trained elite[ ] into our Basic Law," and asserting that "it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a 'more perfect Union,' . . . can impose its own favored social and economic dispositions nationwide" (quoting *Virginia*, 518 U.S. at 558 (majority opinion))).

87. For more on the conservatism of the Roberts and Rehnquist Courts, see generally Marcia Coyle, The Roberts Court (2013) and Thomas M. Keck, The Most Activist Supreme Court in History (2004).

88. *See* Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding the Hyde Amendment, which prohibits the use of federal funds for abortion except in extremely limited circumstances, and holding that even states that participate in Medicaid are not obligated to continue to fund medically necessary abortions for which federal reimbursement is unavailable).

89. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

90. Frances Robles, *With Flurry of Bills, Republican Legislatures Make Abortions Harder to Get*, N.Y. Times, May 10, 2015, at A17 (describing "a surge of bills passed by Republican-

Because *Roe* is conventionally understood as the progenitor of the New Right and the chief cause of social conservative backlash in the 1970s and beyond, some on the left have come to view it as "the gift that keeps on giving" to the Republican Party.[91] On this view, progressives are still paying for the Court's ill-advised decision to cut off democratic debate on abortion and "disenfranchise" millions of pro-life Americans.[92] Some on the left have argued that the best way to contain the ongoing backlash would be to jettison *Roe*.[93] Others have advocated the adoption of a more limited conception of judicial review[94] that would at least shield progressives from another "judicial blunder"[95] on the order of *Roe*. Whether or not such commentary is intended to provide a set of marching orders to social movements, its implications seem clear: better to pursue social change through legislatures than through courts. Scarred by the backlash they believe *Roe* sparked, left-leaning critics of the decision have developed a powerful skepticism of courts as a forum for vindicating civil rights and a strong conviction that progressives ought to pursue their political agenda primarily, or even exclusively, through other channels.

Underlying this skepticism of courts is a presumption that actions taken by judges are especially prone to producing backlash. But *Roe*—frequently cited as prime evidence—does not support this proposition. Careful histories of the late 1960s and early 1970s have shown that backlash against the

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controlled state legislatures . . . that make it harder for women to have abortions" and reporting that states have passed over two hundred such laws since 2011, "when provisions restricting abortion access began sweeping state legislatures").

91. *Should Liberals Stop Defending* Roe*?: Sanford Levinson and Jack M. Balkin Debate*, LEGAL AFF.: DEBATE CLUB (Nov. 28, 2005, 9:15 AM), http://www.legalaffairs.org/webexclusive/debateclub_ayotte1105.msp [http://perma.cc/FR32-U2FU].

92. Wittes, *supra* note 9, at 51 (discussing "the pro-life sense of disenfranchisement" that resulted from *Roe*); *see also* Eskridge, *supra* note 49, at 1312 (asserting that *Roe* left traditionalists feeling as though they had been "disowned" by their country).

93. *See, e.g.*, Katha Pollitt, *Should* Roe *Go?*, THE NATION, Aug. 1, 2005, at 13 (observing that "Democratic Party insiders quietly wonder if abandoning abortion rights would win back white Catholics and evangelicals," and that a "chorus of pundits . . . argue that *Roe*'s unforeseen consequences exact too high a price: on democracy, on public discourse, even, paradoxically, on abortion rights"); Wittes, *supra* note 9, at 48; Levinson, *supra* note 91.

94. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME 4–6, 50 (1999) (advocating that judges adopt a "minimalist" approach to judicial review in order to, among other things, forestall the social instability and decline in mutual respect caused by decisions like *Roe*); Eskridge, *supra* note 49, at 1312–13 (advocating a "pluralism-facilitating" theory of judicial review that counsels courts to avoid issuing decisions, like *Roe*, that drive groups out of politics and impede democratic deliberation). For further discussion of progressive scholars whose skepticism of courts is fueled by the belief "that adjudication may cause backlash of the kind they attribute to *Roe v. Wade*," see Post & Siegel, *supra* note 20, at 374, 390–406. Post and Siegel include in this camp Michael Klarman, whose work they read "as arguing that courts should only cautiously enforce constitutional rights because their efforts will interfere with the realization of constitutional values that might be achieved without conflict through legislation." *Id.* at 393.

95. Eskridge, *supra* note 49; *see also* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 31 (1996) (describing *Roe* as "a blunder insofar as it resolved so much so quickly").

liberalization of abortion laws predated the Court's decision and arose in response to steps taken by legislators, not judges.[96] Backlash in this context arose independently of judicial review and was no less fierce for it.[97] High-stakes party politics and the strategizing that attended the rise of the New Right bore significantly more responsibility for escalating the conflict over abortion than the Justices—both Republican- and Democrat-appointed—who joined the Court's opinion in *Roe*. Conventional accounts of this history depict the Court in *Roe* as uniquely and intensely jurispathic,[98] striking at the pro-life side so brutally that millions of Americans rose up to defend their political commitments against a Court that had overstepped its bounds. But more historically grounded accounts reveal the significant role of non-judicial actors in stoking the debate over abortion—actors whose

96. *See, e.g.*, Gene Burns, The Moral Veto 227–28 (2005) (noting that by 1973—and despite majority support for reforming abortion laws—a mobilized pro-life movement had brought the state-level reform process to a halt and observing: "Given how often claims about the need for 'judicial restraint' have *Roe* in mind, it is striking how incorrect are the empirical assertions that often form the basis of such a critique of *Roe*."); Thomas M. Keck, Judicial Politics in Polarized Times 213 (2014) (discussing evidence that "the early legislative victories of the pro-choice movement at the state level prompted an extensive pro-life backlash"); Lawrence H. Tribe, Abortion: The Clash of Absolutes 50–51 (1990) (suggesting that it was not *Roe* but an earlier string of victories by the right-to-life movement that stopped the momentum of abortion rights advocates in the early 1970s); David J. Garrow, *Abortion Before and After* Roe v. Wade*: An Historical Perspective*, 62 Alb. L. Rev. 833, 840–41 (1999) ("We could fill a very long shelf with writings that claim that it was *only* the Supreme Court's action in *Roe v. Wade* that created an intensely energized right to life movement, and that if the Court had not gone as 'far' as it did in *Roe*, then anti-abortion forces would not have mobilized in the ways that they did during the 1970s and 1980s. . . . This view is simply and utterly wrong. . . . [An upsurge in anti-abortion mobilization in the early 1970s in response to liberalization of abortion laws in New York] helped stimulate a very politically influential right to life upsurge all across the country, in state after state after state, throughout 1971 and 1972. During 1971 and 1972, pro-choice forces won *no* political victories. . . . Thus, by November 1972, when Richard Nixon was overwhelmingly re-elected to the presidency after mounting a very explicitly anti-abortion general election campaign, prospects for making any sort of non-judicial headway with abortion law liberalization looked very bleak indeed."); *cf.* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. Rev. 1235, 1240 (2010) (challenging the litigation-centered backlash thesis with respect to the campaign for same-sex marriage in California by showing that the reasons for the backlash—which culminated in a constitutional amendment—had "less to do with deficient legal strategy and judicial overreaching than with the unpredictability of events and the implacability of opposition to marriage for same-sex couples").

97. *See* James E. Fleming & Linda C. McClain, Ordered Liberty 230 (2013) ("The causes of the emergence of the right to life movement are numerous, and many of them have nothing to do with . . . how broadly or narrowly, shallowly or deeply, judicial opinions are written. . . . The right to life movement would have been born with or without *Roe* . . . . [T]he 'new right,' neoliberalism, and neoconservatism—countless varieties of 'antiliberalism' . . .—would have emerged with or without *Roe*. The 'women's movement' and gains in women's equality and reproductive freedom also would have provoked backlash with or without *Roe*.).

98. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 40–44 (1983) (describing the jurispathic function of courts, the process by which judges kill particular conceptions of right and wrong, and the worldviews such conceptions produce, by choosing one version as *the* law and destroying or trying to destroy the rest).

motives for escalating that debate were quite distinct from resentment toward the Court for its decision in *Roe*.

The progressive critique of *Roe* rests on an assumption that the right to abortion would have been better protected, and the debate over abortion less wrenching and politicized, if the Court had stayed its hand in 1973, either by not intervening in the abortion debate or by taking a more incremental approach to the issue. Had the Court refrained from intervening, critics argue, the campaign for legislative reform, which had racked up a string of important victories, could have proceeded apace at the state level. Had the Court taken a more incremental approach, at least it wouldn't have "cut off" popular debate and triggered a ferocious backlash that has bolstered the Republican Party's electoral success and chipped away at the right to abortion for decades. As historians have shown, however, progress toward abortion-law liberalization at the state level had stalled—in fact, had come to a halt—years before the Court decided *Roe*. Likewise, there is little reason to believe that an incremental approach by the Court would have prevented abortion from becoming a source of passionate and sustained political conflict at the national level. The incentives identified by Republican Party strategists in the late 1960s to make abortion a key political issue on the national stage and to use it as a lever in the great political realignment they hoped to achieve by persuading Catholic Democrats to switch their party affiliation were in no way dependent on the Court. Of course, *Roe* became a useful target after it was decided. But one reason it was so useful is that it could be incorporated seamlessly into a political strategy that had been devised years earlier.

Roe's critics contend both that the decision strangled popular debate over abortion and that it triggered a ferocious national debate on the subject.[99] It seems impossible as a theoretical matter for both of these propositions to be true; as a historical matter, neither is. National debate over abortion did not begin or end with *Roe*. *Roe* did not create that debate: it was swept up in it; it became a platform for it. Vast amounts of critical attention have been devoted to the question of how *Roe* transformed the debate over abortion. But this has diverted attention away from a question that is at least as important: How has the debate over abortion transformed *Roe*? The women's movement began to argue in the 1970s that the Court's decision had vindicated women's liberty and equality interests; the New Right cited the decision as evidence of the danger judicial activism posed to "traditional family values." *Roe* became the villain in the pro-life movement's account of its own origins. For this reason, it became a villain to many on the left as well. The *Roe* we know is a case that has been substantially shaped, even remade, by these layers of meaning.

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99. Justice Scalia's dissenting opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* provides a striking illustration of this tension. He argues, in the space of a few pages, both that Roe "fanned into life an issue that has inflamed our national politics" and that it "foreclose[ed] all democratic outlet for the deep passions this issue arouses." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 995, 1002 (1992) (Scalia, J., dissenting). For more on these seemingly contradictory strands in criticism of *Roe*, see Post & Siegel, *supra* note 20, at 398–400.

Thus, the lesson to be derived from *Roe* would seem to have less to do with the perils of judicial review and more to do with the power of narrative and the role of political parties and social movements in making constitutional meaning. The New Right in the late 1970s attributed its rise to the groundswell of anger *Roe* had ostensibly triggered among the American people. Leaders on the right claimed that *Roe* had energized opponents of abortion, driving them into the pro-life movement and the voting booth, where they registered their commitment to "traditional family values" and their rejection of judicial tyranny by electing Ronald Reagan. Over time, this narrative about *Roe* became conventional wisdom, not because it accurately described the role of *Roe* in abortion politics or the political realignment of the 1970s, but because the New Right controlled political discourse to a significant degree. They were the winners in the late 1970s and 1980s, and their narrative became the dominant one.[100]

The backlash narrative displaced other narratives that might have prevailed had subsequent events taken a different turn. A signal contribution of the new work on *Roe* is that it unsettles this narrative and prompts us to look again at history that has often been obscured in scholarly and popular discourse about the decision. In particular, the women's movement began to argue in the late 1960s that reproductive autonomy was a key aspect of women's full and equal citizenship.[101] In 1970, on the fiftieth anniversary of the Nineteenth Amendment, tens of thousands of women across the United States participated in a Women's Strike for Equality.[102] The strikers put forth three basic demands: free access to abortion and high-quality daycare, and

100. Of course, conservatives were not the only actors in this period to embrace the *Roe* backlash narrative. Some progressives too blamed *Roe* for the monumental reversal of direction at the Supreme Court and in politics more generally at the end of the 1970s. Something major had happened in American law and politics and *Roe* offered a convincing explanation, even to some who believed the case was correctly decided as a matter of constitutional principle.

101. *See, e.g.*, Betty Friedan, Address Before the First National Conference on Abortion Laws, *Abortion: A Woman's Civil Right* (Feb. 1969), *in* GREENHOUSE & SIEGEL, *supra* note 24, at 38, 38–40 (arguing that "[w]omen are denigrated in this country, because women are not deciding the conditions of their own society and their own lives," and that "[t]he right of woman to control her reproductive process must be established as a basic and valuable human civil right not to be denied or abridged by the state"); Nat'l Org. for Women, *Bill of Rights for Women in 1968* (1967), *reprinted in* FEMINIST CHRONICLES, 1953–1993 214 (Toni Carabillo et al. eds., 1993) (including these demands in a document articulating the movement's central claims); Press Release, Nat'l Org. for Women, *Task Force on the Family* (1967), *reprinted in* FEMINIST CHRONICLES, *supra* at 201, 201–02 (urging the repeal of all laws restricting women's right to abortion and arguing that "[i]f women are to participate on an equitable basis with men in the world of work and of community service, child-care facilities must become as much a part of our community facilities as parks and libraries are"); *see also* SELF, *supra* note 46, at 134–60 (discussing the centrality and prominence of abortion in women's claims to liberty and equality in the late 1960s and early 1970s).

102. For more on the strike, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1988–89 (2003).

equal opportunity in jobs and education.[103] The strikers framed these demands as constitutional.[104] They argued that ending discrimination in the workplace, making daycare available to all Americans, and decriminalizing and ensuring access to abortion were essential to women's liberty and equality.[105]

In the years after *Roe*, leaders in the women's movement linked the decision to the Court's emerging sex-discrimination jurisprudence. They explained how traditional regulation of abortion reinforced conventional sex roles in contravention of new understandings of the Fourteenth Amendment. They argued that access to abortion was essential to the autonomy and equal citizenship of women, and that *Roe* had vindicated these interests by extending constitutional protection to the right to end a pregnancy. This understanding of the right to abortion, as the linchpin of women's equal status in American society, is not the dominant understanding on the Court today. The Court recognized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[106] that the regulation of abortion implicates women's equality interests.[107] And Justice Ginsburg has argued repeatedly that abortion restrictions violate the Fourteenth Amendment when they reflect or reinforce the idea that women are mothers first and that caregiving is their natural role.[108] But Justice Ginsburg's most forceful argument to this effect appears in a dissenting opinion in a case in which the majority reasons about restrictions on abortion in quite different, even conflicting, ways.[109]

The idea that *Roe* guaranteed equal citizenship to a historically subordinated group is not foreign to popular discourse about the case, but it is muted there as well. The Court has observed that "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded."[110] Even Americans not inclined to view the history of the Constitution in this way would

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103. *Id.*

104. *Id.* at 1990.

105. *Id.* at 1991.

106. 505 U.S. 833 (1992).

107. *Casey*, 505 U.S. at 852, 887–98 (striking a spousal notification provision on the ground that it reflected a "common-law understanding of a woman's role within the family" that the Court had rejected as inconsistent with constitutional equal status guarantees).

108. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting) ("[L]egal 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."); Ginsburg, *supra* note 6, at 383 (arguing that abortion restrictions implicate "a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen").

109. *See Carhart*, 550 U.S. at 159 (asserting that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child," and suggesting that some abortion restrictions help to protect "mother[s]" from the "[s]evere depression and loss of esteem" that may follow from the decision "to abort the infant life they once created and sustained").

110. United States v. Virginia, 518 U.S. 515, 557 (1996) (footnote omitted).

have no trouble explaining how *Brown v. Board of Education* fits into it. The same is not true of *Roe*. The ongoing dominance of the New Right's narrative about *Roe* means that far fewer Americans view the decision as a guarantee of women's full inclusion in "We the People."

The image of the Court as a tyrannical body, arrogating to itself prerogatives that properly belong to the citizenry, is a powerful one. Beginning in the late 1970s, the New Right successfully deployed this image in service of a substantive constitutional vision that involved, among other things, the preservation of traditional sex and family roles. *Roe*—which lay at the intersection of the New Right's anti-Court rhetoric and its promotion of "traditional family values"—became a symbol of what happens when the Court intervenes in the enforcement of these values: a backlash of unfathomable proportions that acts as a drag on progressive change for generations.

This understanding of *Roe* hangs over scholarly and popular debate about abortion and judicial review to this day. When scholars—even progressive ones—analyze *Roe*'s place in constitutional history and think about the role of courts in protecting civil rights, they do so in the shadow of this hegemonic account. Recognizing the political origins and practical functions of the backlash narrative opens space for scholars to reevaluate the history of *Roe* and reason about the decision in ways that understand it as something other than a judicial blunder, a Pyrrhic victory, and an albatross around the Left's neck.

Coda

For much of the twentieth century, Americans' understanding of the period after the Civil War was derived primarily from the anti-Reconstruction propaganda of Southern Democrats in the decades following Reconstruction's end. This propaganda portrayed Reconstruction as a radical idea imposed on a traditionalist nation, a grave error that triggered a backlash among the white community in the South, which banded together to defend its prerogative to determine the ground rules of Southern society. This understanding of Reconstruction persisted for decades because it "presented a set of easily identifiable heroes and villains[,] . . . enjoyed the imprimatur of the nation's leading scholars[,] . . . [and] accorded with the political and social realities of the first half of this century."[111] It helped to shore up a social and political regime determined to thwart the relatively expansive conceptions of liberty and equality that had motivated government decisionmaking in the aftermath of the Civil War.

Beginning in the 1960s, new histories of Reconstruction were written. These histories recovered evidence from the period that had been obscured by the dominant narrative, particularly the testimony of the freed black people who had advocated for the overthrow of the old regime. New accounts of Reconstruction challenged the notion that it had been a terrible mistake that

111. Eric Foner, *The New View of Reconstruction*, Am. Heritage, Oct./Nov. 1983, at 10.

inflicted needless suffering on the nation. They showed that the conventional narrative of the period served a political function—that what had long seemed simple fact was in reality designed to further a specific conservative agenda. Eventually, Americans came to view Reconstruction not as "the darkest page in the American saga,"[112] but rather as a moment replete with promise—a promise of liberty and equality, as yet unfulfilled. The shift in perception was not enough, in itself, to make that promise a reality. But it was a start.

112. *Id.*