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THE COUNTERMAJORITARIAN PARADOX

Neal Devins*

LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE*. By David J. Garrow. New York: Macmillan Publishing Co. 1994. Pp. 981. \$28.

In 1970, judicial recognition of abortion rights seemed far-fetched. In January of that year, Linda Greenhouse wrote in the *New York Times Magazine* about a “right to abortion” — describing “[s]uch a notion . . . [as] fantastic, illusory. The Constitution is searched in vain for any mention of it. The very phrase rings of the rhetoric of a Women’s Liberation meeting.”¹ While Greenhouse’s bit of hyperbole was a setup to one of the first full-blown popular press treatments of burgeoning judicial recognition of abortion rights, no one could have foreseen the prospect of a sweeping Supreme Court decision invalidating forty-six state antiabortion laws — at least not in 1970.

At that time, however, the events leading up to the Supreme Court’s *Roe v. Wade*² decision had already been set in motion. In the fall of 1969, Norma McCorvey — a.k.a. Jane Roe — realized she was pregnant and sought legal counsel to attack Texas’s antiabortion statute. In June 1970, a three-judge federal district court struck down Texas’s antiabortion statute on privacy grounds.³ Just one year later, the Supreme Court granted certiorari in *Roe* and McCorvey’s attorneys — Linda Coffee and Sarah Weddington — were furiously working on their Court briefs. In January 1973, after two oral arguments and the additions of Justices Lewis Powell and William Rehnquist to the Court, the Supreme Court’s opinion in *Roe* sent shock waves throughout the nation.

How could a decision of such monumental import catch the nation — including most legal academics — by surprise?⁴ Was *Roe*, as Robert Bork suggests, a brazen “judicial usurpation of demo-

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1. Linda J. Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, N.Y. TIMES, Jan. 25, 1970, § 6 (Magazine), at 30.

2. 410 U.S. 113 (1973).

3. *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970).

4. See DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 151, 170 n.33 (1976).

cratic prerogatives"?⁵ Alternatively, was *Roe* the inevitable outgrowth of *Griswold v. Connecticut*⁶ — a decision whose precedential effect was not realized because it struck down “an uncommonly silly law,”⁷ Connecticut’s antiquated ban on the use of contraceptives?

David J. Garrow’s *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*⁸ helps answer these and many other questions. Garrow meticulously uncovers the events leading up to *Griswold* and *Roe* and the deliberations of the Justices and their clerks in both cases. While the book — at close to 1000 pages — is weighed down by its own thoroughness, Garrow lays bare the efforts of reproductive freedom advocates and the Justices sympathetic to their arguments.

Despite covering territory that Bernard Schwartz, Mary Dudziak, and others have already explored,⁹ *Liberty and Sexuality* is a strikingly original work. Garrow painstakingly details the inner-workings of both the reproductive freedom community and the Supreme Court in *Griswold* and *Roe*. By interviewing well over two hundred individuals who participated in these controversies and reading everything and anything connected to these disputes — including the case files of former Justices William Brennan, William O. Douglas, and Thurgood Marshall — Garrow has provided the definitive account of the plaintiffs’ side of *Griswold* and *Roe*. This account, in and of itself, is an extraordinary achievement.

Liberty and Sexuality seeks to be much more than a history of the *Griswold* and *Roe* litigation, however. Perceiving the constitutional right to privacy to be a “basic truth” (p. 705) and *Roe* to be “the legal and moral equivalent of *Brown v. Board of Education*,”¹⁰ *Liberty and Sexuality* seeks to give *Roe v. Wade* its due as “a landmark in the growth of American freedom.”¹¹ Garrow pursues his normative ends through two techniques. First, Garrow focuses his attention on the reproductive freedom community. By treating

5. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 116 (1990).

6. 381 U.S. 479 (1965).

7. 381 U.S. at 527 (Stewart, J., dissenting).

8. David Garrow is a legal historian whose *Bearing the Cross* won the Pulitzer Prize in 1987.

9. See BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* 83-151 (1988) [hereinafter SCHWARTZ, BURGER COURT]; BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 227-39 (1985) [hereinafter SCHWARTZ, WARREN COURT]; Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 IOWA L. REV. 915 (1990); Catherine G. Roraback, *Griswold v. Connecticut: A Brief Case History*, 16 OHIO N.U. L. REV. 395 (1989).

10. Michael Anderson, *From Civil Rights to Abortion Rights*, N.Y. TIMES, Feb. 20, 1994, § 7 (Book Review), at 7 (quoting an interview with David Garrow).

11. A Conversation with David J. Garrow, News from Macmillan (copy on file with author).

the story of these social activists and lawyers as the one worth telling, Garrow — through an evenhanded but generally sympathetic portrayal of these individuals — places his readers in the shoes of one side of the bitter struggle over abortion. The prolife community, to the extent Garrow considers it, is typically portrayed in less sympathetic terms.¹² For Garrow, who — in promoting *Liberty and Sexuality* — has described Operation Rescue as “really beyond the pale in just the same way the Klan is,”¹³ the prolife community is principally viewed as an obstacle on the path toward the achievement of liberty.

Garrow's second technique is purely factual. Specifically, by demonstrating that Catholic interests in Connecticut effectively and repeatedly blocked efforts to repeal that state's anticontraceptive law and that a burgeoning right-to-life movement may well have undermined prochoice legislative reform efforts, *Liberty and Sexuality* implies that court action was instrumental to the cause of reproductive freedom.¹⁴ In striking this significant blow for judicial activism, Garrow masterfully rebuffs two strands of historically based criticism of *Griswold* and *Roe*. First, Garrow lays to rest the claim that Yale law professors cooked up *Griswold* because, as Judge Bork put it at his confirmation hearing, “they like this kind of litigation.”¹⁵ Instead, he demonstrates that before *Griswold* struck it down, Connecticut's anticontraception law had blocked creation of family planning centers for low-income women for more than two decades, thereby providing an equity-based justification for the lawsuit. Second, contrary to the recent wave of attacks by prochoice liberals — including Clinton Supreme Court appointee

12. Garrow limits his description of John Noonan — then a University of California law professor and now a federal appeals court judge — to three words: “Roman Catholic lawyer.” P. 330. Noonan, however, fares much better than Reagan Associate Deputy Attorney General Bruce Fein — whom Garrow refers to as “[a]n undistinguished but often-quoted one-time Justice Department official” (p. 267) — and Fordham law professor Robert M. Byrn, who Garrow describes as “a forty-year-old bachelor who still lived with his mother” (p. 522).

13. David J. Garrow, *David Garrow on Roe v. Wade*, Rts., Apr.-June 1994, at 2, 4 (interview with Edith Tiger).

14. This lesson is implicit in *Liberty and Sexuality*. Garrow's technique is to sweep his readers away in a tidal wave of information and, after they have recovered from this factual onslaught, to let them reach whatever conclusions they may. For many reviewers of *Liberty and Sexuality*, Garrow's refusal to explain what lessons should be drawn from his narrative is a frustrating shortcoming. See, e.g., Gerald Rosenberg, *Political Processes and Institutions*, 23 CONTEMP. SOC'Y. 656 (1994); R. Alta Charo, *The Civil Rights Struggle Over Human Reproduction*, 26 FAM. PLAN. PERSP. 181 (1994) (book review); Kristin Luker, *The Hard Road to Roe*, N.Y. TIMES, Feb. 20, 1994, § 7 (Book Review) (reviewing LIBERTY AND SEXUALITY), at 7. For me, I rather liked being left to my own devices to make sense of the extraordinary mass of uniformly well-presented information that is *Liberty and Sexuality*.

15. *Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 1, at 116 (1987) (statement of Robert H. Bork).

Ruth Bader Ginsburg — against *Roe* as being counterproductive to the prochoice movement, Garrow's history lesson makes clear that the prochoice movement was necessarily dependent upon judicial action.

Garrow's history lesson is incomplete, however. While demonstrating that *Roe* was a necessary step to the creation of meaningful abortion rights, *Liberty and Sexuality* inaccurately infers that the story of reproductive freedom is one of judicial resistance to legislatures dominated by prolife interest groups. Garrow does not consider the ways in which judicial decisionmaking and elected government action affected each other. For example, although *Liberty and Sexuality* considers post-*Roe* developments up through the Supreme Court's 1992 reaffirmation of abortion rights in *Planned Parenthood v. Casey*,¹⁶ it limits its sights to court-related action. Garrow does not give any meaningful treatment to legislation and regulation designed to alter the face of abortion rights. More significantly, he does not consider the ramifications of such elected government action on Court decisionmaking. Garrow simply cannot achieve his grander objective of helping "people to appreciate what *Roe* really represents"¹⁷ without considering the constitutional dialogue that has taken place between the courts and elected government in the three decades since *Griswold* and the two decades since *Roe*.

That Garrow's presentation is incomplete reveals *Liberty and Sexuality's* obsession with elevating the stature of *Roe v. Wade* to a victory for American freedom on the order of *Brown v. Board of Education*. At one level, Garrow's comparison fails because *Brown* is generally understood to be "the greatest moral triumph constitutional law ha[s] ever produced,"¹⁸ whereas honorable people can disagree about the moral rightness of a decision that places reproductive autonomy ahead of potential human life. Yet, even if the *Roe-Brown* analogy is appropriate — as it almost certainly is for a good many of Garrow's readers — *Brown* itself points to the necessity of getting beyond Supreme Court decisions and into elected government action in explicating the shaping of constitutional values. Just as the story of *Brown* must include southern resistance, the 1964 Civil Rights Act,¹⁹ and the busing controversy, the story of *Roe v. Wade* encompasses abortion funding restrictions, the "gag rule," and several other legislative and executive initiatives.

16. 112 S. Ct. 2791 (1992).

17. A Conversation with David J. Garrow, *supra* note 11.

18. BORK, *supra* note 5, at 77.

19. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended principally at 42 U.S.C. §§ 2000a to 2000h-6 (1988 & Supp. III 1991)).

This review will help put *Roe* in proper perspective by considering the ways that elected government and judicial action influence each other. In particular, the story of abortion rights must consider how social and political forces contributed to the Court's moderation of *Roe* in *Planned Parenthood v. Casey*, a decision that replaced *Roe*'s stringent trimester standard with a less demanding "undue burden" test.²⁰ While this exercise may deflate *Roe*'s achievements, it will also point to the pivotal role that Supreme Court decisions play in elected government deliberations. Specifically, when considering the constitutionality of legislative and regulatory initiatives, elected government has looked to Supreme Court decisions as the defining benchmark. Furthermore, rather than approving legislation or regulations directly at odds with *Roe*, elected government has expressed its opposition through funding bans and other indirect techniques. Finally, and most significantly, *Roe* and its progeny shaped elected government attitudes toward abortion. The result of this interaction is that despite the *Casey* Court's returning much of the abortion issue to the states, state lawmakers — apparently preferring the *Roe*-created status quo — no longer appear interested in enacting antiabortion restrictions.

Liberty and Sexuality recognizes neither the profound role played by political and social influences in Court decisionmaking nor the equally profound effect of Court decisionmaking in shaping the scope and sweep of elected government action. Garrow's book is nonetheless monumental — far and away the definitive guide to the Court's reasoning in and the political developments that preceded *Griswold* and *Roe*. This review, building upon Garrow's lessons regarding the Supreme Court's role in the abortion dispute, offers an alternative paradigm to the one Garrow suggests. Part I of this review summarizes *Liberty and Sexuality*'s ample teachings about the leadership role that courts played in fueling the reproductive autonomy movement. Without decisions like *Griswold* and *Roe*, as *Liberty and Sexuality* makes clear, it is uncertain whether and when the political process would have recognized an individual's right to reproductive freedom. Part II of this review extends the teachings of *Liberty and Sexuality* by considering the ways elected government and the courts influence each other.

I. THE ROAD TO *ROE*

Liberty and Sexuality is at its best when demonstrating the necessity of judicial action to make reproductive freedom meaningful, particularly by using the stories of those involved in this crusade. Contrary to what we are led to believe by the self-serving revision-

20. 112 S. Ct. at 2819.

ist histories of conservatives who dislike judicially created rights and progressives who now see the legislatures as more rights-protective than the courts, the evisceration of Connecticut's anticontraception statute and the establishment of meaningful abortion rights required judicial intervention.

A. *Birth Control in Connecticut*

Garrow's presentation of the story of *Griswold* is truly a revelation, for the Bork view that *Griswold* was simply a test case put together by a group of elites at the Yale law school is widely shared. Indeed, during my first year of teaching, I was told a tale about how the wife of Yale University's president — who, along with her upper-crust friends, was active in Planned Parenthood — convinced New Haven's chief of police at a cocktail party to arrest her for violating the otherwise unenforced anticontraception statute.²¹ The truth of the matter is that the Connecticut law blocked the operation of family planning clinics, preventing poor women from, among other things, being able to be fitted for diaphragms.²² Roman Catholic hospitals in several Connecticut cities, moreover, dismissed from their staffs doctors who publicly opposed the anticontraception statute.²³ While men were able to purchase condoms at gas stations, drug stores, and the like (p. 128), and women of means were able to skirt the Connecticut law through state-condoned diaphragm fittings at the offices of noncomplying physicians (p. 136), the effect of the anticontraception statute was hardly imaginary.

The real story of *Griswold* begins in 1939. In June of that year, the Catholic Clergy Association of Waterbury passed a resolution, "read from the pulpit of each and every Roman Catholic Church in Waterbury," condemning birth control as "contrary to the natural law and therefore immoral" and calling for the enforcement "to the full extent of the law" of an 1879 Connecticut criminal statute sanctioning individuals who use or assist in the use of contraceptives (p. 5). Drafted by P.T. Barnum — "of circus fame" (p. 16) — and supported by Catholic church officials who argued that "[t]he Creator gave the sex function for just one purpose" (p. 17), the Connecticut law was generally ignored and seemed destined to become obsolete when the Waterbury clergy made their appeal. In response to the clergy's call to shut down the recently opened Waterbury Maternal Health Center, however, police raided the clinic and arrested its physician-directors. Following a state supreme court

21. Garrow lists several versions of this story. See pp. 267-68.

22. P. 171. Many of these women traveled to New York state for diaphragm fittings. P. 139.

23. See Dudziak, *supra* note 9, at 928-29.

decision upholding the statute,²⁴ the Waterbury clinic and all other birth control clinics in Connecticut closed their doors (pp. 77-78).

For the next twenty-five years, family planning advocates in Connecticut — led by Kit Hepburn, the actress's mother and an activist whose reform efforts date back to 1910 (pp. 9-10) — unsuccessfully lobbied the Connecticut legislature to repeal the 1879 statute. Despite a pronounced “gap between the practices of Catholic lay people and the proclamations of church officials,”²⁵ the Catholic-dominated Connecticut Senate repeatedly stymied legislative reform in Connecticut. Testifying before the Connecticut legislature about “‘moral principles which are the foundation of this law’ ” (p. 127) and using its pulpits to inform parishioners that “‘support of any candidate advocating birth control measures is a violation of the natural law of God’ ” (p. 118), the Catholic Church was a special interest far more powerful than the combined force of family planning advocates and public opinion.

With no meaningful prospect for legislative reform, birth control advocates turned their attention to the courts. In *Tileston v. Ullman*²⁶ and *Poe v. Ullman*,²⁷ however, Connecticut state courts and the U.S. Supreme Court proved unsympathetic to these efforts. The Supreme Court's attitude — brilliantly and thoroughly canvassed in *Liberty and Sexuality* — was akin to the view later expressed by Judge Bork, namely, that the Connecticut statute was unenforced and therefore a nullity. It did not matter to the Court that the contraception statute was challenged by doctors unable to treat their patients as well as married couples who faced significant pregnancy-related threats to their physical health (pp. 144-46). For Chief Justice Earl Warren, the plaintiffs — seeking to force the Court to embrace the then-discredited doctrine of substantive due process — had made the Justices “‘guinea pigs for an abstract principle’ ” (p. 181). To prove this point, Justice Felix Frankfurter called Waterbury prosecutor Bill Fitzgerald to discuss his affidavit that any person who violates the 1879 statute “‘must expect to be prosecuted and punished’ ” (p. 187). This remarkable conversation confirmed Frankfurter's intuition that there was little threat of prosecution under the Connecticut statute.

Although the Supreme Court had declared the Connecticut law a practical nullity, Planned Parenthood — both fearing prosecutions and hoping to change the law through judicial or legislative reform — had yet to violate the 1879 statute. Consequently, with

24. *State v. Nelson*, 11 A.2d 856 (Conn. 1940).

25. P. 164. When *Griswold* was argued, seventy-eight percent of Catholics thought that birth control information should be widely available. P. 229.

26. 26 A.2d 582 (Conn. 1942).

27. 367 U.S. 497 (1961).

no birth control clinics in Connecticut, *Poe* forced Planned Parenthood to choose between open defiance of the law by providing contraceptive services and legislative reform efforts, which had proven unsuccessful for close to fifty years. The former course was chosen. One day after *Poe*, Planned Parenthood openly declared its intention to violate the law by publicly offering contraceptive services, noting in a press statement that they “would ‘of course welcome prosecution by the state’ so that the ‘absurd and antiquated’ 1879 law could be removed from the books” (p. 196). Within one week of the clinic’s opening, police arrested Estelle Griswold, president of Connecticut’s Planned Parenthood Federation, and Lee Buxton, the former chair of the obstetrics and gynecology department at Yale’s medical school, presenting the Court with a clearly justiciable challenge to the 1879 statute.²⁸

The Supreme Court found itself in a quandary with *Griswold*. Earl Warren’s decision to assign the case to William O. Douglas — whose cavalier approach to opinion writing revealed an “inattention to legal detail and indifference to precedent”²⁹ — did not help matters. His initial *Griswold* draft, as Garrow points out, “may have taken more than twenty minutes [to write], but not [by] much” (p. 245). Unwilling to utilize the substantive due process analysis that he and other New Dealers fought so hard to defeat, Douglas relied on the First Amendment’s right of association, an approach that prompted Justice Hugo Black to state at conference that the “‘right of husband and wife to assemble in bed is a new right of assembly to me’” (p. 245). Recognizing the failings of Douglas’s initial approach, William Brennan and his law clerk Paul Posner devised an alternative strategy. “‘Instead of expanding the First Amendment,’” Brennan wrote Douglas, why not say the Connecticut statute violates the right to privacy “‘created out of the Fourth Amendment and the Fifth, together with the Third’” (p. 247). From this letter emerged Douglas’s recognition of a right to privacy “emanating” from the “penumbras” surrounding various provisions of the Bill of Rights.³⁰

28. Specifically, in response to pressure from James G. Morris, “a forty-two-year-old West Haven Roman Catholic father of five [who] was the night manager of Avis Rent-a-Car’s Downtown Garage,” (p. 202) New Haven police investigated a just-opened family planning clinic. There they found Estelle Griswold who “was quite overjoyed to see them” and promptly told police of action she had taken in “violation of the [1879] law.” P. 203.

29. SCHWARTZ, WARREN COURT, *supra* note 9, at 237 (quoting JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 252-53 (1980)).

30. This Brennan-inspired alternative also seemed silly, “attract[ing] the giggles” of the Justices’ clerks. P. 249. Several Justices considered alternative approaches, none of which attracted significant support. Arthur Goldberg settled on a Ninth Amendment strategy and instructed his law clerk — now Supreme Court Justice — Stephen Breyer “to undertake the appropriate research and preliminary drafting.” P. 250. Another approach — suggested by Warren law clerk and *Roe* critic John Hart Ely — was to invalidate the 1879 law on equal protection grounds by looking at “how the Connecticut statute prevented the operation of

That *Griswold* might reinvigorate substantive due process decisionmaking, with the benefit of twenty-twenty hindsight, seems hardly surprising. When *Griswold* was decided, however, the Court was clearly uncomfortable with taking this step. *Liberty and Sexuality* makes this abundantly clear. Warren's discomfort with substantive due process explains his decision not to assign *Griswold* to John Marshall Harlan (p. 243), who — with the help of his law clerk and later Reagan Solicitor General Charles Fried³¹ — had earlier relied on substantive due process analysis in attacking the constitutionality of the Connecticut statute (p. 195). Moreover, while many of the Justices spoke of the marital right to privacy in their *Griswold* determinations, these Justices recognized that it would be quite a trick "to persuasively articulate how one or another *accepted* constitutional doctrine applied to the Connecticut statute" (pp. 243-44; emphasis added). The Court never accomplished this trick. For better or worse, *Griswold* began the Court's descent down the slippery slope that ultimately led it to *Roe's* formal embrace of substantive due process decisionmaking.

B. From *Griswold* to *Roe*

A New York University law student, Roy Lucas, discovered the *Griswold-Roe* nexus in the fall of 1966.³² That neither the reproductive rights community nor legal academics saw *Griswold* as the first step to court-ordered abortion rights now seems remarkable. At the time of *Griswold*, however, there was little reason to think that the Supreme Court was prepared to seize on substantive due process doctrine to alter fundamentally the laws of nearly every state. Garrow, while sympathetic to the Court's expansive use of privacy, makes clear that the *Griswold-Roe* connection was barely imaginable until fledgling law graduate Roy Lucas began convincing federal courts to strike down antiabortion laws in the late 1960s.

Before *Griswold*, the thought of a constitutional right to abortion seemed farfetched. Birth control pioneer Margaret Sanger, in explaining her opposition to Connecticut's anticontraception law, "emphasized strongly that the advocates of birth control are not in favor of abortion, but desire only to prevent the beginning of life" (p. 17). The original legal challenge to the Connecticut law, moreover, labeled "contraception the 'antithesis' of abortion . . . [which]

birth control clinics for the poor, but not the provision of similar services to better-off patients of private physicians." P. 237. While prochoice critics of *Roe* now embrace this tactic, none of the *Griswold*-era Justices pursued this approach. P. 250.

31. Fried informed Harlan before oral arguments in the *Poe* case that "individual married couples have a right to engage in marital relations in the privacy of their own consciences," P. 174.

32. Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. Rev. 730 (1968).

'the State has the right to control.'"³³ With few exceptions pre-*Griswold* abortion rights advocates opposed efforts to repeal anti-abortion measures in favor of less-sweeping reforms. In 1959, for example, Alan Guttmacher spoke of " 'vigorously oppos[ing]' " any proposal for " 'unrestricted legal abortion' " (p. 278).

Griswold and its immediate aftermath likewise reveal a sharp divide between the contraception and abortion issues. When the Court heard *Griswold*, Planned Parenthood attorney and Yale law professor Thomas Emerson noted at oral arguments that the invalidation of the anticontraception law would not create a right to abortion. Emerson claimed that " '[t]he conduct that is being prohibited in the abortion cases' " does not " 'occur in the privacy of the home' " and that " '[abortion] involves taking what has begun to be a life.' "³⁴ In the Court's private deliberations of *Griswold*, moreover, Earl Warren went out of his way to distinguish the Connecticut statute from antiabortion measures, "implying that he thought such laws were valid."³⁵ More striking than the Court's consideration of *Griswold*, as *Liberty and Sexuality* reveals, is the first wave of reactions to the case. Roy Lucas's initial choice for faculty sponsor, Norman Dorsen — who later served as president of the American Civil Liberties Union — was not enthusiastic about the project. As Lucas later recalled, " 'People thought it was a weird idea. My professors kind of laughed at me' " (p. 337). The civil liberties community too thought that *Griswold* did not provide an adequate basis to challenge abortion laws. In February 1966, the ACLU concluded that " 'restrictive abortion laws . . . while unduly restrictive, are not so unreasonable as to be unconstitutional' " and that " 'society could decide . . . to place such value on the life of the unborn child as to render abortion possible only in a narrow range of circumstances' " (p. 313).

How then did an idea first concocted in the spring of 1967 when Roy Lucas finished his law school paper make its way to the Supreme Court four years later when certiorari was granted in *Roe*? *Liberty and Sexuality* does a superb job of chronicling the meteoric rise of court-ordered abortion rights, beginning with a July 1968 model brief prepared by Lucas and culminating with the Court's decision in *Roe*.

For starters, the principal impetus for court-ordered reform came from the courts themselves. In 1968, retired Supreme Court Justice Tom C. Clark advanced a *Griswold*-based right to abortion,

33. P. 70; see also p. 274.

34. P. 240. Emerson, however, did suggest in a 1965 *Michigan Law Review* symposium on *Griswold* that the Court might be willing to recognize abortion rights. Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

35. SCHWARTZ, WARREN COURT, *supra* note 9, at 239.

at least “until the time that life is present.”³⁶ Yet in early 1969 the principal focus of the reform movement was legislative liberalization in New York and other states (p. 367). Although Roy Lucas seemed determined to launch a series of coordinated test case challenges (p. 381), judicial reform did not take hold until the fall of 1969, when courts in California and Washington, D.C. rejected state efforts to prosecute doctors for violating antiabortion restrictions. In one case, *People v. Belous*,³⁷ the California Supreme Court declared that “[t]he fundamental right of the woman to choose whether to bear children follows from the Supreme Court’s and this court’s repeated acknowledgement of a ‘right to privacy.’”³⁸ In *United States v. Vuitch*,³⁹ federal district court judge Gerhard Gesell spoke of “increasing indication” in Supreme Court decisions that the “right of privacy . . . may well include the right to remove an unwanted child at least in early stages of pregnancy.”⁴⁰

With *Belous* and *Vuitch*, the prochoice community began to grasp the obvious, namely, that courts were far more likely than legislators to liberalize abortion rights. The most visible of these challenges, of course, is *Roe* itself. Garrow makes clear that the *Roe* litigation, unlike the NAACP’s deliberative strategy in *Brown*,⁴¹ was decidedly haphazard — much closer to spontaneous combustion than to the carefully drawn plans of some national interest group.

The chain reaction that ultimately produced *Roe v. Wade* began in March 1969, when women members of the University of Texas’s Students for a Democratic Society (SDS) turned to gender issues after witnessing “the disagreeably sexist behavior of SDS’s male national leaders” at an SDS National Council meeting (p. 389). One manifestation of this shift was the distribution of information on how to obtain an abortion in Mexico. Perceiving that more needed to be done, these women asked Sarah Weddington — a 1967 Texas law graduate — whether she would consider launching a constitutional challenge to Texas’s antiabortion law (p. 395). Weddington agreed, enlisted the help of her law school classmate Linda Coffee, and waited for a plaintiff to materialize. Thanks to serendipity, a pregnant woman who wanted an abortion, Norma McCorvey,

36. P. 372 (quoting Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A.L. REV. 1, 8-9 (1969)).

37. 458 P.2d 194 (Cal. 1969).

38. *Belous*, 458 P.2d at 199 (quoted at p. 377).

39. 305 F. Supp. 1032 (D.D.C. 1969), *revd.*, 402 U.S. 62 (1971).

40. *Vuitch*, 305 F. Supp. at 1035, *quoted at p.* 382.

41. On the NAACP’s litigation strategy, see JACK GREENBERG, *CRUSADERS IN THE COURTS* (1994) (reviewed in this issue by Professor Margaret Russell — Ed.); RICHARD KLUGER, *SIMPLE JUSTICE* (1975); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

quickly emerged and granted her permission to launch a Jane Roe challenge to the Texas law.⁴²

While the rest may be history, *Liberty and Sexuality* does a phenomenal job of exposing how many rocks there were on the road to *Roe*. Far from a pitched battle between high-powered veteran lawyers, the contest between Weddington and Coffee, and the State of Texas reveals the grass-roots nature of the *Roe* challenge. Weddington and Coffee did their own typing in filing their original complaint and brief (pp. 438-39). In preparing their Supreme Court filings, Weddington in particular confronted a lack of resources, necessitating her lawyer-husband's last minute participation in the brief drafting, and the help of an overly aggressive Roy Lucas, who — as head of the poorly run Madison Institute — sought to displace her as lead counsel in the case.⁴³ For the State of Texas, *Roe* inspired a less-than-vigorous defense. The bulk of the Texas brief was lifted directly from a prolife amicus filing by two hundred and twenty-two physicians — a brief that had been shared with the state for this very purpose.⁴⁴

Internal Supreme Court deliberations likewise reveal that when *Roe* was first argued, its landmark status was anything but inevitable. The original Blackmun draft, as revealed by Bernard Schwartz in 1988, struck down the Texas statute on vagueness grounds and expressly rejected the argument that “a pregnant woman has an unlimited right to do with her body as she pleases.”⁴⁵ How this weak-kneed approach to abortion rights evolved into *Roe*'s express embrace of substantive due process and its unyielding trimester test is one of the highlights of *Liberty and Sexuality*. For starters,

42. Norma McCorvey — unlike the challengers to the Connecticut contraception statute — was indigent, uneducated, and not particularly interested in reshaping the direction of constitutional jurisprudence. P. 404. In convincing McCorvey, Coffee “stressed that being a plaintiff would not take much time, would not entail any costs, and almost certainly would not require any courtroom testimony or public identification.” *Id.* True to Coffee's word, McCorvey was out of the loop throughout the *Roe* litigation.

43. Pp. 461-62. Lucas's aggressive tactics were not appreciated. Sarah Weddington eventually cut off communication with Lucas. P. 564. Prochoice lawyers also shut Lucas out of *Doe v. Bolton*, 410 U.S. 179 (1973), *Roe*'s companion case. P. 463. In the end, while Lucas played an instrumental role in framing the prochoice litigation strategy, his self-righteous and intrusive posturing alienated him from much of the reproductive autonomy community. See pp. 463-64, 469-70, 493, 505.

44. Pp. 510-11. Texas did not help its position at oral argument. Jay Floyd, who argued the case on behalf of Texas, began his argument with an off-color remark. Referring to Sarah Weddington and Linda Coffee, Floyd commented: “It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.” Oral Argument Transcript, 410 U.S. 113 (1993) (No. 70-18), reprinted in 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 796 (Philip B. Kurland & Gerhard Casper eds., 1975). Floyd further weakened his case by responding to a question about Texas's choice to specify that life begins at conception by waxing philosophically that “there are unanswerable questions in this field” and “[w]hen does the soul come into the unborn — if a person believes in a soul — I don't know.” 75 *Id.* at 804.

45. SCHWARTZ, BURGER COURT, *supra* note 9, at 90.

Warren Burger's decision to assign *Roe*, and its companion Georgia case, *Doe v. Bolton*⁴⁶, to Harry Blackmun — according to William Douglas at least — reeks of the Chief Justice's manipulation of his case assignment authority. Although Blackmun was willing to strike down the Texas statute, Douglas's conference notes suggest that both Burger and Blackmun approved of Georgia's draconian restrictions on abortion rights (p. 533). Matters were further complicated when Blackmun signed onto a Burger-led effort to have *Roe* and *Doe* reargued so that newly confirmed Nixon appointees Lewis Powell and William Rehnquist could participate in the decision. According to Blackmun, "I believe, on an issue so sensitive and so emotional as this one, the country deserves the conclusion of a *nine-man*, not a *seven-man* court" (p. 552; emphasis added).

Contrary to Burger's apparent intent, reargument, thanks to Lewis Powell's firming up the prochoice coalition, moved the *Roe* draft towards an absolutist prochoice posture.⁴⁷ Not only did Powell support overturning the Texas and Georgia statutes, but "he thought *Roe* 'should [be] the lead case' and that he would decide it not on vagueness grounds but on the more basic issue" (p. 575). Combusting with a strengthened majority, Brennan and Marshall — in a critical letter written by Marshall's law clerk Mark Tushnet — successfully lobbied Blackmun for the establishment of a trimester standard guaranteeing women an unqualified right to abortion during the first three months of pregnancy (pp. 583-85). Although Potter Stewart objected to this "inflexibly legislative" approach, Blackmun concluded that such judicial policymaking, while "arbitrary," was "not to be avoided."⁴⁸

C. *Judicial v. Legislative Reform*

The Court designed *Roe v. Wade* to put an end to the abortion dispute. Justice Harry Blackmun put forth a trimester test governing state authority over the abortion decision both to make clear what the Court intended and to limit future governmental efforts to sidestep the Court's decision. Indeed, Blackmun implored his colleagues to decide *Roe* "no later than the week of January 15 to tie in with the convening of most state legislatures" (p. 585) and proposed issuing a press statement to accompany the decision — something that had never been done and ultimately was not done here — to keep the press from "going all the way off the deep end" in reporting news of the decision (p. 587).

46. 410 U.S. 179 (1973).

47. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 332-52 (1994) (reviewed in this issue — Ed.).

48. Bob Woodward, *The Abortion Papers*, WASH. POST, Jan. 22, 1989, at D1, D2.

Blackmun's efforts here reveal that politics played a large role in both the content and packaging of *Roe*. When he announced the decision, however, Blackmun started his opinion by observing that the judicial task was "to resolve the issue by constitutional measurement, free of emotion and of predilection."⁴⁹ Portraying the Court as being above the political fray, the supreme pursuer of constitutional truth in our three-branch system, Blackmun apparently sought to strengthen the Court's legitimacy and to ensure that states widely followed *Roe*.⁵⁰ Twenty years later, in announcing his retirement, Blackmun declared victory. With prochoice president Bill Clinton at his side and *Roe's* reaffirmation recently secured, Blackmun described *Roe* as "a step that had to be taken as we go down the road to the full emancipation of women."⁵¹

Whether Blackmun's claims about *Roe's* achievements and the legacy Blackmun left us through *Roe* are more ethereal than real is the question du jour. Over the past several years, prochoice liberals have increasingly savaged *Roe*. Political scientist Gerald Rosenberg, for example, contends that *Roe* "was far less responsible for the changes that occurred than most people think"⁵² and that the growth of right-to-life forces in the wake of the decision suggests "that one result of litigation to produce significant social reform is to strengthen the opponents of such change."⁵³ More strikingly, Ruth Bader Ginsburg, in December 1992, lambasted *Roe* for "prolong[ing] divisiveness and deferr[ing] stable settlement of the [abortion] issue" by short-circuiting early 1970s legislative reform efforts.⁵⁴ On another occasion, Ginsburg attacked *Roe* as "[h]eavy-handed judicial intervention" and said that it "ventured too far in the change that it ordered."⁵⁵

What gives? With tens of thousands of legislative proposals, countless executive initiatives, wicked Supreme Court confirmation battles, and more acrimony than any social policy issue since slavery, it seems a little late in the day to wonder whether or not *Roe* mattered. Nevertheless, a slew of highly regarded political scientists and constitutional lawyers — most of whom are avidly

49. *Roe v. Wade*, 410 U.S. 113, 116 (1973).

50. Blackmun advanced similar claims in subsequent abortion decisions. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2854 (1992) (Blackmun, J., concurring in the judgment in part concurring in part, and dissenting in part); *Thornburg v. American College of Obst. & Gyn.*, 476 U.S. 747, 759, 771 (1986).

51. Linda Greenhouse, *The Nation: How a Ruling on Abortion Took on a Life of Its Own*, N.Y. TIMES, Apr. 10, 1994, § 4, at 3.

52. GERALD N. ROSENBERG, *THE HOLLOW HOPE* 201 (1991).

53. *Id.* at 342.

54. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992).

55. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381, 385 (1985).

prochoice — now depict *Roe* as counterproductive, a “hollow hope.”⁵⁶ For this new wave of Court critics, only social movements and elected branch action accomplish meaningful reform.

Roe's progressive critics emphasize that in the decade preceding the decision, the abortion pendulum had begun to swing.⁵⁷ In 1962, the Model Penal Code was amended to authorize abortions when the health of the mother was endangered, when the infant might be born with incapacitating physical or mental deformities, or when the pregnancy was a result of rape or incest. In 1967, the American Medical Association endorsed the Model Penal Code's limited approval of abortion. In 1971, the National Conference of Commissioners on Uniform State Laws drafted a Uniform Abortion Act that would have placed no limitations on abortion during the first twenty weeks of pregnancy. By the time of *Roe*, seventeen states had liberalized their abortion laws, principally adopting the limited reforms of the Model Penal Code. Pointing to these developments, Ginsburg and others maintain that the Court could have left it to state legislatures to reform their abortion laws.⁵⁸

Liberty and Sexuality meets these progressive critics of *Roe* head on by demonstrating that despite changes in state law, the medical profession, and public opinion, the reformers were fighting an uphill battle. Many states rejected the Model Penal Code reform, and some states that enacted reform legislation imposed so many restrictions that the number of legal abortions actually decreased.⁵⁹ When the Court decided *Roe*, strict antiabortion laws remained on the books in nearly every state. Contrary to Ginsburg's claims, the abortion reform movement barely put a dent in state laws criminalizing abortion. “[C]alculating that therapeutic exceptions bills were the most they could possibly attain,” most prochoice activists did not even seek repeal of criminal abortion statutes (pp. 359, 374).

The legislative battles leading up to *Roe* are telling for other reasons. In the early stages of this reform movement, there was no right-to-life movement. By the time of *Roe*, a vigorous right-to-life movement was prepared to do battle with prochoice reformers. Of great significance, in 1972, right-to-life activists helped defeat Michigan and North Dakota referenda that would have repealed those states' criminal abortion laws (pp. 576-77). In the months before the *Roe* decision, moreover, prolife interests scored key legislative

56. See ROSENBERG, *supra* note 52.

57. See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 233-34 (1992).

58. See *supra* notes 52-55; see also Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 766-67 (1991).

59. EVA R. RUBIN, *ABORTION, POLITICS, AND THE COURTS* 23 (rev. ed. 1987).

victories in Pennsylvania, where legislation allowing abortions only when the mother's life was threatened was approved by a 157-to-34 vote, and in Massachusetts, which approved by 178-to-46 a bill that specified conception as the beginning of human life (p. 547). In New York, prolife forces, headed by the Roman Catholic Church, were gaining momentum in an effort to repeal that state's permissive abortion legislation (p. 368).

"From the immediate vantage point of 1973," Garrow concludes, no one in the prochoice community — with memories of the right-to-life mobilization effort "so freshly in mind" — expressed any regret that the Supreme Court "had ruled that a woman's choice with regard to abortion was a constitutionally protected right rather than a criminally punishable preference that could be left to the annual vagaries of state legislative votes or statewide popular referenda" (pp. 616-17). While there is no way of telling precisely what the political process would have yielded had the Court left the abortion decision with the states,⁶⁰ Garrow persuasively demonstrates that the prospects of sweeping legislative reform were dim. Most states did not reform their laws, and for the most part, those that did made only minor alterations. Furthermore, a rapidly growing and increasingly powerful right-to-life movement raised doubts about future reform efforts.

Liberty and Sexuality's defense of judicial intervention — at least for supporters of reproductive rights — is convincing. The stories of *Roe* and *Griswold* reveal that legislative majorities were unwilling to expand reproductive rights. Whether one describes this failure as the triumph of special interests or as the preservation of moral norms, progressive defenders of the political marketplace are "far off target."⁶¹

II. THE COUNTERMAJORITARIAN PARADOX

Garrow's proof that judicial intervention and "liberty and sexuality" go hand in hand tells only part of the story of what *Roe* really represents. Courts cannot go it alone in ordering massive social change. Elected government action at the state and federal level plays an integral role in the shaping of constitutional values. *Liberty and Sexuality*, for all its virtues, is blinded by its obsession with Court action. The book brushes aside state and federal responses

60. On this question, Jeffrey Rosen concludes that "[t]he political evidence that Garrow collects fails to undermine Ginsburg's basic insight." Jeffrey Rosen, *Penumbrae Formed by Emanations*, ATLANTIC MONTHLY, Apr. 1994, at 121, 122 (reviewing LIBERTY AND SEXUALITY). Kathleen Sullivan, in contrast, concludes that "Garrow convincingly depicts the legislative success of the [right-to-life movement]." Kathleen M. Sullivan, *Law's Labors*, NEW REPUBLIC, May 23, 1994, at 42, 44 (reviewing LIBERTY AND SEXUALITY).

61. David Garrow, *History Lesson for the Judge: What Clinton's Supreme Court Nominee Doesn't Know About Roe*, WASH. POST, June 20, 1993, at C3.

to *Roe* — unless they concern attempts to shape Court doctrine through judicial appointments or Supreme Court advocacy. Indeed, Garrow's comprehensive discussions of the politics surrounding Connecticut's contraception ban and the limits of pre-*Roe* legislative reform principally function as a foil to demonstrate the necessity of judicial intervention.

While detailing the stories of the *Roe* and *Griswold* litigation is a monumental achievement, Garrow's presentation is nonetheless incomplete and, as a result, slightly misleading. This Part supplements Garrow's history lesson by considering post-*Roe* politics. Specifically, this Part calls attention to the ways courts and elected government shape constitutional values and each other.

A. *Elected Government Attitudes Toward the Judiciary*

Prochoice advocates' antipathy for elected government is easy to understand. Before *Roe*, nearly every state outlawed or placed significant restrictions on abortion access. Without *Roe*, moreover, there is little reason to think — as Garrow ably demonstrates — that state reform efforts would have amounted to much. Finally, the bulk of post-*Roe* elected government activity appears downright hostile, not just to *Roe* but to judicial authority as well.

Elected government resistance to abortion rights, however, does not mean that the dialogue between the courts and governmental actors is fundamentally adversarial — with the Court persistently beating down elected government's attacks. Over the past two decades, the courts have helped shape legislative norms. Of equal significance, elected government reprisals — contrary to most writings on this topic⁶² — reveal a profound respect for judicial authority among elected government officials. In these ways, the Court's influence is even more profound than *Liberty and Sexuality* suggests.

To be sure, most elected government action has sought to limit abortion rights. At the same time, no federal and virtually no state action has directly challenged Supreme Court decisionmaking authority. The campaign to have the Supreme Court overrule *Roe*, for example, hardly calls judicial authority into question. The appointment of judges who disapprove of *Roe* as well as the filing of briefs calling for *Roe*'s overruling, instead, recognize that the fate of *Roe* lies with the judiciary.

More telling than these Court-centered efforts, legislative and regulatory initiatives reveal a willingness to work within parameters set by the Supreme Court. At the federal level, a Republican-controlled Senate rejected early 1980s proposals that sought to nul-

62. See, e.g., BARBARA H. CRAIG & DAVID M. O'BRIEN, *ABORTION AND AMERICAN POLITICS* (1993); RUBIN, *supra* note 59; LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990).

lify *Roe* — human life legislation, court-stripping, and constitutional amendment. When the federal government did act, it never directly called into question the correctness of *Roe*. Restrictions on abortion funding, family planning services, and fetal tissue research do not contradict *Roe* and its progeny. While these measures express a preference for childbirth and make access to abortion services more difficult, none of these antiabortion efforts challenges the constitutionality of the abortion right.

Drawing a line, as the federal government has done, between judicial authority, which it does not challenge, and abortion access — which, at least prior to the election of Bill Clinton, it did not support — is much more than the triumph of form over substance. That Congress and the White House have channeled their opposition to a judicial pronouncement in ways that do not openly contradict Court decisionmaking is testament to the elected branches' respect for the judiciary as a coequal branch of government. Indeed, if anything, Congress and the White House have been extraordinarily solicitous of the Court's abortion-related action.

When the elected branches engage in constitutional interpretation, the undisputable benchmark of their efforts is Supreme Court decisionmaking. Not only are congressional reports and executive branch testimony replete with citations to the *U.S. Reports*, but neither executive branch officials nor legislators defend constitutional positions at odds with the Supreme Court. When Bush administration officials testified against Congress's efforts to use its commerce power to codify *Roe*, for example, they never forthrightly embraced a theory of federalism at odds with Supreme Court pronouncements; instead, they couched their federalism argument in public policy terms.⁶³ Likewise, when the Senate Judiciary Committee considered human life legislation, only subcommittee chair John East spoke of Congress's authority to interpret independently the Constitution, but his subcommittee report nonetheless emphasized Court decisionmaking.⁶⁴ Admittedly, Court rulings are sufficiently open-ended that they present plenty of fodder for prochoice and prolife forces. In addition, the invocation of Court decisions, rather than reflecting actual respect for the Court, may be little more than a smoke screen designed to gain partisan political advantage. The fact remains, however, that both

63. See *Freedom of Choice Act of 1991: Hearing of the Sen. Comm. on Labor and Human Resources*, 102d Cong., 2d Sess. 16 (1991) (statement of John Harrison, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice) [hereinafter Harrison Testimony].

64. See SUBCOMM. ON SEPARATION OF POWERS OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 1ST SESS., THE HUMAN LIFE BILL S. 158: REPORT TOGETHER WITH ADDITIONAL AND MINORITY VIEWS TO THE COMMITTEE ON THE JUDICIARY 20-30 (Comm. Print 1981).

sides of any given issue perceive that their constitutional arguments will be taken seriously only if built around Court doctrine.

State responses to *Roe*, for the most part, follow a similar pattern. Although forty-eight states passed abortion legislation in the years following *Roe*, only a handful of states have played a leadership role in enacting stringent abortion laws. Most states wait to see if the courts will approve these "challenger" state initiatives.⁶⁵ Furthermore, most challenger state action is not clearly at odds with Court decisions but tests the limits of these decisions. For example, *Roe* did not explicitly address parental or spousal consent, public funding, hospital-only abortions, and waiting periods, among other things. State action on those subjects engages the judiciary in a dialogue on the sweep of abortion rights; it does not necessarily challenge Court authority.⁶⁶

The possibility that elected government output may not measure elected government preferences also suggests that one should not read too much into elected government resistance to *Roe*. Many elected officials were quietly pleased by *Roe*. John Hart Ely, for example, speaks of "[t]he sighs of relief as this particular albatross was cut from the legislative and executive necks."⁶⁷ That states enacted an avalanche of abortion restrictions may only mean that legislators saw no downside in responding to prolife interest groups, for prochoice concerns were content to leave it to the courts to protect their interests. In a sense, federal and state efforts to limit abortion rights paid homage to a judiciary that would tow the line and provide whatever constitutional protections were appropriate.

Roe's transformation of the political marketplace, in other words, was rooted in the belief that the Supreme Court would vigorously defend abortion rights. By legalizing abortion, *Roe* eliminated the demand for prochoice legislation while leaving the demand for prolife legislation unaffected, or perhaps even causing it to grow. At the same time, *Roe* also increased the supply of prolife legislation. Before the decision, the benefit the prochoice

65. See Glen Halva-Neubauer, *Abortion Policy in the Post-Webster Age*, PUBLIUS, Summer 1990, at 27, 32-34.

66. There is an important caveat here; state efforts to limit the sweep of abortion rights present — and are intended to present — the Court with an opportunity to rethink its position on abortion. As such, these efforts are clearly antagonistic to *Roe*. Nevertheless, virtually all state antiabortion efforts — by speaking to matters not explicitly addressed by the Court — do not question the Court's authority to issue opinions or render judgments that "have general applicability and deserve the greatest respect from all Americans." Edwin Meese III, *The Tulane Speech: What I Meant*, WASH. POST, Nov. 13, 1986, at A21, reprinted in 61 TUL. L. REV. 1003 app. at 1004 (1987). See generally Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977 (1987).

67. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

movement obtained from a legislative victory was offset by the loss the prolife movement sustained, and vice versa. But *Roe* eliminated many, if not most, negative externalities associated with prolife laws. By writing abortion rights into the Constitution, the Court assured prochoicers that they could not lose the benefits they had won. Specifically, because courts likely would invalidate antiabortion measures that ran afoul of *Roe*'s trimester test, prochoicers had little reason to fight legislative efforts to limit abortion access. Consequently, legislators voting on prolife bills no longer had to worry that their prochoice constituents might complain. Instead, they could vote for the bills so that the prolife activists would obtain a legislative benefit, while *Roe* ensured that prochoice citizens would not suffer any measurable loss.

Despite the efforts of prolife groups to pass laws that might give the Supreme Court an opportunity to limit *Roe*, between 1973 and 1989 the Court decided only a single major issue in their favor, when it permitted states to refuse to fund poor women's abortions through Medicaid.⁶⁸ *Webster v. Reproductive Health Services*⁶⁹ changed all that. On the brink of overturning *Roe*, three Justices declared "the rigid *Roe* framework"⁷⁰ unworkable and opened the door to antiabortion legislation. Unlike Court rulings approving restrictions on federal funding of abortions, *Webster* signaled the Court's readiness to limit abortion access for all women. By threatening the rights of middle- and upper-class women, however, *Webster* revealed a general contentment among federal and state legislators with the *Roe*-created "status quo." Specifically, rather than prompting a new wave of abortion regulation, legislative inaction followed in *Webster*'s wake.

The post-*Webster* calm reveals that many legislators would have preferred that the Court retain control over abortion and not return the issue to elected government. Grace Duke, a Republican Ohio state legislator, spoke of "everyone hoping the courts would decide and it wouldn't go through the legislatures."⁷¹ William Black, a Republican Illinois state legislator, began to support abortion rights in the aftermath of *Webster*, "which he said had given new weight and effect to his votes on abortion."⁷² Even in Missouri, *Webster* came as a not-entirely-welcome surprise to state legislators. "[Ninety-five] percent who voted for this bill [upheld in *Webster*] believed it

68. *Harris v. McRae*, 448 U.S. 297 (1980).

69. 492 U.S. 490 (1989).

70. 492 U.S. at 518 (Rehnquist, C.J., joined by White & Kennedy, JJ.).

71. Joe Frost, *Americans in the Center Focus on Abortion Fight*, NEW ORLEANS TIMES PICAYUNE, Sept. 11, 1991, at A3.

72. William E. Schmidt, *Onetime Abortion Foes Aren't So Sure Anymore*, N.Y. TIMES, Dec. 4, 1989, at A18.

didn't have a chance,"⁷³ argued Missouri prochoice activist Mary Bryant. "They looked at that preamble [specifying that life begins at conception] and laughed. 'This is stupid. The court will never go for it.'"⁷⁴

Webster's transformation of the political marketplace, although contrary to the predictions of prochoice and prolife interest groups that an avalanche of antiabortion legislation would follow in the decision's wake,⁷⁵ is not surprising. Knowing that prochoice forces were "going to take names and kick ankles,"⁷⁶ *Webster* made right-to-life initiatives less likely to succeed. The *Roe*-created "status quo" became the governing norm, despite the fact that *Roe* had earlier invalidated forty-six state laws.⁷⁷

*Planned Parenthood v. Casey*⁷⁸ tells a similar tale. When the Court agreed to hear *Casey* in January 1992, abortion rights supporters saw the "neck of *Roe v. Wade* squarely on the judicial chopping block" and spoke of "[t]he days of safe and legal abortion in America [as] numbered."⁷⁹ What the Court did, however, was to embrace a middle-ground approach — reaffirming *Roe* but rejecting its stringent trimester standard in favor of a less-demanding undue burden standard. As was true with *Webster*, the Court's recognition of broad state regulatory authority reinforced the post-*Roe* status quo. Most state Attorneys General, for example, have resisted enforcing existing state laws with Pennsylvania-type restrictions.⁸⁰ Instead, Attorneys General returned the issue to the state legislatures, claiming that lawmakers need to reaffirm their support

73. Cynthia Gorney, *Taking Aim at Roe v. Wade*, WASH. POST, Apr. 9, 1989 (Magazine), at 18.

74. *Id.*

75. Representative Chris Smith (R-N.J.), chair of the Congressional Pro-Life Caucus, heralded *Webster* as "truly a significant victory for unborn children . . . [that] is likely to lead to the enactment of state laws." Press Conference of the National Right to Life Committee, Federal News Service, July 3, 1989, available in LEXIS, Nexis Library, Fednew File. Kate Michelman, Executive Director of the National Abortion Rights Action League (NARAL), went a step further, observing, "We are now careening down the slippery slope towards governmental control of our most fundamental right. Women's lives hang by a thread, and the Justices this morning handed the state politicians a pair of scissors." Press Conference on the *Webster v. Reproductive Health Services* Decision, Kate Michelman, Executive Director, National Abortion Rights Action League, Federal News Service, July 3, 1989, available in LEXIS, Nexis Library, Fednew File.

76. 135 CONG. REC. 18,170 (1989) (statement of Rep. Les AuCoin).

77. *Webster* also prompted a spate of prochoice legislative initiatives at both the state and federal level. Connecticut, Maryland, Nevada, and Washington all responded to the decision by passing protective legislation. At the federal level, Congress sought to loosen abortion funding restrictions — only to be thwarted by a Bush veto — and took up freedom of choice legislation to codify *Roe v. Wade*. See FISHER & DEVINS, *supra* note 57, at 232-44.

78. 112 S. Ct. 2791 (1992).

79. Linda P. Campbell, *Court To Hear Key Abortion Case*, CHI. TRIB., Jan. 22, 1992, § 1, at 1, 10.

80. Mimi Hall, *The Abortion Ruling: Day Two*, USA TODAY, July 1, 1992, at 3A.

for abortion restrictions by writing a new law. State legislators, however, seem reluctant to enact antiabortion measures. Although *Casey* has hardly slowed down the pace of abortion-related proposals — roughly three hundred measures were introduced in each of the two years following the decision⁸¹ — state responses to *Casey* reinforce the post-*Webster* trend of diminishing state intervention in abortion. Most striking, according to Alan Guttmacher Institute studies, “antiabortion legislators [have] heeded . . . [*Casey*] and curtailed their attempts to make abortion illegal.”⁸² In 1994, for example, no state introduced legislation to outlaw abortion.⁸³ Furthermore, in the two years following *Casey*, a third of legislative initiatives would have guaranteed the right to abortion.⁸⁴ Finally, of the handful of abortion regulation measures adopted since *Casey*, most involve restrictions approved by the Court: waiting periods, informed consent, and parental notification.⁸⁵

Casey's impact on federal abortion politics is also telling. Prior to the decision — when there was reason to think that the Court was set to overrule *Roe v. Wade* — Congress seemed poised to codify abortion rights through freedom of choice legislation. *Casey*'s qualified reaffirmation of *Roe* killed that effort, despite the fact that freedom of choice legislation was far more protective of abortion rights than the Court's newly minted “undue burden” standard.⁸⁶ For many prochoice lawmakers, there no longer was adequate reason for Congress to bear the decisional costs of taking a hard-line position on abortion rights. After all, *Roe* — though crippled — was clearly alive. Along the same lines, Congress saw no reason to challenge directly the Court's decisionmaking authority — something it is typically reluctant to do in constitutional disputes — over something as amorphous as the appropriate standard of review in abortion cases.

Elected government perceptions about the judicial role and the respect owed Supreme Court decisions figures prominently in the story of abortion politics. To begin with, rather than independently interpret the Constitution, elected officials frame their constitutional arguments around Supreme Court decisions. Far more signif-

81. Alan Guttmacher Inst., *Legislative Proposals and Actions*, ST. REPROD. HEALTH MONITOR, May 1994, at i [hereinafter 1994 HEALTH MONITOR]; Alan Guttmacher Inst., *Legislative Proposals and Actions*, ST. REPROD. HEALTH MONITOR, Dec. 1993, at i [hereinafter 1993 HEALTH MONITOR].

82. 1993 HEALTH MONITOR, *supra* note 81, at i.

83. 1994 HEALTH MONITOR, *supra* note 81, at ii.

84. *See* 1994 HEALTH MONITOR, *supra* note 81; 1993 HEALTH MONITOR, *supra* note 81.

85. *See id.* State refusal to act on *Casey* refutes the suggestion that *Roe* led to increased public opposition to nontherapeutic abortions. *See* Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989).

86. *See* Harrison Testimony, *supra* note 63.

icantly, elected government has chosen certain types of limited responses and rejected more confrontational approaches. That is quite significant, as is the fact that federal and state officials, while supporting measures at odds with abortion rights, may well have preferred that the Court maintain control over this issue. On this point, the striking absence of elected government action following the Court's recognition of substantial state regulatory power in *Webster* and *Casey* suggests a seeming contentment with Court-created abortion rights. *Liberty and Sexuality*, while heralding the judicial intervention in *Griswold* and *Roe*, does not fully recognize the impact of Court decisionmaking. The real story of *Roe v. Wade*, contrary to Garrow's inference but supportive of his hypothesis, reveals a surprising sensitivity of elected government to the judiciary.

B. *Social and Political Influences on Supreme Court Decisionmaking*

Just as the courts shape elected government, elected government also shapes the courts. *Liberty and Sexuality*, by treating Court decisionmaking as the *sine qua non* of the abortion dispute, never considers the pivotal role that social and political influences play in Court decisionmaking.

Throughout the post-*Roe* period, the Court validated elected government efforts to limit abortion rights. At the federal level, the Court approved several legislative and regulatory initiatives and struck down none. By emphasizing Congress's power of the purse and the deference owed to executive branch statutory interpretations, the Supreme Court upheld abortion funding restrictions in *Harris v. McRae*;⁸⁷ federally supported adoption counseling by religious organizations in *Bowen v. Kendrick*;⁸⁸ and regulations forbidding family planning centers from discussing abortion in *Rust v. Sullivan*.⁸⁹ These decisions make clear that the elected branches play a vital role in the abortion dispute.

1992's *Planned Parenthood v. Casey*⁹⁰ is a culmination of these interchanges between the Court and elected government. After five abortion-dominated Supreme Court confirmation hearings and hundreds of thousands of abortion protesters marching each year at its steps, the Court formally reconsidered and moderated *Roe*. By simultaneously reaffirming abortion rights and gutting *Roe*'s stringent trimester test, *Casey* sought to find a middle ground between two irreconcilable poles.

87. 448 U.S. 297 (1980).

88. 487 U.S. 589 (1988).

89. 500 U.S. 173 (1991).

90. 112 S. Ct. 2791 (1992).

Casey is a remarkable decision. At one level, the Court seems beside itself in self-doubt. Acknowledging that it can neither appropriate funds nor command the military to enforce its orders, the Court recognizes that its power lies “in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary.”⁹¹ In other words, as psychologists Tom Tyler and Gregory Mitchell observe, the Court seems to believe “that public acceptance of the Court’s role as interpreter of the Constitution — that is, the public belief in the Court’s institutional legitimacy — enhances public acceptance of controversial Court decisions.”⁹² This emphasis on public acceptance of the judiciary seems proof positive that the outcome in *Casey* cannot be divorced from the case’s explosive social and political setting.⁹³

Casey, however, goes to great lengths to declare that “social and political pressures,”⁹⁴ far from being relevant, must be resisted. Otherwise, anarchy will rule the day, for our nation will have forsaken its commitment “to the rule of law.”⁹⁵ For this reason, *Casey* hinges its reaffirmation of *Roe* on *stare decisis* grounds. In other words, whether or not the Court correctly decided *Roe* is beside the point; the Court’s institutional legitimacy and, with it, the rule of law will be shattered if the Court “overrule[s] under fire.”⁹⁶ Beyond this rule of law claim, *Casey* invokes judicial supremacy to defend its authority to settle the abortion dispute. Calling on the “contending sides of a national controversy to end their national division,”⁹⁷ *Casey* implores the public to rise to the occasion by submitting to the Court.

All of this brings us to the \$64,000 question: How independent is the Court? *Casey*’s middle-ground approach, as well as its emphasis on legitimacy and public acceptance, at face value, supports

91. 112 S. Ct. at 2814.

92. Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 715 (1994).

93. *Casey*’s middle-ground approach to both abortion rights and broad state regulatory authority, without question, matched public opinion. Fifty-seven percent of voters supported the Pennsylvania law. *Wall Street Journal/NBC Poll*, WALL ST. J., May 22, 1992, at A1. By a fifty-nine to twenty-one percent margin, however, voters also said that they were more likely to support candidates who support abortion rights in the 1992 elections. *Wall Street Journal/NBC Poll*, WALL ST. J., Oct. 23, 1992, at A1. More specifically, “many Americans . . . support such restrictions on access to abortion services as requiring women younger than 18 years to get a parent’s permission (70% to 73% approve), a 24-hour waiting period (69% to 81%), and requiring married women to inform their husbands before receiving an abortion (62% to 69%).” Robert J. Blendon et al., *The Public and the Controversy Over Abortion*, 270 JAMA, 2871, 2873 (1993).

94. 112 S. Ct. at 2814.

95. 112 S. Ct. at 2814.

96. 112 S. Ct. at 2815.

97. 112 S. Ct. at 2815.

the claim of Robert Dahl, Richard Funston, and others that the Supreme Court is molded by popular opinion.⁹⁸ Dahl's landmark 1957 study found that the Court was hardly ever successful "in blocking a determined and persistent lawmaking majority on a major policy."⁹⁹ Rather, with the appointments-confirmation process enabling the elected branches to place on the Court individuals whose political philosophies comport with majoritarian preferences, Dahl concludes that "policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."¹⁰⁰ Funston's 1975 study builds upon this theme. Arguing that only "during transitional periods, in which the Court is a holdover from the old coalition, [will] the Court . . . perform the counter-majoritarian functions ascribed to it by traditional theory,"¹⁰¹ Funston concludes that the Court is typically a yea-saying branch. "The hypothesis, in other words, is that, as Mr. Dooley so cryptically put it, 'the Supreme Court follows the election returns.'"¹⁰²

There is little doubt that the Court is sensitive to politics. The abortion dispute, however, stands as a counterexample to Dahl and Funston's broader claims about judicial compliance with lawmaking majorities. To begin with, the Court has spoken with a countermajoritarian voice throughout the abortion controversy. *Roe v. Wade* invalidated forty-six state laws. From *Roe* to *Webster*, the Court withstood an onslaught of state antiabortion measures, striking most of them down and extending its reasoning in *Roe*.¹⁰³ Although the Court approved federal and state efforts to limit abortion through appropriations and other indirect restrictions, the Court never backed away from its conclusion that a woman has a constitutionally protected right to terminate her pregnancy. *Casey*, while severely limiting *Roe*, nonetheless reaffirmed *Roe*'s "central

98. See Beverly B. Cook, *Public Opinion and Federal Judicial Policy*, 21 AM. J. POL. SCI. 567 (1977); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975).

99. Dahl, *supra* note 98, at 286.

100. *Id.* at 285.

101. Funston, *supra* note 98, at 796.

102. *Id.* For the classic argument that the Court's principal function is to provide legitimacy to governmental conduct by upholding it as constitutional, see CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* (1960).

103. While many of these antiabortion measures were the triumph of well-organized and intensely interested political minorities over a prochoice majority that left it to the courts to protect their interests, it is nonetheless true that these measures were enacted through the "majoritarian" political process. Consequently, although Court decisions striking down these abortion restrictions may have matched public opinion, these Court decisions — like any decision striking down the action of elected majorities — were technically countermajoritarian.

[countermajoritarian] holding."¹⁰⁴ In so doing, *Casey* invalidated a spousal notification provision that has wide public-opinion support.¹⁰⁵

It is nonetheless incorrect to view the abortion dispute as the triumph of law over politics. The Court has approved a broad range of indirect restrictions on abortion rights and has significantly moderated its *Roe v. Wade* holding. Much like elected government's refusal to challenge Court decisionmaking authority directly, the Court too seems respectful of elected government participation in the shaping of constitutional values. *Liberty and Sexuality* errs in not recognizing the interactive nature of constitutional decision-making by failing to examine the ways in which elected government and the courts have shaped each other. *Liberty and Sexuality* is somewhat misleading in depicting the relationship between the Court and elected government in linear adversarial terms. While that depiction goes a long way in explaining the pre-*Roe* period, which is the principal focus of Garrow's study, the *Roe* to *Casey* period — which is clearly a part of Garrow's study — tells a much different story.

III. CONCLUSION

A permanent feature of our constitutional landscape is the ongoing tug and pull between elected government and the courts. Without question, social and political forces "set[] the boundaries for judicial activity and influence[] the substance of specific decisions, if not immediately then within a few years."¹⁰⁶ The Supreme Court's repudiation of the trimester standard as well as its approval of abortion funding restrictions and Reagan-era regulatory initiatives are therefore very much a part of "what *Roe* really represents."¹⁰⁷ At the same time, by "placing issues on the agenda of public opinion and of other political institutions [and] providing an imprimatur of legitimacy to one side or another,"¹⁰⁸ Court action affects majoritarian preferences. *Roe* makes clear how influential Court decisions can be. It served as a benchmark in constitutional deliberations undertaken by elected government. More strikingly, *Webster* and *Casey*'s noneventful aftermath reveals that *Roe* shaped political attitudes toward abortion rights.

David Garrow's *Liberty and Sexuality* demonstrates *Roe*'s monumental impact in making abortion rights a reality. Without deci-

104. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2812 (1992).

105. Blendon et al., *supra* note 93, at 2873.

106. Louis Fisher, *Social Influences on Constitutional Law*, 15 J. POL. SCI. 7, 8 (1987).

107. A Conversation with David J. Garrow, *supra* note 11.

108. Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 63 (1976).

sions like *Griswold* and *Roe*, there is little reason to think that the 1960s abortion reform movement would have succeeded. *Liberty and Sexuality* drives this point home. Its thoroughgoing history of pre-*Roe* politics is an achievement in and of itself — effectively rebutting Robert Bork's suggestion that *Griswold* was superfluous as well as the claims of Ruth Bader Ginsburg, Gerald Rosenberg, and others that *Roe* did less to help the cause of reproductive autonomy than people commonly suppose.

Liberty and Sexuality, happily, offers much more than a refutation of the historical foundations of *Griswold's* and *Roe's* critics. The book also does a superior job of detailing the history of the litigation strategy of the reproductive autonomy movement and the deliberations of the Supreme Court Justices sympathetic to the cause. While Garrow's focus on the prochoice side of the equation makes his history a bit one-sided, he is meticulous and evenhanded in telling this side of the story.

Where *Liberty and Sexuality* falters is in its failure to consider the interactive nature of constitutional decisionmaking, especially in the post-*Roe* era. History makes clear that courts and elected government influence each other in significant ways. Garrow's history is too Court-centered to recognize these influences. Despite this criticism, *Liberty and Sexuality* is indispensable reading for anyone interested in uncovering the story of *Roe v. Wade*. With *Roe's* landmark status assured, *Liberty and Sexuality* too will endure as the definitive account of the *Roe* decision and the events leading up to it.