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Symposium

Democracy and the Courts: The Case of Abortion

LINDA GREENHOUSE*

The topics for this Symposium on Democracy and the Courts—judicial selection, legal literacy, and the role of public opinion—are so rich and varied that only in my dreams could I do justice to them in my allotted time, let alone get my arms around them. So in these remarks, I will seek to be illustrative rather than comprehensive.

I thought the timing of this Symposium was propitious when I first heard about it, because there seems to have been a recent explosion of both scholarly and public interest in the general topic of the relationship between the Supreme Court and public opinion. Barry Friedman’s excellent new book, The Will of the People,’ is just one example. There is undoubtedly more than one reason for the current flowering of interest in this age-old topic. One is probably the Court’s intervention in the 2000 presidential election, which shone a public spotlight on the Supreme Court even as it—surprisingly to many people—evidently did little to dent the Court’s public legitimacy.2 Another reason may be recent high-profile cases, from Lawrence v. Texas3 to the series of decisions growing out of the detentions at Guantanamo Bay,4 that have kept the Court in

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the public eye on issues of high cultural and political salience. And a third possible reason occurs to me—I will get to it in a minute.

There are two mutually exclusive paradigms that express the relationship between the Supreme Court and the public. One, reflected by Barry Friedman’s book, holds that the Court over time tends to situate itself in the mainstream of public opinion—although the precise mechanisms by which it does so are elusive and open to debate.5 This paradigm deals with the “counter-majoritarian difficulty” by disclaiming that the Court is counter-majoritarian.

The opposite paradigm is personified by the rejected Supreme Court nominee, Robert H. Bork. In “A Country I Do Not Recognize”: The Legal Assault on American Values, a collection of essays published by the Hoover Institution in 2005, Bork states that it is “obtrusively apparent” that “[t]here exists a fundamental contradiction between America’s most basic ordinance, its constitutional law, and the values by which Americans have lived and wish to continue to live.”6 Bork sees “the Supreme Court’s departures from the Constitution” as “driven by ‘elites’ against the express wishes of a majority of the public.”7 His targets include what he calls a “concocted” right to privacy and the Court’s commitment to “radical individualism in moral matters amount[ing] (almost) to nihilism.”8 Roe v. Wade,9 Planned Parenthood of Southeastern Pennsylvania v. Casey,10 and Lawrence v. Texas11 are, not surprisingly, among Judge Bork’s prime examples of Supreme Court decisions that have hijacked the culture and held it hostage to the Justices’ own vision.12 This is the counter-majoritarian difficulty on steroids.

These conflicting paradigms, Friedman’s and Bork’s, are invoked in nearly any discussion of the Supreme Court’s abortion cases, and I will return to that subject in a minute. But first, I offered a minute ago to suggest a third possible reason for the spike in interest in our topic. Assuming, arguendo, the validity of Judge Bork’s examples of divergence between the Court’s performance and the public will, all are examples that place the Court to the left of the public. But I think there is a good argument that the polarity has shifted in the past few years, and that we now have, for the first time since the years of the early New Deal, a Supreme Court that is arguably to the right of the American public. That

5. Friedman, supra note 1, at 374–76.
7. Id.
8. Id. at xiii, xxv.
12. Bork, supra note 6, passim (citing Roe, 410 U.S. 113; Planned Parenthood of Se. Pa., 505 U.S. 833; Romer v. Evans, 517 U.S. 620 (1996); Lawrence, 539 U.S. 558).
is a phenomenon that few people alive today can actually remember, and it has interesting political implications that participants in this Symposium might wish to explore, either here or in their own research.

There was some early evidence that the Roberts Court was moving to the right of the public. Recall the equal pay case of *Ledbetter v. Goodyear Tire & Rubber Co.*, a case of statutory interpretation that was promptly overturned by Congress in a bill that President Obama signed into law as one of his first official acts. Recall another case from the same term: *Parents Involved in Community Schools v. Seattle School District No. 1*, a constitutional decision that rejected efforts by two school systems—and dozens or hundreds of others—to preserve the hard-won gains of integration through the marginal use of racially conscious student assignment plans.

But it was the decision less than a month ago in *Citizens United v. FEC* that seems to have truly alarmed the public—as well as making the timing of this Symposium not only propitious but brilliant. This is not the occasion to parse the First Amendment holding of that case or to evaluate the public response to it—a response that I think is at least somewhat overblown. The fact is that there has been a huge public response. That this response is being deftly managed, or one might even say manipulated, by the Democrats, including the President, should not lead us to ignore the fact that the Court, in its seemingly boundless endorsement of constitutional rights for corporations, gave the Democrats plenty to work with. So just the other day I saw a Web ad paid for by the Democratic Senatorial Campaign Committee entitled “Citizens Before Corporations” and featuring as its visual image something that looked like a newspaper headline and that read: Court Rolls Back Decades of Reform: Dems Vow To Fight for Citizens; GOP Sides with Corporate Money. The ad asked people to sign a petition—“Join Democrats in demanding that Republicans support legislation to reduce runaway corporate spending on elections.” It warned viewers,

The Supreme Court decision of *Citizens United v. Federal Election Commission* will allow corporate special interests to spend an unlimited amount of money to influence campaigns, drowning out the

19. Id.
voices of the American people and rolling back decades of progress to ensure elections are fair. Many Republicans applauded the decision.\textsuperscript{20}

But in fact, more than half the Republicans surveyed two weeks after the decision was issued said they opposed it, while only thirty-seven percent favored it.\textsuperscript{21} The ruling seems to have alarmed not only progressives, but the “tea party” populists among Republicans, as well as Republicans who like the outcome well enough but fear that the five-to-four decision, with Republican-appointed Justices comprising the majority, will provide potent fodder for the Democrats.\textsuperscript{22} For anyone interested in the relationship between the Court and the public, it is hard to imagine a more intriguing scenario.

I’d like to use the remainder of my time to say a few words about the most maddeningly ambiguous example in modern Supreme Court history of the relationship between the Supreme Court and popular opinion—the example of \textit{Roe v. Wade}.\textsuperscript{23} \textit{Roe} serves as something of a Rorschach in which people find the messages they want to see. On the one hand, it is possible to understand \textit{Roe v. Wade} as the culmination of a steady shift in public opinion about abortion that took place over the preceding decade, outside any courtroom. Barry Friedman observes that this shift carried such indicators as the American Law Institute’s endorsement of abortion reform in 1962; the almost universal public sympathy prompted that year by the plight of Sherri Finkbine, the young mother and children’s television host who had to go to Sweden for an abortion after realizing that sleeping pill she had been taking was thalidomide; the American Medical Association’s dropping of its longstanding opposition to legal abortion in the late 1960s; and the New York Legislature’s repeal of the state’s criminal abortion statute in 1970.\textsuperscript{24}

In Harry Blackmun’s file as he was working on \textit{Roe} was a \textit{Washington Post} column by George Gallup,\textsuperscript{25} reporting on a poll in the summer of 1972 that asked respondents whether they agreed with the statement that “the decision to have an abortion should be made solely by a woman and her physician.”\textsuperscript{26}

Sixty-three percent of men agreed with that statement.
Sixty-four percent of women agreed.
Sixty-five percent of Protestants agreed.

\begin{itemize}
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Cummings, \textit{supra} note 17.
  \item \textsuperscript{22} See id.
  \item \textsuperscript{23} 410 U.S. 113 (1973).
  \item \textsuperscript{24} Friedman, \textit{supra} note 1, at 296–97.
  \item \textsuperscript{25} Linda Greenhouse, \textit{Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey} 91 (2005).
  \item \textsuperscript{26} George Gallup, \textit{Abortion Seen up to Woman, Doctor}, \textit{Wash. Post}, Aug. 25, 1972, at A2.
\end{itemize}
Fifty-six percent of Catholics agreed.
Fifty-nine percent of Democrats agreed.
And this may surprise you: Sixty-eight percent of Republicans agreed.\(^{27}\)

As did, of course, seven middle-aged to elderly Supreme Court Justices, including three of the four appointed by Richard Nixon, all of whom quite plausibly may have believed that their decision, while likely to provoke some controversy, essentially ratified the views of the public mainstream.

And on the other hand, of course, are those who claim that public opinion, however measured, was irrelevant; that \textit{Roe v. Wade} was the rogue opinion of a misguided Supreme Court; and that, through error or arrogance or both, the Court intruded where it did not belong, usurped the democratic process, and in doing so, unleashed a firestorm that has shaped our politics ever since.\(^{28}\)

For a new book, \textit{Before Roe v. Wade},\(^{29}\) my co-author, Reva Siegel of Yale Law School, and I have recently concluded an intense examination of the pre-\textit{Roe} abortion debate in the United States. I can tell you that there is a lot about this complex chapter in social, political, and legal history that remains elusive. But I want to use this occasion to address it, for two reasons. One is to redress a historical misunderstanding of \textit{Roe}’s aftermath, the widely held backlash theory that depicts the decision as having ignited a conflagration.\(^{30}\) In fact, that bed was on fire when the Court lay down on it, as I hope to demonstrate. The second reason is that the inquiry raises the deeper question of the institutional limits on the Supreme Court’s ability to gather knowledge—either about cases in particular or the world in general. If we accept the premise that the Supreme Court tends to navigate in the main channel of public opinion, we have to be concerned about the danger that the Court will occasionally run aground in a fog of faulty assumptions and incomplete information.

How do judges know what they know—or what they think they know? We only have to recall October Term 2007 and the embarrassing episode of the Court’s decision in \textit{Kennedy v. Louisiana}\(^{31}\) to see in high relief the extent to which the Supreme Court, regarding itself as bound in

\(^{27}\) \textit{Id.}
\(^{30}\) \textit{See} Planned Parenthood of Se. Pa., 505 U.S. at 995–96; Brooks, \textit{supra} note 28; Rosen, \textit{supra} note 28.
a formal sense by the record below, can easily become the victim of the partial information of which it is a passive recipient.

*Kennedy v. Louisiana* was the decision in which the Court, applying its counting-by-states capital jurisprudence, discerned a national consensus against imposing the death penalty for the rape of a child. The majority based that conclusion on the fact that only a handful of states had made child rape a capital offense and that Congress, while tinkering periodically with the federal criminal code, had not included child rape among federal crimes punishable by death.

Except that Congress had—in a 2006 amendment to the Uniform Code of Military Justice that made the rape of a child subject to the death penalty in the military. Neither the parties nor their amici had informed the Justices of this fact. The Solicitor General had not even filed a brief to assert a federal interest in the outcome of the case. It is hard to say whether the five-to-four decision might have come out the other way had the Court known of the recent federal enactment from the beginning of its consideration. After supplemental briefing, the majority simply took note of the situation and reaffirmed its opinion. But the episode reminds us to be humble in our assumptions about what the Court knows—even of readily ascertainable facts, let alone something as amorphous and malleable as public opinion.

What did the Court know, or think it knew, about abortion? Although *Roe v. Wade* is often depicted as a bolt out of the blue, a bombshell that landed on an unsuspecting and unprepared populace, it is important to recall that the decision was neither the product of a snap judgment nor one that fell outside the parameters of public expectation. The case was, after all, the subject of two high-visibility arguments. It was pending at the Supreme Court for the unusually long period of twenty-seven months, through three Terms—from October 1970, when the jurisdictional statement reached the Court, until January 22, 1973, when the decision was issued. An article in the January 2, 1973, New York Times discussed the prospect of a renewed fight over the "explosive" issue of abortion in the state legislative session about to open, and then noted that the issue might soon be taken out of the hands of the governor and the legislature, "since the Supreme Court is expected to rule definitively on abortion, perhaps within a month or two."
Anyone reading the majority opinion in *Roe v. Wade*—as few of those who expound upon it actually do—will be struck by the physician-centric framework that the Court establishes for the exercise of the right to abortion that it is declaring. “The decision vindicates the right of the physician to administer medical treatment according to his professional judgment,” the opinion states in summary, a few paragraphs from the end. 39 Many people assume that this focus reflects the background of Justice Blackmun, the opinion’s author, who had served as general counsel to the Mayo Clinic, had many friends who were doctors, and was deeply interested in medical subjects. 40

But in fact, abortion reform had first made its appearance in public conversation as a public health issue, and it did not require Harry Blackmun’s special medical connections to see it that way. In 1960, the American Public Health Association published in its *Journal* an article by Dr. Mary Calderone, who at the time was medical director of Planned Parenthood, entitled *Illegal Abortion as a Public Health Problem*. 41 The public health profession began prodding other, more conservative medical organizations to rethink their opposition to legalized abortion. It took the better part of a decade but, as I noted earlier, the American Medical Association eventually did so after years of study and debate. 42

It is worth noting that the medical and, to a lesser extent, the legal profession embraced the cause of abortion reform before the women’s movement made legal abortion a cause. The National Organization for Women (NOW) was founded in 1966 with the goal of ending discrimination against women in the workplace. 43 The “Bill of Rights” that NOW adopted in 1967 comprised eight “demands.” 44 The first was for passage of the Equal Rights Amendment. 45 The next six all dealt with aspects of access for women to full participation in the economy, through enforcement of anti-discrimination laws and policies, availability of child care, reform of maternity leave policies, and equality of access to education. 46 Only the last referred to assuring “the right of women to

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45. Id.
46. Id.
control their reproductive lives” by removing legal limitations on access to birth control and abortion.47

It was Betty Friedan’s great contribution to understand and articulate the link between those demands. Only by having control over their reproductive lives could women have the power to plan and define their lives and become full participants in the economy. In a fiery speech to the Illinois Citizens for Medical Control of Abortion in February 1969, Friedan described the right to abortion not as one element in a program of economic empowerment, but as essential to women’s “full self-determination” and “full dignity.”48 “Your cause is now mine,” Friedan declared.49 NARAL was born at that conference.50

Eighteen months later, Friedan organized the “women’s strike for equality” to mark the fiftieth anniversary of women’s suffrage, August 26, 1970.51 Her point was that the right to vote had not achieved meaningful equality. It was a day of nationwide marches and rallies that garnered considerable media attention and swelled NOW’s ranks. Marchers carried signs that called for “free 24-hour child care” and “free abortion on demand.”52

This kind of agitation and rhetoric did not go unobserved. Nor was it occurring without context. The march toward reform was taking place not only in the streets, but in legislatures and courts in the year 1970. The repeal of New York’s abortion law had just taken effect, and women were flocking to New York for safe, legal, and reasonably low-cost abortions.53 In June, a three-judge federal district court, acting on a complaint filed three months earlier, had struck down the Texas abortion law, which permitted abortion only to save a woman’s life, as unconstitutionally broad, vague, and in violation of a woman’s “fundamental” right to decide whether to have children.54 Yes, the Roe v. Wade plaintiffs actually won in district court—they appealed to the Supreme Court because the district court had issued only a declaratory judgment and failed to give injunctive relief.55

47. Id.
48. GREENHOUSE & SIEGEL, supra note 29, at 40.
49. Id. at 38.
50. Id. Founded as the National Association for Repeal of Abortion Laws, this advocacy organization is now called NARAL Pro-Choice America. See NARAL Pro-Choice America, Key Moments in NARAL Pro-Choice America’s History, http://www.prochoiceamerica.org/about-us/learn-about-us/history.html (last visited June 24, 2010).
51. GREENHOUSE & SIEGEL, supra note 29, at 41–44.
52. Id. at 44 (graphic image).
53. Id. at 150.
55. See id.
These events caused great concern within the Catholic Church, which mobilized on a variety of fronts. In New York, pressure brought by the church and its affiliated Right to Life Committee caused the legislature in 1972 to repeal the repeal, and only Governor Rockefeller's veto kept the 1970 reform from being erased. Catholic scholars, both lay and clergy, confident in their own faithful, worked hard to find a secular language in which opposition to abortion could reach and mobilize the non-Catholic community. They did this by invoking the language of international human rights, and even of the domestic struggle for civil rights, on behalf of the unborn, and they were aided by the wide circulation of photographs of the developing fetus as well as by disturbing images of fetuses dismembered by abortion.

Phyllis Schlafly, a brilliant strategist of the political right who had formed an organization to defeat the Equal Rights Amendment, was among the first to articulate what anyone who thought about the matter might have concluded: that what the abortion-rights advocates were proposing had to do with much more than reproduction, more even than the fetus and its "right to life." What was at stake was the social order itself: the role of women, the organization of families. Abortion, in other words, had migrated far from concerns about public health and population, and had taken on a social and cultural meaning that made profound social conflict inevitable.

The migration of the slogan "abortion on demand" captures this rapidly shifting resonance. Originally, it was a feminist slogan offered in opposition to the so-called therapeutic abortion reform laws that had replaced the old criminal laws. Under these new laws, a woman could theoretically obtain a legal abortion, but first she had to satisfy several doctors—three in the Georgia law that was successfully challenged in Doe v. Bolton—that she met particular criteria entitling her to terminate a pregnancy. "Abortion on demand" simply meant that women were competent to decide the matter for themselves without being judged or evaluated by doctors, and that they could seek abortion as they sought any other medical service.

But as the meaning of abortion shifted from the medical to the social and cultural, "abortion on demand" came to be used against feminists and their claims and to signify a reckless, amoral self-indulgence. This was the sense in which President Nixon used the phrase in 1971, when he repudiated a Pentagon policy that had allowed military

56. GREENHOUSE & SIEGEL, supra note 29, at 158-60.
57. Id. at 99-100.
58. Id. at 218-20.
59. Id. at 249-50.
servicewomen to have abortions in any military hospital. 61 "Abortion on demand," the President said, could not be "square[d] with my personal belief in the sanctity of human life." 62

Soon enough, abortion took on a political resonance as well. Nixon's political advisors in his 1972 reelection campaign urged him to use the abortion issue to challenge the traditional Democratic Party allegiance of urban Catholic voters. 63 The Democratic nominee, George McGovern, had expressed only equivocal support for abortion rights, but following a policy memo dubbed by its author, Patrick Buchanan, as the "assault book," the Nixon campaign succeeded in pinning three Scarlet As on the Democratic candidate, labeling him the "triple-A candidate" for amnesty (for Vietnam War draft evaders), acid (and other illegal drugs), and abortion. 64

This is a very abbreviated account of a complex and tumultuous two-and-one-half year period, from the Women's Strike for Equality in the summer of 1970 to Richard Nixon's reelection in November 1972. Recall that this period corresponds almost exactly with the period during which Roe v. Wade, filed at the Supreme Court in October 1970, was awaiting decision. By the end of that period, the reaction against abortion reform had been carefully nurtured and propelled across the political landscape. But yet the messages of reaction were not in general circulation. They were precisely targeted to where they would do the most good. They were not meant for all ears, and they may not have been reflected in polls designed to test the existence of diffuse support for abortion rights. Today, when you mention the Triple-A anti-McGovern slogan to political conservatives, you find immediate recognition. Among political liberals or those who were unengaged in politics in the early 1970s, you are likely to get a blank look. I was a voter in 1972, and I paid close attention to politics, yet I do not remember ever hearing the slogan.

By the 1972 election, in any event, the Court's decision in Roe was a fait accompli. Essentially, all that remained was for the members of the majority formally to join Justice Blackmun's opinion and for them to add whatever else they wished to say in concurring opinions. Chief Justice Warren E. Burger, who would soon enough prove to be the weakest link in the Court's abortion-rights majority, was perhaps, through his sympathies with the Nixon administration, the most in touch with how the discourse had shifted during Roe's prolonged sojourn at the Court. "Plainly, the Court today rejects any claim that the Constitution requires

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61. GREENHOUSE & SIEGEL, supra note 29, at 198.
62. Id.
63. Id. at 215–18.
64. Id. at 215–16, 267.
abortions on demand,” he wrote in the closing line of a three-paragraph concurring opinion.65

Outside the Court’s quiet precincts, a conflagration was raging. The decision acted as an accelerant, certainly, but the Supreme Court did not ignite the blaze. *Roe v. Wade* entered the Court from one world and emerged twenty-seven months later into another. We understand that world today through the lens of *Roe*, but it is a distorting lens. Our story offers, I think, a cautionary tale for those who seek to understand the relationship between the Supreme Court and public opinion. It is an understanding worth seeking, but not always easy to find.

Polls that are adequate to measure diffuse support can fail to measure the passionate mobilization by a minority. The National Opinion Research Center has been polling on abortion at least since the mid-1960s. In 1972, on the eve of *Roe*, it asked whether abortion should be legal for a variety of reasons, including whether the “[f]amily has very low income and cannot afford any more children,” the “[w]oman is married and does not want more children,” and the “[w]oman is not married and does not want to marry the man.”66 Responses across the ensuing decades have been quite stable. For example:

- Family can’t afford more children as a reason for abortion:67
  1972: Yes, 46%.
  2008: Yes, 41%.

- Married woman doesn’t want more children:68
  1972: Yes, 38%.
  2008: Yes, 43%.

- Unmarried woman doesn’t want to marry the man:69
  1972: Yes, 41%.
  2008: Yes, 39%.

The National Opinion Research Center did not begin until 1977 to ask whether abortion should be legal if the woman wants one “for any reason” (what we might call “abortion on demand”).70

1977: Yes, 37%.
2008: Yes, 40%.

Someone landing from Mars and being presented with these figures would find it hard to imagine that the thirty-seven years since *Roe* have seen electoral and judicial politics revolving around the question of

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65. 410 U.S. at 208.
67. Id. at 11.
68. Id.
69. Id. at 12.
70. Id.
abortion, with the Supreme Court continually pressed to cut back on the right that it declared and—under the leadership of Justices chosen in no small part because of their known or assumed opposition to abortion—perhaps more likely to do so now than at any time in the past. The last Justice who joined the Supreme Court without abortion playing a role in the nomination or confirmation process was John Paul Stevens. Named to the Court in December 1975, almost three years post-\textit{Roe}, he was not asked a single question about abortion at his confirmation hearing.\footnote{GREENHOUSE & SIEGEL, \textit{supra} note 29, at 258; see also Linda Greenhouse, \textit{Justice John Paul Stevens as Abortion-Rights Strategist}, 43 \textit{U.C. Davis L. Rev.} 749, 751 (2010).} During those three years, the issue had not yet become the driving force in our politics that it would be five years later, when the Republican Party platform pledged to support only those judicial nominees who opposed a right to abortion.\footnote{Republican Party Platform of 1980, http://www.presidency.ucsb.edu/ws/index.php?pid=25844.} What has the court been doing for all these years—ratifying public opinion or defying it? Barry Friedman asks us to “[i]magine the Court as tethered to public opinion by a bungee cord,”\footnote{FRIEDMAN, \textit{supra} note 1, at 373.} with a certain freedom of movement but with the ever-present prospect of being ultimately “snapped back into line.”\footnote{Id.} Does that image of free movement within dynamic boundaries hold when individuals are chosen for the Court and arrive at the Court in full awareness that they may someday be called upon to reaffirm or to repudiate \textit{Roe v. Wade}—or whatever \textit{Roe v. Wade} has become since that January day in 1973—and that their place in history may depend on which side they choose? Does abortion present a special case, or a case in point?