Tulsa Law Review

Volume 55
Number 2 *Book Review*

Volume 55 | Number 2

Winter 2020

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JOSHUA C. WILSON, THE NEW STATES OF ABORTION POLITICS (STANFORD UNIVERSITY PRESS 2016). PP. 128. PAPERBACK $14.00.

MARY ZIEGLER, BEYOND ABORTION: *ROE V. WADE* AND THE BATTLE FOR PRIVACY (HARVARD UNIVERSITY PRESS 2018). PP. 400. HARDCOVER $46.50.

MOBILIZING *ROE*: THE POLITICAL LIFE OF A DECISION, BEYOND ABORTION AND BEYOND COURTS

Roe v. Wade[1] is the most visible and blatant abortion dispute landmark both inside and outside American borders. From the beginning, the case raised controversies of different natures. It was considered a stunning victory for the plaintiffs, the "most concretely important thing" that the American Supreme Court did for women,[2] and some pro-choice groups thought it would even resolve the abortion issue. On the other hand, it raised many criticisms in academia and among feminists. Some feminist analysis pointed out the ruling's perils and ambivalences considering its focus on a privacy-centered argument, a right that has never been an ally to women's rights.[3] The Court's position was considered weakened for using a medically approved autonomy idea, at the exclusion of a sex-equality perspective.[4] At the same time, voices from the opposing camp accused it of being a "lawless decision" or a symbol of judicial tyranny.[5]

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1. 410 U.S. 113 (1973).

2. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 981 (1984).

3. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 997–98 (1991); *see also* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93–102 (1988).

4. Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985).

5. Clark D. Forsythe, Senior Counsel of Ams. United for Life, Address at the Republican Assembly of Lake County Ronald Reagan Dinner (Apr. 25, 2015).

While most political attention has—always, but especially more recently—been on the risks or expectations of *Roe v. Wade* being overturned, its legal, political, and societal importance is not an all or nothing game. From different perspectives and fields of knowledge, the recently released books *The New States of Abortion Politics* by the political scientist, Joshua C. Wilson,[6] and *Beyond Abortion: Roe v. Wade and the Battle for Privacy* by legal historian, Mary Ziegler,[7] account for a more nuanced and intricate history of this court decision and its legacy. These two complementary readings show that on one hand *Roe v. Wade* does not mean only abortion rights, but has a windfall effect on multiple issues unrelated to abortion. And on the other hand, access to abortion involves much more than *Roe*.

While the most direct legal impact of the decision was the specific recognition of a woman's right to choose an abortion or not within the trimester system, its true legacy requires accessing what has happened in its aftermath in a sometimes quieter and more indirect manner, both in the field of legal interpretation and social mobilization. In this vein, the books reveal a history of the decision's effects, considering how it fueled and sustained legal battles in sub-national legislative and judiciary spheres and how it transformed both sides of the activist field in a mobilization spiral that involved attempts to re-signify, amplify, reframe, or limit the decision's force and reach.

Wilson tells the story of how *Roe* propelled the organization of anti-abortion mobilization, reshaped party politics, and inaugurated a new battlefield of abortion regulations in state legislatures and courts. While Ziegler, in an innovative approach to legal mobilization, expands the abortion field to trace the reinterpretations of the right to privacy by different social actors, who disputed a variety of subjects and sometimes pointed to opposite political orientations. The books illustrate the legal battles' dynamics, in which legal decisions almost never mean the end of a political conflict, but rather the conflict's relaunch in renewed boundaries.

ACCESSING *ROE*'S IMPACT BEYOND ABORTION. HOW FAR CAN WE GO WITH PRIVACY RIGHTS?

One can look at the effects of court decisions in different ways: their direct and practical effects on the ground, the creation of rights or burdens, the concrete changes in the function of institutions or individuals' lives. From an internal point of view, one can trace the decision's effect in the legal architecture or in the jurisprudence. A more complex and less obvious way to address a decision's effect is to open the lens more broadly, by expanding the institutional boundaries of the idea of legal mobilization and looking at societal uses of law, as resources and strategies for social and political mobilization.

Without expressly referring to theoretical jargon, Ziegler's reconstruction is in tune with understandings of legal mobilization as communicative practices and interpretative battles that transcend its institutional dimension.[8] And the history dialogues with social movements studies that consider the symbolic and cultural dimension of social

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6. JOSHUA C. WILSON, THE NEW STATES OF ABORTION POLITICS (2016).

7. MARY ZIEGLER, BEYOND ABORTION: *ROE V. WADE* AND THE BATTLE FOR PRIVACY (2018).

8. *E.g.*, Michael McCann & Tracey March, *Law and Everyday Forms of Resistance: A Socio-Political Assessment*, *in* STUDIES IN LAW, POLITICS, AND SOCIETY 207 (Austin Sarat & Susan Silbey eds., 1995).

mobilization, through the processes of framing reality and disputing meanings.[9] Using these lenses, Ziegler tells the history of the right to privacy, inside and outside the abortion field, in institutional and non-institutional arenas. She shows how social movements inventively used interpretations of *Roe* to sustain new legal and political battles, which amplified the decision's effects but also tested the limits of the right to privacy.

In pursuing the political life of the decision and more specifically the right to privacy, the book travels through very different fields of dispute, from the circumscribed right to abortion to a range of issues related to self-determination and personal liberty. *Roe* proved to be a very flexible resource for social movements.

Inside abortion politics, the appropriation of the decision by the pro-choice movement was not exactly faithful to the written decision. From the beginning, *Roe* was equated with the "right to choose," an idea that was not framed in that way by the Supreme Court. Understandings linked to self-determination and the right to make decisions about one's own body became the most commonly spread interpretation of *Roe* and the one that most easily travelled through different disputed fields. *Roe* was seen by different groups as an opportunity to advance an agenda on sexual liberty, including sex-education and same-sex relationships.

But the potential of the "right to choose" argument overflowed beyond the field of sexual liberty. Right-to-die movements have mirrored this line of thought in pursuing laws and court decisions. From the perspective of legal scholars, it is fascinating to observe how each adaptation also entailed a redefinition of privacy rights. In this field, the right to privacy was connected to sophisticated ideas of choice linked with the constitutional right to maintain identity and independence and avoid the loss of dignity. In addition, the disability movement came on the scene to promote a different reading of the right to privacy. In order to differentiate the situation of abortion from end of life decisions, this movement argued that disabled people would choose to die because they suffer prejudice and lead stigmatized lives. In doing so, the question of structural conditions in which people make decisions was brought to the choice debate.

These interpretative shifts show that disputes on privacy rights involved not only expanding the influence of the decision to different causes, but also advancing very different ideas regarding the decision's contents. The National Organization for Women (NOW), for example, used *Roe* to campaign for rape law reforms, arguing that the right to control one's body would encompass state protection against private acts of violence. It was a considerable deviation from the more traditional interpretation that involved merely demanding no undue intervention from the state in intimate decisions. Another inventive—and somewhat paradoxal—adaptation of the language of privacy was made by gay rights activists to demand more than just tolerance for acts practiced in intimacy, but the right of gay-couples to publicly display affection.

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9. On framing processes, see David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464 (1986); and Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611–39 (2000). And for applications of this concept, see Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718–61 (2006); Lisa Vanhala, *Anti-Discrimination Policy Actors and Their Use of Litigation Strategies: The Influence of Identity Politics*, 16 J. EUR. PUB. POL'Y 738–54 (2009).

The efforts to remake *Roe* uncover the dynamics of legal mobilization. Rather than pursuing radical changes, actors explore the plasticity of the legal language through interpretative moves that account for gradual and often incremental changes. In the case of privacy rights, Ziegler shows how interpretative disputes that frequently reached courts and sometimes got their support, allowed for large variations and different applications of the right to privacy, from individual models and consumerist frames to anti-discrimination and welfare policies to guarantee free and informed decision. But the book also shows the limits of privacy rights.

Gay and lesbian groups experienced these limits when it became clear that they needed more than to be left alone to make decisions. Anti-discrimination arguments and demands for state support for the AIDS crisis, as well as the importance of portraying homosexuality not as a matter of choice, but of sexual orientation, made organizations linked to these movements eventually abandon *Roe* as a symbolic resource.

Limitations of the same nature became evident as the right to refuse treatment based on *Roe* was mobilized to advocate reform of the mental health care system. The reform ended up backing a consumerist turn in mental health treatments and the privatization of care, so families increasingly were burdened with the deinstitutionalization of patients. As mental-health initiatives and services lost funding, mentally ill and disabled patients were left unprotected. Advocates stressed the importance of government aid and the inability of their clients to survive on their own, yet this didn't correlate with defending the patient's right to choose.

Battles against regulation of medicine were also fertile soil for privacy rights arguments, aligning civil libertarians, progressive-leaning groups interested in holistic therapies, champions of health markets, and far-right groups. Patient privacy entailed different views of healthcare and patient-doctor relationships. For some, it was important to limit discrimination against gays and lesbians, for others, *Roe* would keep business operations safe from state regulation. For the Laetrile movement, a non-approved drug supposedly efficient for cancer treatment, *Roe* recognized the right to choose. On the opposite side, defending the FDA regulation, the American Cancer Society (ACS) read *Roe* as reinforcing the interest of the state in protecting public health, just as *Roe* recognized a similar interest in the regulation of abortion in later stages of pregnancy. The development of this case eventually showed how "the right to choose" argument fell short when confronted with the question of efficacy and the government's interest in protecting public health.

Through historicizing the social battles involved in an iconic liberal right to privacy, Ziegler proves the flexibility of legal interpretation's boundaries and the potential use of "rights language" in social struggles. The book is also simultaneously a history of the ambivalences and limits of liberal legal categories, and fuels an important reflection of critical legal scholars.[10]

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10. For example, Duncan Kennedy, *Nota sobre la historia de CLS en los Estados Unidos*, 11 DOXA 283–93 (1992); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002); María Eva Miljiker, *Duncan Kennedy y la Crítica a los Derechos*, 7 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 91–100 (2006); Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515 (2009); LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

In this sense, she also shows that privacy rights can be used by actors with very different political orientations within an ideological spectrum. The fact that conservatives no longer use *Roe* as a political-legal resource is linked to a shift in the political environment rather than having exhausted its potential for advancing their causes. The polarization around abortion that occurred in the 1980s made the use of *Roe* arguments by conservative groups or politicians linked to the Republican party a taboo. It is interesting to note that the relationship between abortion disputes and party politics plays a role in both books, revealing another specific feature of legal battles—as they occur according to the inner logics of legal interpretation, they respond and at the same time reshape political contexts.

Reconfiguring Abortion Disputes in the USA

The backlash to *Roe* has been an incremental strategy, similar to the shift in anti-abortion activist organization. *The New States of Abortion Politics* helps us to understand this incremental chipping away of *Roe* throughout history, portraying the development of the anti-abortion mobilization and the mutation both of its actors and strategies.

Drawing on "political opportunity" and "resource mobilization" frameworks, the book narrates the transition of anti-abortion mobilization from a disorganized field of activism based on ad-hoc lawyers, grassroots front-clinic activism, Christians who were aiming to isolate themselves from national politics, and a cause with irregular support from the Republican party to an increasingly professionalized field with highly organized and well-funded legal organizations and strong ties with party politics. This process was accompanied by a trial and error strategy that challenged the limits and strength of the decision at federal and local levels.

Pro-choice's victory in *Roe* came before its opponents were organized to counterattack. Initial counter reactions came from Catholic groups, while the Republican Party, Protestants, and Evangelicals were not yet mobilized to resist it. In fact, important Republican politicians were even pro-choice, and abortion only became a party-dividing issue later on, when Ronald Reagan perceived its potential electoral gains.

During the 1980s until the mid-1990s, anti-abortion politics were mostly grassroots focused on informal and direct actions, which could become violent. Mobilization varied from rallies outside clinics, patient and health worker harassment, clinic bombings, and even cases of abortion providers being kidnapped and murdered.

Violent episodes weakened front-clinic activism and functioned as political opportunities for the creation of laws regulating anti-abortion activism in state legislatures, which, in a way, propelled the dispute back to institutional arenas. One of Wilson's chapters is devoted to describing how front-clinic activism became a battlefield per se. For decades, disputes generally involved the passing of buffer zone bills by state legislatures and the challenging of their constitutionality in courts on the basis of the First Amendment, with judicial battles eventually climbing to the Supreme Court. The final blow on these clinic-front regulation disputes came from the Supreme Court only in 2014, with the *McCullen* case judgement. In a nine-zero vote reversing what was once considered a "well-

settled abortion clinic/buffer zone jurisprudence,"[11] the Supreme Court struck down the Massachusetts law regulating street front-clinic protests. Unlike previous legal disputes, which were argued by ad-hoc, volunteer lawyers and local organizations, *McCullen* was filed by a group of well-trained lawyers linked to the Alliance Defending Freedom (ADF), a high profile national organization, with an impressive budget of $40 million in the 2012 fiscal year, which demonstrates the new anti-abortion field configuration.

Contributing to much needed literature on conservative activism, Wilson details the process of anti-abortion activism professionalization that formed a powerful network of elite organizations, allied with Christian law schools, top law firm lawyers, professional fundraising systems, staff training programs, and a national acting network capable of communicating, supporting, and transferring expertise to local actors. This process completely changed the available resources to anti-abortion advocates, who over the last three decades became well-equipped to fight in institutional arenas and implement a less confrontative, incremental strategy.

A 1985 document found by the author in the government's archive prophetically symbolizes modern abortion politics: a gradual strategy made possible by a confluence of factors, but especially by the widening of political opportunities for anti-abortion groups in the Supreme Court. Signed by the then Justice Department attorney and now-sitting Supreme Court Justice, Samuel Alito, the memo recommended as the best strategy to "mitigate" *Roe*'s effect, the increase of abortion regulation in order to "burden" the exercising of the right. According to the document, an incremental approach would even be "preferable to a front assault on *Roe v. Wade*."[12]

In fact, after initial initiatives that challenged *Roe* in a more confrontational way, such as the passing of a constitutional amendment and bills advocating the recognition of life or legal personhood from conception, the anti-abortion strategies moved to more indirect—although no less effective—attacks. Since the mid-1990s the battles became concentrated on regulating abortion services. This strategy involved passing laws in state legislatures that amplified the possibility of states to restrict abortion access by requiring legal requirements, for example, parental and spouse consent, counseling processes, mandatory waiting periods, ultrasounds, and viability tests. All these requirements were designed to discourage women from performing abortions. As a founder of the National Right to Life Committee stated, "it doesn't matter if abortion is legal if it is inaccessible."[13]

Another pillar of this successful strategy is to move legal controversies from states to the federal scale in the Supreme Court. In *Webster v. Reproductive Health Services*,[14] the Supreme Court upheld a Missouri regulation that required fetal viability tests for pregnancies of twenty weeks or more. In *Planned Parenthood v. Casey*,[15] the Supreme Court adjudicated the Pennsylvania law that required informed consent, a twenty-four-hour waiting period, parental consent for minors, and spouse notification. The Court

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11. WILSON, *supra* note 6, at 25 (quoting Judge Selay).

12. *Id.* at 73.

13. Deana Rohlinger, *Moving Forward or Standing Still? The Battle Over Abortion in the 21st Century*, MOBILIZING IDEAS (Mar. 4, 2013), https://mobilizingideas.wordpress.com/2013/03/04/moving-forward-or-standing-still-the-battle-over-abortion-in-the-21st-century/.

14. *See* 492 U.S. 490 (1989).

15. *See* 505 U.S. 833 (1992).

upheld all requirements except the last one. Although *Casey* didn't properly overrule *Roe*, it dismantled the system of trimester abortions, substituting it for one based on fetal viability, a mobile and disputable target, that tends to move backwards as medical technology advances.

The expansion of the legal parameters to regulate abortion by the Supreme Court signaled an environment of political opportunities for restricting abortion, which fueled the passing of hundreds of regulations. Creative new ideas to limit abortion access emerged, anti-abortion strategies turned to the regulation of clinics through TRAP (Targeted Regulation of Abortion Providers) laws. Under the disguise of increasing women's safety and health, these regulations imposed frequently unnecessary requirements on abortion services facilities, such as physical building requirements, unnecessarily emulating those of ambulatory surgical centers or location preconditions like being a certain distance from hospitals and schools. These regulations turned out to be so onerous that many abortion clinics have since closed down. This movement that would practically lead to the extinction of abortion services in some states, like Texas, found a limit in the Supreme Court decision on *Whole Woman's v. Hellerstedt*[16] which recognized that the regulation could not put an undue burden on the exercising of abortion rights.

The decision was considered a "mid-course correction"[17] that set some limits on more aggressive types of abortion laws, but it didn't close the door for continuing regulation, nor reverse the current scenario in which existing state regulations jeopardize access to abortion services.

This long history of legal battles highlights the Supreme Court's role in establishing the paradigms in which interpretative and legislative battles move each time the courts intervene in disputes. *Casey* moved the standards to allow for more regulation than *Roe*. *Hellerstedt* established a limit and stalled more radical attacks on abortion services, while still allowing for creativity in diminishing the circumference limits of the liberty established by *Roe*. As usually happens in legal battles, each ruling reframes and gives new boundaries to the dispute, within which activists continually have space to explore a ruling's grey zones.

CONCLUDING NOTES ON *ROE*'S LEGACY AND RESILIENCE

When assessing the relationship between law and social change, Michael McCann calls the "legacy phase"[18] the complex and subtle assessment of the aftermath of rights-based mobilization for people, relationships, and institutions, including changes in movement's organization, policy reforms, citizen's lives and legal consciousness. Legacy assessments involve short-term and long-term implications, as well as "far more general or unintended implications" that he purposely leaves open to debate, as these depend on

16. *See* 136 S. Ct. 2292 (2016).

17. CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA 37 (2017).

18. Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI. 34 (2006).

empirical and multi-focused assessments.[19]

Considering this broad definition of impact, the two books provide different histories of *Roe*'s aftermath, each of which offers a unique view of its legacy. Ziegler narrates *Roe*'s use outside abortion politics, showing the wide potential of a decision as raw material for further legal battles that transcend a decision's own subject matter and field of application. But she also shows that legal concepts, although flexible and maneuverable, experience limits of legal, institutional, and political nature.

On a different strand, Wilson dives into the decision's influence in reshaping abortion politics and in reconstructing the opportunity structure within movements' development.[20] He shows how *Roe* reshaped the abortion battlefield, established its boundaries, and stimulated the emergence of sophisticated activism that would in turn redefine the very limits and legacies of the decision. The brutal professionalization of the anti-abortion activist field coupled with an environment of political opportunities and allies set the stage for an incremental but successful strategy of chipping away at *Roe* through uninterrupted and multi-level legal battles.

Legacies are generally mixed, contingent and variable and it is difficult to draw a clear line between positive and negative changes, or provide definitive answers on a decision's empowering effects on citizens.[21] Abortion politics highlights this ambivalence in outcome. On one side, *Roe* had an overarching effect and has been used as a mobilization resource for a variety of social movements. On the other side, although proving itself extremely resilient, *Roe* has been eroded by a prolonged counterattack featuring a new crop of activism, a complex federal system, and legal battles involving state legislatures and courts.

Returning to the initial debate on the value of legal mobilization, the books spotlight that only empirical research that connects legal battles and political processes produces the situated knowledge able to extract political and social meaning from legal interpretations. They make a distinctive contribution to the growing debate on the effects of litigation strategies and court decisions on the intersection of social movements and laws, and their mutually constitutive effect,[22] that is, the fact that law shapes social movements and social movements transform a law's meaning and impact.

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19. *Id.* at 34.

20. *See also* ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION (2006).

21. McCann, *supra* note 18, at 19.

22. *Id*. at 34–35.