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Abortion, Politics, and the Courts: Roe v. Wade and Its Aftermath

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ABORTION, POLITICS, AND THE COURTS: ROE V. WADE AND ITS AFTERMATH. By *Eva R. Rubin.* Westport, Conn.: Greenwood Press. 1982. Pp. viii, 211. $25.

In *Abortion, Politics, and the Courts*, Eva Rubin attacks a topic that has both specific and broad dimensions. She specifically describes the abortion reform movement in the United States from the early nineteenth century through 1980. Rubin identifies three stages in the evolution of the abortion controversy: (1) the fight to legitimize abortion through legislative reform; (2) the switch from legislative reform efforts to the promotion of change through the judicial process; and (3) the aftermath of the reformers' great victory in the Supreme Court, *Roe v. Wade*. Rubin also uses abortion reform as a vehicle for making a broad comparison of social change through legislative reform and change through the judicial process.

The first stage of the abortion reform movement began with state criminalization of abortion in the nineteenth century. Abortion went from complete legality in 1821 to complete illegality by 1880. The legislative reform movement, however, did not gain momentum until several factors converged in the 1960's. One such factor was the perceived unfairness of the American Law Institute's 1959 draft Model State Abortion Law. The law created a limited, cumbersome and expensive procedure for legal abortion that would benefit only "persistent and knowledgeable women" (p. 27). Other factors also encouraged the abortion reform movement. A 1962-65 epidemic of German measles and the birth of the "Thalidomide babies" increased public support for abortion. The 1966 formation of the National Organization of Women (NOW) provided the supporters of abortion reform with an organizational structure (pp. 20-23).

Despite these encouraging signs, the results of lobbying for change in state abortion statutes were disheartening. Rubin traces the absence of reform to the inherent conservatism of legislatures, which like to "let sleeping dogs lie" (p. 29). Disillusioned reformers

concluded that winning over public opinion and a majority of state legislators was too difficult.

Abortion reformers turned from state legislatures to the courts. They embarked on a "litigation campaign," bringing a series of court challenges to state abortion laws (pp. 29-55). Although the abortion proponents' litigation campaign was inspired by the civil rights litigation campaign of the 1950's and 1960's, it was unique in several ways. The civil rights litigation campaign had strong organizational ties; the abortion litigation campaign was loosely put together. While civil rights lawyers formed a centrally located legal staff, the abortion campaign lawyers traveled from city to city to help with cases (p. 4).

The abortion litigation campaign produced a "flood" of conflicting state and federal court rulings (pp. 41-45). The Supreme Court, "bombarded with appeals and petitions for *certiorari*" (p. 53), finally realized that it must rule on abortion. In *Roe v. Wade*,[1] the Supreme Court held that the Constitution protects a woman's right to abortion in many situations.[2]

Surprisingly, *Roe v. Wade* has proved to be a mixed blessing for abortion proponents. The decision united the opponents of abortion, who began a national crusade. The anti-abortion forces pushed for a constitutional amendment banning abortion, lobbied in state and national elections, and persuaded Congress to eliminate abortion services from many federal programs.[3] Abortion supporters, caught off guard, blocked the most extreme attacks but failed to make positive gains in expanding abortion rights. Rubin concludes that "[a]fter almost a decade of battling in the courts, the legislatures, and the political arena, it is still unclear what the final outcome of the conflict over abortion will be" (p. 169).

Rubin uses the abortion controversy as a focal point for her comparison of reform through the judicial process and reform through legislative change. She points out that bringing cases in court is much easier than convincing state legislators and the general public of the need for reform. A court will hear any good legal claim meeting minimum technical requirements, and its decision becomes pre-

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

2. Specifically, the Court held that the Constitution prohibits state regulation of first trimester abortion. During the second trimester, the state may regulate abortion only to promote maternal health. The Constitution allows the state to forbid third trimester abortion, except when abortion is necessary to preserve the life or health of the mother. 410 U.S. at 164-65.

3. For example, Congress has passed restrictive anti-abortion riders to a variety of bills, including the Health Programs Extension Act, the National Science Foundation Authorization Act, and the Legal Services Corporation Act. UNITED STATES COMMISSION ON CIVIL RIGHTS, CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMIT CHILDBEARING 11 (1975). Some believe that these congressional actions are unconstitutional, for they undermine a right that the Supreme Court has found to be constitutionally protected. *Id.* at i.

cedent. A successful litigation campaign produces a series of precedents challenging an established doctrine (pp. 30-31).

However, a litigation campaign has certain drawbacks. Opponents of the reform can also use litigation, this time to exploit ambiguities in decisions favorable to the reformers. The full effect of a given case can be narrowed, delayed or avoided by such action (p. 115). Although the reformers need only win over the courts during a litigation campaign, the ultimate success of the campaign depends on cooperation from other branches of government and public support. Rubin suggests that this necessary cooperation and support is missing when success in the judicial process comes too abruptly. The result is a fierce counterattack that can cripple the new policy (pp. 166-67). Rubin fails to discuss another possible problem with litigation campaigns. If the courts use cases to cause social change, they may undermine the authority and prestige of the judiciary.[4]

Some advocates of abortion reform, adopting the above reasoning, believe that more substantial and durable gains would have been made through the legislative processes (p. 166). Rubin disagrees. She describes the abortion issue as "particularly unsuited to rational and careful consideration in democratic deliberative bodies." Rubin bases her opinion on the highly charged emotional content of the abortion issue, its entanglement with moral and religious issues, and the ferocity of pressure group activity on the subject (p. 170). Other commentators agree with this conclusion.[5]

Rubin makes a novel comparison between the litigation strategies of the abortion reform movement and the civil rights movement. However, she fails to develop this comparison to its full potential. Rubin tells us that the civil rights litigation campaign, while successful, had to wait years for full judicial enforcement. Did the abortion campaign follow the same pattern? Was public opinion equally important in the two campaigns? Why do the anti-abortion forces appear to be more successful than the opponents of civil rights? A useful analysis of reform movements directed at the courts would answer these and similar questions.

Abortion, Politics and the Courts provides an interesting look at the abortion controversy, but it fails to tell us when and why a movement should bypass the legislature and turn to the courts. Rubin also fails to discuss the propriety of courts making major policy decisions. Perhaps this book will inspire the additional research and analysis that this topic deserves.

4. *See* A. NEIER, ONLY JUDGMENT 9-30, 236-44 (1982) (reviewed in this issue).

5. *See, e.g.*, A. NEIER, *supra* note 4, at 121.