Public Opinion & the Supreme Court: The Puzzling Case of Abortion

Linda Greenhouse

Abstract: The relationship between the Supreme Court and public opinion remains ambiguous, despite efforts over many years by scholars both of the Court and of mass behavior to decipher it. Certainly Supreme Court Justices live in the world, and are propelled by the political system to their life-tenured positions. And certainly the Court, over time, appears to align itself with the broadly defined public mood. But the mechanism by which this occurs – the process by which the Court and the public engage one another in a highly attenuated dialogue – remains obscure. The Court's 1973 abortion decision, Roe v. Wade, offers a case in point. As the country began to reconsider the wisdom of the nineteenth-century criminalization of abortion, which voices did the Justices hear and to which did they respond? Probing beneath the surface of the public response to Roe serves to highlight rather than solve the puzzle.

LINDA GREENHOUSE, a Fellow of the American Academy since 1994 and a member of the Academy's Council, is the Joseph Goldstein Lecturer in Law at Yale Law School. For thirty years, she covered the U.S. Supreme Court for *The New York Times*; she received the Pulitzer Prize in Journalism in 1998. Her publications include *The U.S. Supreme Court: A Very Short Introduction* (2012), *Before* Roe v. Wade*: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling* (edited with Reva B. Siegel, 2010), and *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (2005).

Students of judicial behavior strive to understand how public opinion reaches and influences the Supreme Court, while scholars of mass behavior study how Supreme Court decisions shape public perceptions of the Court and the issues it addresses. These overlapping inquiries reflect the constant dialogue between the Court and the public. It is an imperfect and sometimes inaudible dialogue, to be sure: one side seemingly remote and theoretically insulated from external influence, the other only episodically attentive and often woefully uninformed. It is a highly attenuated dialogue, filtered through, and at times distorted by, the intervening structures of the media, electoral politics, and the legal system itself.[1] It is dynamic, not static, fluctuating over time and across substantive areas of the Court's and the public's concern.

Clearly, "public opinion and the Supreme Court" is a big subject, the topic of a steady flow of books and articles, most of which acknowledge the ambiguity at the heart of the relationship. In this essay, I offer as a case study the Court's decision in 1973 to constitutionalize a woman's right to abortion. My

focus is not the doctrinal basis of that decision, *Roe v. Wade*,[2] but rather the puzzle of what preceded it and what followed from it. How did the majority in *Roe* – seven middle-aged to elderly men, including three of President Richard M. Nixon's four appointees to the Court – understand the abortion issue in 1973? How did a ruling that did not at first appear particularly polarizing come to symbolize conflict not only over abortion but over the role of the Supreme Court itself? And what does the Court's encounter with abortion, and the public's response to *Roe v. Wade*, tell us about the broader subject of the Supreme Court and public opinion?

Roe v. Wade ended the century-old regime of criminalized abortion, invalidating the laws in all but the handful of states where reform had recently been achieved through legislative action or state-court decision.[3] *Roe* is thus often depicted as having exploded like a bombshell on an unprepared and unaccepting public. Further, given the fact that the abortion issue continues to fester and to influence our domestic politics down to the present day, *Roe* is also often blamed for having caused a "backlash" that, in this account, should serve as a warning to those who would seek judicial resolution of social problems. Indeed, the case has come to many to symbolize the peril of adjudication itself.[4] Consider, for example, a colloquy that took place in a federal courtroom in San Francisco in June 2010, at the end of the federal district court trial in the California same-sex marriage case. Theodore Olson, the lawyer representing same-sex couples seeking the right to marry, had just risen to begin his closing argument when the presiding judge, Vaughn Walker, asked him this question:

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

Mr. Olson responded: "I think the case that you're referring to has to do with abortion." "It does, indeed," said Judge Walker.[5]

In what follows, I take issue with the conventional accounts both of the context in which *Roe v. Wade* entered the world and of the decision's aftermath. But first, some necessary background on our broader subject: how the Supreme Court and the public observe and understand one another.

* * *

> The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.
>
> –Benjamin N. Cardozo[6]

Fifteen years into his Supreme Court tenure and just months before becoming Chief Justice, William H. Rehnquist, reflecting Cardozo's well-known observation, commented that it would be "remarkable indeed" if judges were not influenced by the "currents and tides of public opinion which lap at the courthouse door."[7] Judges may be isolated in their courthouses, he said, but "these same judges go home at night and read the newspapers

or watch the evening news on television; they talk to their family and friends about current events."[8]

One dramatic example was to occur late in Chief Justice Rehnquist's tenure. On April 28, 2004, the Court heard oral argument in two cases challenging the Bush administration's approach to detaining "enemy combatants" in the wake of the September 11, 2001, attacks.[9] Justice Ruth Bader Ginsburg pressed Deputy Solicitor General Paul Clement, arguing for the administration, to acknowledge some limit to the claim of inherent executive authority that he had put forward in his brief. Without some limit, Justice Ginsburg wanted to know, what would stop the president from invoking executive authority to authorize torture? "Well, our executive doesn't," Mr. Clement replied.[10]

Hours later, the CBS News program *60 Minutes* broke the story of the atrocities committed by Americans against inmates of the Abu Ghraib prison in Baghdad. Perhaps some members of the Court were watching. Undoubtedly, with the rest of the country, all learned of the revelations soon enough. Did the major public scandal that unfolded during the weeks between the April arguments and the Court's June opinions influence the majority's rejection of the administration's essential claim – a claim of unilateral power with which judges should not interfere?[11] An intriguing question, unanswerable with any certitude. "Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)" was the title of a 2010 law review article by Lee Epstein (the editor of this issue) and Andrew D. Martin.[12] To their title, the coauthors might have added "or How."

One recently published historical overview, legal scholar Barry Friedman's *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*,[13] conveys the author's premise in its very title and subtitle. The message is that yes, public opinion matters, and that only the mechanics of its influence remains to be unpacked and explained. Other scholars, responding to Professor Friedman's work, question the identity of the relevant "public" whose opinion reaches the Court. Lawrence Baum and Neal Devins, in their article "Why the Supreme Court Cares About Elites, Not the American People,"[14] note that Chief Justice Rehnquist, in his 1986 lecture cited above, specifically referred to "family and friends," rather than to "the public at large."[15]

While "we think that the Court is not immune from changing social norms and that the Justices' opinions will eventually reflect changing social conditions," Professors Baum and Devins write, "[a]t the same time, we do not think that public opinion has a significant direct effect on Court decision making."[16] Few people know much about the Court or its work, they point out, and most Supreme Court decisions pass under the radar of public attention. But Supreme Court Justices, like other people, "want most to be liked and respected by people to whom they are personally close and people with whom they identify. For the Justices, those people are overwhelmingly part of elite groups" – including the legal profession itself.[17]

More than a half-century earlier, in his classic article on the Supreme Court as a "national policy-maker," Robert A. Dahl described the Court as "an essential part of the political leadership." He said, "The main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition" – by which he meant "not simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy."[18] Professor Dahl explained further that the Court can succeed at this

task "only if its action conforms to and reinforces a widespread set of explicit or implicit norms held by the political leadership."[19]

Political scientist Thomas R. Marshall examined Supreme Court decisions over a fifty-year period on issues for which available opinion polling indicated the public's preferred outcome. He found 146 "matches," concluding that "[w]here clear poll margins exist, three-fifths to two-thirds of Court rulings reflect the polls."[20] Professor Marshall's analysis does not suggest simple cause and effect: "No single theory could adequately explain the linkage process."[21] He ascribes considerable significance to the "federal policy process" itself, noting that when the Court defers to congressional action, as it most often does, it is in effect deferring to public opinion.[22]

Common to these and many other studies is the assumption that most Justices, most of the time, do care about maintaining at least a rough alignment with the public mood. Perhaps they care – or perhaps we should hope that they care – only subconsciously; as the legal scholar Paul Freund once said, "[J]udges . . . should not be influenced by the weather of the day, but they are necessarily influenced by the climate of the age."[23] As Lee Epstein and Andrew Martin put it in their article quoted above, "When the 'mood of the public' is liberal (conservative), the Court is significantly more likely to issue liberal (conservative) decisions. But why is anyone's guess."[24]

A possible reason, as Robert Dahl suggested, is that periodic appointments to the Court will almost always reflect the preferences of the ruling regime. Or perhaps, as Lee Epstein and her coauthors proposed in an earlier article, Justices make strategic choices aimed at maximizing the Court's own effectiveness within a system of separated powers:

> We argue that, given the institutional constraints imposed on the Court, the Justices cannot effectuate their own policy and institutional goals without taking account of the goals and likely actions of the members of the other branches. When they are attentive to external actors, Justices find that the best way to have a long-term effect on the nature and content of the law is to adapt their decisions to the preferences of these others.[25]

Tocqueville, as is so often the case, may have put it best: "The power of the Supreme Court Justices is immense, but it is power springing from opinion. They are all-powerful so long as the people consent to obey the law; they can do nothing when they scorn it."[26]

The Gallup Poll made headlines in Fall 2011 when its annual governance poll showed that the percentage of Americans who approved of the Supreme Court had dropped over the preceding two years, from 61 percent to 46 percent.[27] The Court had begun the millennium with an approval rating of 62 percent, dropping into the 40s just once during the ensuing decade, in 2005. The Gallup report did not endeavor to explain the poll result, noting only that the drop "could be a result of the broader decline in Americans' trust in government in general, rather than a response to anything the Court has done recently." Gallup also observed that "Americans still have significantly more trust in the judicial branch than in either the executive or the legislative branch." A separate poll measuring public support for Congress at the end of 2011 showed an approval rating of 11 percent, the lowest since Gallup began polling on public attitudes toward Congress more than thirty years ago.[28]

It is difficult to know how to interpret the Gallup result. Historically, public

support for the Supreme Court has been both high and "remarkably constant."[29] One political science article from 1997 concluded that "an active and even controversial Court can enjoy strong, stable aggregate support."[30] The authors of course could not foresee the Court's controversial intervention in the 2000 presidential election. But even *Bush v. Gore*[31] did almost nothing to dent the Court's high approval rating, either in the immediate aftermath of the decision or in the longer term. "[T]he net effect on the public's evaluation is essentially nil," one researcher concluded a half-year after the ruling.[32] A Gallup poll in June 2001 that asked the question, "Do you approve or disapprove of the way the Supreme Court is handling its job?" found no overall change from the 62 percent approval rate of the previous summer – that is, from before the election. While the results by party affiliation showed that Democrats' approval had declined (although still a majority) while Republicans' had risen, more Democrats said they had a "great deal or quite a lot" of confidence in the Court in June 2001 than had expressed the same level of confidence a year earlier (46 percent compared with 44 percent).[33]

Despite the recent dip in public support, unexplained and perhaps evanescent, the question remains: on what basis does the public support the Supreme Court *at all*? One answer might be that the Court, as discussed earlier, remains attuned over time to the prevailing public mood. Yet this cannot be a complete answer. Many of the Court's most important rulings, from *Brown v. Board of Education*[34] to the Guantánamo decisions,[35] if not demonstrably counter-majoritarian, have plunged the Justices into deeply and emotionally contested territory. Al Gore received more than a half-million more votes nationwide than George W. Bush – including, possibly, more votes in Florida, depending on the recount methodology – yet people generally accepted the result of the Court's intervention.

There is, of course, a difference between diffuse support – general loyalty to the institution and its role – and specific support for a particular set of outcomes. According to James L. Gibson and Gregory A. Caldeira, "[S]upport for the Court has little if anything to do with ideology and partisanship," and instead is "grounded in broader commitments to democratic institutions and processes, and more generally in knowledge of the role of the judiciary in the American democratic system."[36] Diffuse support, in turn, translates into a "positivity bias" under which "the effect of popular and unpopular decisions is asymmetrical."[37] Because people generally support the Court, regarding it as a special institution and not simply another political actor, they tend over time to fit even those decisions they oppose into the overall legitimizing frame. Exposure even to unwelcome decisions "necessarily means exposure to the legitimizing symbols of judicial power."[38]

In one creative study of the "legitimation hypothesis," political scientist Jeffery J. Mondak presented people with one of two versions of a controversial decision, one version said to have been made by the Supreme Court and the other by a school board or other agency of local government. For example, people were given the facts of a 1988 Supreme Court decision, *Hazelwood School District v. Kuhlmeier*,[39] which authorized public school principals to censor the content of the student newspaper. In one version, the outcome was accurately presented as the result of a Supreme Court decision, while in the other, the decision-maker was said to have been the local school board. People in each group were asked whether they agreed with the decision and whether they felt it was "a good or a bad development for public

education." As hypothesized, attributing the result of this and other cases to the Supreme Court conferred more "policy legitimacy" on the outcomes, particularly when the issue was one to which the respondents had not yet been exposed and so did not yet have a fixed view. "Legitimation likely operates on the margins of public opinion," the author concluded, adding: "But incremental does not mean insignificant; the Supreme Court retains a meaningful capacity for legitimation even if that process is confined to the margins of public opinion."[40]

Observing recent Supreme Court confirmation hearings, one might assume that a powerful source of public support for the Court is the belief that judging is basically a mechanical exercise in which judges simply connect the dots. "In each case I have heard, I have applied the law to the facts at hand," Judge Sonia Sotomayor told the Senate Judiciary Committee in her opening statement on July 13, 2009.[41] More colorfully, Judge John G. Roberts, Jr., declared in his opening statement at his confirmation hearing in 2005: "Judges are like umpires. Umpires don't make the rules, they apply them."[42] Senators cheered – indeed, appeared to insist upon – these value-free formulations, endorsing what political scientists have called "the myth of legality."[43]

Not only is this a mythic description of the judicial function, but it does not appear to be a description in which the public actually believes. On the basis of a recent survey, James Gibson and Gregory Caldeira conclude that "most Americans reject the mechanical jurisprudence model: Most believe that judges have discretion and that judges make discretionary decisions on the basis of ideology and values, even if not strictly speaking on partisanship."[44] While Americans are thus legal realists, the authors observe, institutional support for the Supreme Court remains robust nevertheless. Their explanation is that the public is culturally primed to see the exercise of discretion by Supreme Court Justices as "principled discretion," and "[i]t appears that this conception of principled but discretionary judicial policymaking renders realistic views compatible with judicial legitimacy."[45] On this reading, the public is a good deal more sophisticated than its political leaders give it credit for.

To consider *Roe v. Wade* is to confront head-on the many contradictions and ambiguities of our general subject. How did the Justices understand the debate over abortion's legalization and what were the sources of their knowledge? It seems clear that the Justices viewed the issue through the eyes of the elite class in which they moved. The abortion reform movement was driven by the elites: first by the public health profession, which as early as the 1950s called attention to back-alley abortions as a serious public health problem[46]; followed shortly by the American Law Institute, which proposed reform as part of its 1962 Model Penal Code[47]; and eventually by the American Medical Association, which in a resolution adopted by its House of Delegates in June 1970 authorized its members to perform abortions consistent with the "standards of sound clinical judgment" and in the "best interests" of their patients.[48] Four months later, the appeal in *Roe v. Wade* arrived at the Supreme Court.

Although many people today assume that the abortion reform movement was fueled by the women's movement, feminists actually came late to the abortion issue. Equality of economic opportunity was the goal that united feminist activists in the late 1960s and early 1970s, with claims to reproductive freedom only gradually moving up on their list of priorities as Betty Friedan and other leaders made

the connection between women's ability to participate fully in the workforce and to control their reproductive lives. The National Organization for Women's "bill of rights," published in 1967, listed access to contraception and abortion as number ten of its ten "demands." Women who did not view abortion as part of the feminist agenda split from the organization at that point and formed the Women's Equity Action League, focusing on educational and workplace equality.[49]

Women's groups did adopt the abortion-rights cause in a major way in the early 1970s – by which time *Roe v. Wade* was already on the Court's docket. It is plausible to suppose that the publicly feminist cast the abortion issue acquired while the case was under consideration largely escaped the Justices' notice. In any event, women and their now-familiar claims to dignity, autonomy, and equality in matters of reproductive freedom are almost completely absent from the opinion itself.[50] Consider one of the concluding paragraphs of Justice Harry A. Blackmun's majority opinion:

> The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.[51]

Roe remained on the Court's docket for an unusually long time. Typically, the Court disposes of a case within a year or so; a petition that arrives over the summer and that is granted within a few months after the start of the new term in October will be argued after the first of the new year and decided by the end of June. *Roe* was different. After the appeal from a federal district court in Texas arrived in October 1970, the Justices put the case aside while they proceeded to decide two other cases with possible implications for *Roe*.[52] Not until April 1971 did the Court add *Roe* to its calendar for argument and decision.

By the time the case was scheduled for argument, in December 1971, Justices Hugo L. Black and John Marshall Harlan had unexpectedly retired, and the Court was down to only seven members. In cases they deemed sufficiently important to be heard by a full nine-member Court, the remaining Justices deferred the scheduled arguments until the vacancies could be filled. They did not see *Roe* as such a case ("How wrong we were," Justice Blackmun later reflected[53]), and the seven Justices heard argument on December 13, 1971. The following month, the two new Justices, Lewis F. Powell, Jr., and William H. Rehnquist, took their seats, and the Court decided in June 1972 that *Roe* should be reargued. The second argument took place on October 11, 1972, and the Court issued the decision on January 22, 1973.

Roe's unusual trajectory through the Court is significant because it was during those crucial twenty-seven months that the cultural and political resonance of the abortion issue began to shift. Women marching under banners that called for "free abortion on demand" conveyed a message very different from articles in medical journals calling for abortion restrictions to be relaxed for the sake of public health. There were many such articles in Justice Blackmun's files.[54]

At the same time, the Catholic Church was mobilizing energetically against the tides of reform. The New York legislature, which had repealed the state's nineteenth-century criminal abortion statute in 1970, repealed the repeal in 1972 under intense pressure from the church on Catholic legislators. Only Governor Nelson A. Rock-

efeller's veto kept New York from recriminalizing abortion.[55] President Nixon, running for reelection, was being urged by his advisors to take a strong stand against abortion as a way of drawing Catholic voters away from their traditional home in the Democratic Party.[56] Following that advice, the president in May 1972 had sent a public letter to New York's Cardinal Cooke expressing his support for the Cardinal's campaign to reinstate the abortion prohibition.[57]

Also that spring, President Nixon rejected the proposal by the Rockefeller Commission on Population and the American Future, a blue-ribbon group he himself had established more than two years earlier, that restrictions on access to contraception and abortion be lifted as a matter of federal policy.[58] That a presidential commission composed of civic, business, and political leaders from throughout the country could make such a recommendation could only have served to reinforce the Justices in their belief that there was broad public support for decriminalizing abortion.

Indeed, a Gallup poll in Summer 1972 made the point powerfully, showing broad agreement across all demographic groups with the statement: "The decision to have an abortion should be made solely by a woman and her physician." Sixty-three percent of all men and 64 percent of women agreed with the statement. So did 65 percent of Protestants and 56 percent of Catholics. Surprisingly from today's perspective, and significantly for understanding what was to come, more Republicans than Democrats agreed: 68 percent to 59 percent. In his *Roe v. Wade* working file, Justice Blackmun had a copy of George Gallup's syndicated column describing the poll results.[59]

It is not surprising that this poll, with the broad question it posed, did not reflect the growing conflict over abortion. A more nuanced poll on abortion attitudes, conducted by the National Opinion Research Center of the University of Chicago (NORC) beginning in 1965 as part of its General Social Survey, was more revealing. This poll asked whether a woman should be able to obtain a legal abortion under any of six circumstances. Three of the circumstances, often described as "hard" reasons for abortion, were health endangerment, rape, and "a strong chance of a serious defect in the baby." The other three, the "soft" circumstances, were income too low to afford another child; an unmarried woman who did not wish to marry the father; and a married woman who did not want more children. In the 1972 NORC survey, support for an abortion right for the "hard" reasons ranged between 79 percent (for rape and fetal defect) to 87 percent (pregnant woman's health). But fewer than half the respondents (40 to 49 percent) supported legalized abortion for any of the three "soft" reasons. Diffuse support for ending the regime of criminalized abortion was clearly much greater than specific support when respondents were asked to envision particular reasons for terminating a pregnancy.[60]

In any event, the messages of the increasingly energized opposition were strategically targeted and, at that time, almost entirely Catholic. For example, on a Sunday in late Summer 1970, Republican election registrars set up tables in front of more than a dozen Catholic churches in Southern California with the purpose of encouraging Sunday Mass worshipers to change their registration from Democrat to Republican. From the pulpit, priests urged their parishioners to take advantage of the opportunity, in protest against an abortion-rights plank in the state Democratic Party platform. The Republican State Committee had reached out to the priests to enlist their cooperation. The in-

cident was reported critically in the progressive Catholic magazine *Commonweal*.[61]

Still, the right-to-life position had not yet become part of the fabric of public Catholic identity by the time of the Gallup poll, so respondents could both identify themselves as Catholic and also express agreement with the poll's broad statement of support for abortion. That the one Catholic on the Supreme Court, William J. Brennan, Jr., also favored legalizing abortion made it all the more unlikely that the other Justices would perceive what was happening outside their quiet precinct. They had little way of realizing that *Roe v. Wade*, having arrived at the Court from one world, would emerge into another.

Clearly, conflict over abortion was growing before the Supreme Court ruled. In no sense did the Court "start it." At most, *Roe* served as accelerant on a smoldering fire. But did it even serve that purpose? Not right away and not directly. Turning *Roe v. Wade* the decision into *Roe v. Wade* the symbol took concerted effort by those whose interests the transformation served. The polarization and party realignment that eventually – but only eventually – occurred define the abortion landscape that we know today.

Newspaper commentary the morning after the decision was highly favorable, including in media markets far from centers of liberal sentiment. *The Atlanta Constitution*'s editorial called the decision "realistic and appropriate," despite the fact that in *Doe v. Bolton*,[62] the companion decision to *Roe*, issued the same day, the Court had invalidated Georgia's abortion law, which was based on the American Law Institute model. Although *Roe* struck down a Texas law, newspapers in Texas praised the opinion, with the *Houston Chronicle* calling it "sound" and the *San Angelo Standard-Times* calling it "wise and humane." The *San Antonio Light* commented: "The ruling is not perfect, but it was as close to it as humanly possible."[63] Overall support for abortion rose slightly in the aftermath of *Roe*, as reflected in the NORC poll results from 1972 to 1973[64] – evidence, perhaps, of the "legitimation hypothesis" discussed earlier.[65] (Although one frequently cited article, based on a more granular study of the poll data, concluded that while net support changed little, even rising slightly, there was evidence that attitudes toward the legitimacy of abortion for the NORC "discretionary" reasons had diverged and "changed in the direction of greater group differences and conflict," evidence of early polarization.[66])

The Catholic hierarchy, of course, reacted with outrage, and varieties of a "human life amendment" were introduced in Congress. But the church was essentially alone. The Evangelical Protestant churches, which today are at the forefront of anti-abortion activism, had not yet expressed the categorical opposition to abortion that they would come to embrace. As the abortion issue became increasingly visible in the late 1960s and early 1970s, many religious denominations felt obliged to formulate a position. In June 1971, the Southern Baptist Convention adopted a resolution calling for "legislation that will allow the possibility of abortion under such conditions as rape, incest, clear evidence of severe fetal deformity, and carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother."[67] The same year, the National Association of Evangelicals likewise announced that "we recognize the necessity for therapeutic abortions" for reasons of health and possibly for other reasons as well.[68]

Evangelicals regarded abortion as a Catholic issue, and it was some years before they adopted the issue as their own. The Reverend Jerry Falwell, a prominent

Evangelical, did not preach against abortion until five or six years after *Roe*, when Republican Party strategists approached him and urged his help in creating the "pro-family" coalition that became the Moral Majority.[69]

Into the mid-1970s, the abortion issue remained quiescent as a target of political mobilization. In December 1975, President Gerald Ford (whose wife, Betty, spoke openly in favor of abortion rights) named Judge John Paul Stevens to succeed Justice William O. Douglas on the Supreme Court. Justice Douglas's retirement created the first vacancy on the Court since *Roe* was decided. Yet at his Senate confirmation hearing, nearly three years after *Roe*, Judge Stevens, whose views on the issue were unknown, did not receive a single question about abortion before being confirmed by a vote of 98-0.[70] In October 2011, I had occasion to ask Justice Stevens whether the absence of abortion questions had surprised him. Not at all, he replied, because the Supreme Court had ruled, and abortion was not an open issue.

As late as 1980, the Republican national platform offered only mild criticism of the Court and *Roe*, declaring that "we recognize differing views on this question among Americans in general – and in our own party."[71] Reflecting the fact that many Republicans supported legalized abortion, as revealed by Gallup in the 1972 poll, the party still remained, to at least some degree, a "big tent" on the issue. But by 1984, its platform declared: "The unborn child has a fundamental individual right to life which cannot be infringed."[72] Those who thought otherwise were no longer welcome.

While the mechanics of party realignment are beyond the scope of this article, it is highly unlikely, given the evidence from the early years after the decision, that *Roe* alone could have been the engine. Rather, several brilliant political strategists of the New Right, including Richard Viguerie, Paul Weyrich, and Phyllis Schlafly – all Catholic – saw the opportunity to bring Catholics and Evangelicals together under a "pro-family" banner that included opposition not only to abortion, but also to the proposed equal rights amendment, which had been approved by Congress and sent to the states for ratification.

Evangelicals also were highly energized by the controversy over whether religious schools and colleges that discriminated on the basis of race should be entitled to tax-exempt status. The Carter administration's decision to withdraw tax exemption infuriated the Evangelical community, all the more so when the Supreme Court upheld the policy in the *Bob Jones* case, even after the Reagan administration had repudiated it.[73] While this episode has largely faded from public memory, it has been the subject of recent scholarship and is now generally understood as having "marked a key moment in the formation of modern evangelical politics."[74]

We need not decide whether to give *Roe*, or the equal rights amendment (or the transformation in the role of women, which of course continued despite the defeat of the proposed amendment[75]), or the *Bob Jones* controversy pride of place in bringing about the party realignment that produced the recent spectacle of a half dozen Republican presidential hopefuls vying to prove the fervor of their opposition to abortion.[76] But certainly those who attribute our ongoing culture wars to a single Supreme Court decision, now entering its fifth decade, must explain away numerous crosscurrents, contingencies, and ambiguities – the many pieces of the puzzle that is the Supreme Court and public opinion.

ENDNOTES

[1] See, for example, Dan M. Kahan, "Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law," *Harvard Law Review* 125 (2011): 29. Kahan notes "the role that mediating institutions play in bridging the work of the Court and public consciousness of it."

[2] *Roe v. Wade*, 410 U.S. 113 (1973).

[3] Those states were New York, California, Washington, and Alaska. While other states had liberalized their laws to a lesser degree (not sufficiently to meet the test of *Roe v. Wade* or its companion case, *Doe v. Bolton*), thirty states retained their nineteenth-century laws, under which abortion was a crime except when necessary to save a pregnant woman's life.

[4] Examples of these critiques of *Roe* in popular as well as academic literature are legion: for example, Jeffrey Rosen's reference to the Court's "aggressive unilateralism" in his book *The Most Democratic Branch: How the Courts Serve America* (New York: Oxford University Press, 2006), 93; Benjamin Wittes's assertion that "[o]ne effect of *Roe* was to mobilize a permanent constituency for criminalizing abortion – a constituency that has driven much of the southern realignment toward conservatism," in "Letting Go of *Roe*," *The Atlantic*, January/February 2005, 48, 51; and Cass Sunstein's charge that "the decision 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," in "Three Civil Rights Fallacies," *California Law Review* 79 (1991): 766. See generally Linda Greenhouse and Reva B. Siegel, "Before (and After) *Roe v. Wade*: New Questions About Backlash," *Yale Law Journal* 120 (2011): 2028.

[5] Transcript of Record, *Perry v. Schwarzenegger*, No. C 09-2292-VRW (N.D. Cal. June 16, 2010), 3095. Of course, Judge Walker went on to rule that Proposition 8, which barred same-sex marriage, was unconstitutional; see *Perry v. Schwarzenegger*, 701 F. Supp. 2d 921 (N.D. Cal. 2010).

[6] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921), 168.

[7] William H. Rehnquist, "Constitutional Law and Public Opinion," *Suffolk University Law Review* 20 (1986): 768 – 769. Then-Associate Justice Rehnquist delivered his lecture at Suffolk University Law School on April 10, 1986.

[8] Ibid., 768. Indeed, Chief Justice Rehnquist went on to lead a Court that was unusually attentive to public opinion. Political scientist Thomas R. Marshall notes that 123 opinions of the Rehnquist Court (majority, concurring, and dissenting opinions as well as *per curiam* decisions) referred directly to public opinion, more than in any previous Court. Thomas R. Marshall, *Public Opinion and the Rehnquist Court* (Albany: State University of New York Press, 2008), 4, 21.

[9] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Padilla v. Rumsfeld*, 542 U.S. 426 (2004). Paul Clement argued for the government in both cases. The quoted exchange is from the argument in *Padilla*.

[10] For an account of this colloquy in the context of the detainee cases, see Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon & Schuster, 2006), 152.

[11] The *Padilla* case was decided on procedural grounds. The Court rejected the administration's substantive positions in *Hamdi* and in *Rasul v. Bush*, 542 U.S. 466 (2004), which had been argued the previous week.

[12] Lee Epstein and Andrew D. Martin, "Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)," *University of Pennsylvania Journal of Constitutional Law* 13 (2010): 263.

[13] Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009).

[14] Lawrence Baum and Neal Devins, "Why the Supreme Court Cares About Elites, Not the American People," *Georgetown Law Journal* 98 (2010): 1515.

[15] Ibid., 1520.

[16] Ibid., 1519.

[17] Ibid., 1537.

[18] Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 293–295.

[19] Ibid., 294.

[20] Thomas R. Marshall, *Public Opinion and the Supreme Court* (Boston: Unwin Hyman, 1989), 192. An appendix comprising the 146 "matches" can be found at 194–201. Three "matches" for three parts of the holding in *Roe v. Wade* appear at 198. See my discussion beginning on page 74.

[21] Ibid., 191.

[22] Ibid., 187–188.

[23] A Colloquy, Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit (May 24, 1988) in *Federal Rules Decisions* 124 (1989): 338.

[24] Epstein and Martin, "Does Public Opinion Influence the Supreme Court?" 263.

[25] Lee Epstein, Jack Knight, and Andrew D. Martin, "The Supreme Court as a Strategic National Policymaker," *Emory Law Journal* 50 (2001): 584.

[26] Alexis de Tocqueville, *Democracy in America*, ed. J. P. Mayer and Max Lerner; trans. George Lawrence (New York: Harper & Row, 1966), 137; as quoted by Ralph Lerner, "The Supreme Court as Republican Schoolmaster," *Supreme Court Review* 1967 (1967): 127.

[27] http://www.gallup.com/poll/149906/supreme-court-approval-rating-dips.aspx.

[28] http://www.gallup.com/poll/145238/congress-job-approval-rating-worst-gallup-history.aspx.

[29] Jeffery J. Mondak and Shannon Ishiyama Smithey, "The Dynamics of Public Support for the Supreme Court," *The Journal of Politics* 59 (1997): 1116.

[30] Ibid., 1115.

[31] *Bush v. Gore*, 531 U.S. 98 (2000).

[32] Herbert M. Kritzer, "The Impact of *Bush v. Gore* on Public Perceptions and Knowledge of the Supreme Court," *Judicature* 85 (2001): 37.

[33] Ibid., 38.

[34] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[35] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Padilla v. Rumsfeld*, 542 U.S. 426 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 551 (2006); and *Boumediene v. Bush*, 553 U.S. 723 (2008).

[36] James L. Gibson and Gregory A. Caldeira, *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People* (Princeton, N.J.: Princeton University Press, 2009), 61.

[37] Ibid., 10.

[38] James L. Gibson, Milton Lodge, Charles Taber, and Benjamin Woodson, "Can Judicial Symbols Produce Persuasion and Acquiescence? Testing a Micro-Level Model of the Effects of Court Legitimacy," paper prepared for the 2010 Annual Meeting of the Midwest Political Science Association, http://mysbfiles.stonybrook.edu/~bwoodson/symbol/Text%2023,%20Midwest%20Paper1.pdf.

[39] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

40 Jeffery J. Mondak, "Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation," *Political Research Quarterly* 47 (1994): 690.

41 Confirmation Hearing on the Nomination of Sonia Sotomayor to be an Associate Justice of the United States Supreme Court Before the Senate Committee on the Judiciary, 111th Cong. 59 (2009) (statement of Judge Sonia Sotomayor).

42 Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States Before the Senate Committee on the Judiciary, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.).

43 For example, Brandon L. Bartels and Christopher D. Johnston, "Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process," *Public Opinion Quarterly* 76 (Spring 2012): 105; John M. Scheb II and William Lyons, "Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions," *Political Behavior* 23 (2001): 182.

44 James L. Gibson and Gregory A. Caldeira, "Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?" *Law & Society Review* 45 (2011): 207–208.

45 Ibid., 213.

46 See, for example, Mary Steichen Calderone, "Illegal Abortion as a Public Health Problem," *American Journal of Public Health* 50 (1960): 948.

47 Model Penal Code (1962 official text), Section 230.3. The proposal made exceptions to the general prohibition of abortion, regarding as "justifiable" the termination of a pregnancy resulting from rape, incest, or other "felonious intercourse"; pregnancy that threatened grave harm to the woman's physical or mental health; or instances when "the child would be born with grave physical or mental defect." Two doctors needed to certify in writing that one of these indications was present. Twelve states rather quickly amended their laws along the lines of the American Law Institute model: Arkansas, California, Colorado, Delaware, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Carolina, South Carolina, and Virginia. See endnote 3, above.

48 American Medical Association, House of Delegates Proceedings: Annual Convention 1970, "Resolution No. 44, Therapeutic Abortion," 221.

49 Linda Greenhouse and Reva B. Siegel, eds., *Before* Roe v. Wade*: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling* (New York: Kaplan Publishing, 2010), 36–38; available at http://documents.law.yale.edu/before-roe.

50 For further discussion of this point, see Linda Greenhouse, "How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse," *Suffolk University Law Review* 42 (2008): 41.

51 *Roe v. Wade*, 410 U.S., 165–166.

52 The cases were *Younger v. Harris*, 401 U.S. 37 (1971) (dealing with federal court jurisdiction over ongoing state criminal proceedings; one of the challengers to the Texas abortion law in *Roe* was a doctor facing state prosecution for performing an illegal abortion) and *United States v. Vuitch*, 402 U.S. 62 (1971) (challenging the District of Columbia's abortion statute as unconstitutionally vague).

53 Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (New York: Henry Holt/Times Books, 2005), 80.

54 Ibid., 90–91.

55 Greenhouse and Siegel, *Before* Roe v. Wade, 158–160.

56 Ibid., 215–218.

57 Ibid., 157–158. See also Greenhouse and Siegel, "Before (and After) *Roe v. Wade*," 2052–2059.

58 Greenhouse and Siegel, *Before* Roe v. Wade, 201 – 207. The report and a list of the Rockefeller Commission's members can be found at http://www.population-security.org/rockefeller/001_population_growth_and_the_american_future.htm.

59 George Gallup, "Abortion Seen Up to Woman, Doctor," *The Washington Post*, August 25, 1972. See Greenhouse, *Becoming Justice Blackmun*, 91.

60 Donald Granberg and Beth Wellman Granberg, "Abortion Attitudes, 1965 – 1980: Trends and Determinants," *Family Planning Perspectives* 12 (1980): 252. This dichotomy in public support for what are sometimes called "health" reasons versus "discretionary" reasons has remained visible in the decades since *Roe*. See Charles H. Franklin and Liane C. Kosaki, "Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion," *American Political Science Review* 83 (1989): 761 – 763; and Karlyn Bowman and Andrew Rugg, *AEI Public Opinion Studies: Attitudes About Abortion* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 2010), 11 – 12.

61 Lawrence T. King, "Abortion Makes Strange Bedfellows: GOP and GOD," *Commonweal*, October 9, 1970, 37 – 38.

62 *Doe v. Bolton*, 410 U.S. 179 (1973).

63 These newspaper responses are collected in David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade (New York: Macmillan, 1994), 605 – 606 and n.8, 873.

64 Granberg and Granberg, "Abortion Attitudes, 1965 – 1980," 252.

65 See Gibson, Lodge, Taber, and Woodson, "Can Judicial Symbols Produce Persuasion and Acquiescence?"; *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); and Mondak, "Policy Legitimacy and the Supreme Court."

66 Franklin and Kosaki, "Republican Schoolmaster," 759.

67 Greenhouse and Siegel, *Before* Roe v. Wade, 71 – 72.

68 Ibid., 72 – 73.

69 Greenhouse and Siegel, "Before (and After) *Roe v. Wade*," 2064 – 2065.

70 Linda Greenhouse, "Justice John Paul Stevens as Abortion-Rights Strategist," *UC Davis Law Review* 43 (2010): 749.

71 Greenhouse and Siegel, "Before (and After) *Roe v. Wade*," 2068.

72 Ibid.

73 *Bob Jones University v. United States*, 461 U.S. 574 (1983).

74 Joseph Crespino, "Civil Rights and the Religious Right," in *Rightward Bound: Making America Conservative in the 1970s*, ed. Bruce J. Schulman and Julian E. Zelizer (Cambridge, Mass.: Harvard University Press, 2008), 101. For an authoritative account of the *Bob Jones* litigation and its background, see Olatunde Johnson, "The Story of *Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence," in *Statutory Interpretation Stories*, ed. William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett (New York: Foundation Press/Thomson Reuters, 2011), 127 – 163.

75 See Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA," *California Law Review* 94 (2006): 1323.

76 See, for example, Julian Pecquet, "Republican Candidates Move to the Right on Abortion Ahead of Caucuses," *The Hill*, December 31, 2011, http://thehill.com/blogs/healthwatch/abortion/201857-gop-candidates-move-to-the-right-on-abortion-ahead-of-iowa-caucuses.