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### Permalink

<https://escholarship.org/uc/item/6vk059sx>

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### Publication Date

2005-08-12

# In Due Time: The Courts and Backlash

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**Abstract:** This essay explores the nature of active opposition to judicial decisions—“anti-judicial backlash.” Are there patterns to backlash? Who are the actors? How is backlash expressed? What are the consequences of backlash? On what grounds do individuals or institutions oppose judicial decisions? Viewing the courts as one of a range of actors involved in the development and implementation of social reform, I question whether the use of the courts to promote social change is always the optimal choice—even when the courts support the arguments of change agents. I develop a set of typologies to analyze opposition to *Roe v. Wade* and the School Prayer Cases in order to explore the nature and consequences of anti-judicial backlash. Using these typologies I analyze whether similar patterns of backlash are emerging in response to *Goodridge v. Department of Public Health*. I find that anti-judicial backlash can significantly hinder the impact of court decisions and can create unanticipated obstacles and setbacks for the movement as a whole.

**Key Words:** court, court decision, judicial decision, judicial opinion, backlash, opposition, social change, same-sex marriage, abortion, school prayer.

# **In Due Time: The Courts and Backlash**

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Prepared for Presentation at the  
Annual Meeting of the Southern Political Science Association  
January 6-8, 2005, New Orleans, LA

## **In Due Time: The Courts and Backlash**

**Abstract:** This essay explores the nature of active opposition to judicial decisions—“anti-judicial backlash.” Are there patterns to backlash? Who are the actors? How is backlash expressed? What are the consequences of backlash? On what grounds do individuals or institutions oppose judicial decisions? Viewing the courts as one of a range of actors involved in the development and implementation of social reform, I question whether the use of the courts to promote social change is always the optimal choice—even when the courts support the arguments of change agents. I develop a set of typologies to analyze opposition to *Roe v. Wade* and the School Prayer Cases in order to explore the nature and consequences of anti-judicial backlash. Using these typologies I analyze whether similar patterns of backlash are emerging in response to *Goodridge v. Department of Public Health*. I find that anti-judicial backlash can significantly hinder the impact of court decisions and can create unanticipated obstacles and setbacks for the movement as a whole.

On November 18, 2003 the Massachusetts Supreme Court ruled that, as it was written, the Massachusetts Constitution allowed for same-sex marriage. Falling short of issuing licenses to the plaintiffs, the court punted responsibility back to the Massachusetts legislature. As the state legislature began negotiating a bill to allow civil unions, the State Supreme Court, on February 3, 2004, issued a warning to the legislature that they would not accept anything less than legal marriage for same-sex couples. The case has incited a national panic. President Bush publicly scolded the courts and announced his intention to promote a constitutional amendment banning same-sex marriage. The Democratic Presidential candidates were united in their opposition to gay marriage. Several states have implemented Defense of Marriage Acts (DOMAs) or other bans on same-sex marriage. Amidst growing public opposition and a flurry of state legislative and judicial battles, some have set their eye on the Supreme Court to resolve the issue. However, legal scholars and activists have voiced concern over the use of “legal advocacy” to initiate this debate. Why the need for caution? Why are gay rights advocates

concerned? Was it in the best interests of the gay community to use the judiciary in Massachusetts to legalize gay marriage?

Many political scientists have explored the impact of the courts on promoting social change. Some have focused on the question of compliance. Do individuals and institutions comply with court decisions? What factors go into their consideration of whether to comply? Sorauf, in his 1976 analysis of the reaction to the school prayer decisions, finds that courts are not the final arbiter of change. Decisions are digested and interpreted by a range of individual actors. Johnson (1967) and Dolbeare et. al. (1971) demonstrate that compliance with Supreme Court decisions is not automatic or even eventual. Individual actors and institutions rely on a range of factors when deciding whether to comply with and how to respond to court verdicts. The decisions of these individuals and agencies, in turn, can have a significant impact on the effect of Supreme Court opinions. Often it is the decisions of these actors—sometimes at the local level—that shape the long-term success of these verdicts.<sup>1</sup> Muir (1967) conducts a microlevel analysis of individual responses to Supreme Court decisions and finds that factors such as ideology, perception of the court, presence of additional viable options, position within the community and their relationship with peers can impact how individuals interpret, perceive and respond to judicial decrees. Other scholars question the effectiveness of the court in promoting social change. Rosenberg (1991) describes a constrained court, unable to “produce significant social reform” except under very specific circumstances.<sup>2</sup> Analyzing *Brown v.*

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<sup>1</sup> Johnson argues that compliance depends on whether the court opinion is clearly articulated, whether there is room for interpretation and the existence of other formal and/or extralegal venues to continue the debate. Dolbeare and Hammond argue that compliance depends on the content/substance of the decision; attitudes toward the issue and the courts; the ability of individuals to promote compliance among a community of non-compliers; the behavior of political actors.

<sup>2</sup> Rosenberg argues that courts can impact significant social reform under the following conditions: when “there is ample legal precedent for change; *and* there is support for change from substantial numbers in Congress and from the executive; *and*, either a) positive incentives are offered to induce compliance; or b) costs are imposed to induce compliance; or c) court decisions allow for market implementation; or d) administrators and officials crucial for

*Board of Education, Roe v. Wade* and other landmark Supreme Court cases, Rosenberg concludes that “U.S. courts can almost never be effective producers of significant social reform.”

(338) Major judicial victories are “often more symbolic than real.”(341)

However, surely the courts *do* play an important role in impacting social change, beyond their power to promote compliance. Court decisions in a pluralist society help activate public opinion, invite reaction and mobilize opposition. Individuals digest and interpret decisions, calculate the pros and cons of compliance, and use decisions to affirm attitudes toward the contested issue and the court in general. Court opinions can serve as a launch pad for counter-movement attacks, may inspire opponents to seek alternate venues for redress, redefine or reprioritize the terms of the debate, elevate issues to the public realm and call into question the very nature of the judiciary. This essay explores the nature of active opposition to judicial decisions—“anti-judicial backlash.” Are there patterns to backlash? Who are the actors? How is backlash expressed? What are the consequences of backlash? On what grounds do individuals or institutions oppose judicial decisions? Viewing the courts as one of a range of actors implicit in the development and implementation of social reform, I question whether the use of the courts to promote social change is always the optimal choice—even when the courts support the arguments of change agents. Understanding the nature of anti-judicial backlash allows legal advocates to measure the consequences of legal advocacy beyond the verdict, recognizing the important impact that court decisions have on public opinion, interest group mobilization, and the legislative process. I analyze backlash to *Roe v. Wade* and the School Prayer Cases to explore the nature and consequences of anti-judicial backlash. I then conduct a brief analysis of the response to legal advocacy approaches to the same sex marriage debate.

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implementation are willing to act and see court orders as a tool for leveraging additional resources of for hiding behind.” (36)

## A Little Caution Goes a Long Way

Within the context of the controversy surrounding gay rights, particularly gay marriage, legal scholars and advocates have cautioned gay couples and activists from utilizing the courts to legitimate their rights. Some argue that the courts will spur on opposition, endangering the very cause that the courts sought to protect. Cass Sunstein states that “there might be good reason for caution on the part of the courts. An immediate judicial vindication of the principle could well jeopardize important interests. It could galvanize opposition. It could weaken the antidiscrimination movement itself. It could provoke more hostility and even violence against gays and lesbians.” (Estlund and Nussbaum, 225) Douglas Reed, in his analysis of the Hawaii Supreme Court’s same-sex marriage decision finds that despite the power of the courts, opposition can still be extremely effective in dismantling judicial victories. After the Hawaii Supreme Court ruled in favor of same-sex marriage, Hawaiian citizens, through referenda, passed a constitutional amendment limiting marriage to heterosexual couples. By overestimating the authority of the courts, argues Reed, gay rights advocates did not account for the impact of “popular constitutionalism”<sup>3</sup> on the sustainability of the decision. (Reed, 925)

Others argue that, although valid in principal, a right to gay marriage would be politically untenable and that courts should tone down the rights rhetoric. In his analysis of the Vermont Supreme Court’s opinion on gay marriage Andrew Koppelman states that “the mushy rationale that the Vermont court adopted” when granting gay Vermonters the right to civil unions, not gay

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<sup>3</sup> Through popular constitutionalism “the meanings of state constitutions--in both legal and political senses--are defined through both extra-judicial and judicial mechanisms... The resulting form of constitutionalism...advocates a far less text-centered and judge-centered approach than previous accounts of the ‘new judicial federalism.’ Indeed, popular constitutionalism means that fundamental state commitments are far more readily transformed through the political activity of citizens than is possible under the U.S. Constitution. The result is that state constitutional law is less circumscribed by legal norms and more defined by political coalitionbuilding and mobilization. The interpreter of state constitutions, under popular constitutionalism, is less likely to be a judge and more likely to be a mobilized and politically active citizenry. ” (Reed, 875)

marriage “provided maximum flexibility. This has obvious attractions.”(Koppelman, 147) He compares the court’s toned down approach with the Warren Court’s landmark decision in *Brown v. Board of Education*. “Prudence,” states Koppelman, “may sometimes dictate that courts obscure the very principles that they are defending. *Brown* is commonly remembered, inaccurately, as holding that segregation was wrong because it treated blacks unequally.” (p. 148) However, *Brown* was actually “cautiously written and cautious with its results. It did not order the immediate desegregation of the schools.” (p. 148) Koppelman argues that “Warren...knew something about politics. He understood how vulnerable the Court was in taking on segregation, and he did not think it prudent to offend the South by too vigorous a denunciation of its oppressive social system.”(p. 148)

Others argue that the legislature should be given an opportunity to determine the outcome. In a 2001 Albany Law Review article, William Eskridge applauds the Vermont Supreme Court’s ruling in *Baker* because it “gave the political system an opportunity to create a regime of equal rights for same-sex couples” by giving the legislature the choice of allowing same-sex marriage or creating a separate but equal institution that conferred upon gay couples the rights and benefits provided married couples by the state of Vermont. (p. 864) “The same-sex marriage movement teaches us that process matters and that equality cannot be shoved down unwilling throats, especially by the judiciary.” (p. 881) Cass Sunstein argues that “elected officials” have greater latitude and discretion to tackle controversial debates. “As part of their constitutional duty, elected officials and citizens themselves should clearly state the basic governing principle, which is that discrimination on the basis of sexual orientation is morally and legally unacceptable.” (Estlund and Nussbaum, 225)



Finally, some scholars contend that the courts should avoid contentious questions of morality. John Hart Ely, in *Democracy and Distrust*, states that the question regarding gay rights

thus reduces to whether the claim is credible that the prohibition in question was generated by a sincerely held moral objection to the act (or anything else that transcends a simple desire to injure the parties involved). It is tempting for those of us who oppose laws outlawing homosexual acts to try to parlay a negative answer out of the fact that, at least in the case of consenting adults, no one seems to be hurt in any tangible way, but on honest reflection that comes across as cheating. (p. 256 n93)

### *Not Just a Gay Rights Issue*

These arguments are not new, nor are they confined to the gay rights debate. Practitioners and legal scholars along the ideological continuum have explored the tension between the judiciary as arbiters of morality and virtue and a “bounded judiciary” institutionally restricted and answerable to political and public institutions. Conservative legal scholars, such as Robert Bork, argue that “justice in a larger sense, justice according to morality is for Congress and the President to administer, if they see fit, through the creation of new law.” (Bork, 6) Walter F. Murphy, an advocate for the “activist” court <sup>4</sup> asserts in *Elements of Judicial Strategy* that

where the Justice is less sure about the support that will be forthcoming, he might decide to avoid for a time decisions on this issue or to restrict them to narrow, procedural points (p.172)...When he could not avoid a decision on the merits, the Justice might reckon that the opposition was so strong that in the long run it would do more than good to his policy and to the Court to make the sort of ruling he really wanted or even to write a compromise opinion. (p. 173)

Alexander Bickel in the *Morality of Consent*, argues that “the general good is achieved by pragmatic trial and error—having regard to principle, but not dogmatically bound to it in action—which is the genius of democratic institutions.” (p. 105) A sensitive Court

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<sup>4</sup> Murphy states that constitutional interpretation “requires finding and justifying one’s understanding of the fundamental values and aspirations the constitutional text may reflect” also recognizes that there is a time for caution.

tends to attack problems at the retail, in the smallest possible compass, illuminating ultimate principles in the glare of its headlights, as it were, but seldom speeding ahead to seize such principles and to deploy them for the definitive, authoritative resolution of large social and political issues. (p. 106)

## **The Literature on Backlash**

It is clear that legal scholars, regardless of their perspective on judicial activism believe that there is a need for the judicial caution and prudence, even at the expense of high principles. But why are these legal scholars so wary? What is at risk if the judiciary does not “resist the seductive temptations of moral imperatives?” (Bickel, p. 142) Several scholars have addressed pieces of this question, through empirical studies and theoretical analyses. Below is a review of the most salient.

Walter F. Murphy, in *Elements of Judicial Strategy*, provides a robust framework through which to begin to identify and sort the mechanism of backlash to judicial opinions. Murphy organizes anti-judicial backlash into the following categories: lower court, federal, state, and interest group. Contrary to popular belief lower courts do provide a check on Supreme Court decisions. Although philosophically bound to uphold Supreme Court decisions, in practice there are few incentives for state courts or lower federal courts to follow high court dicta. Murphy points out four institutional factors that provide room for lower court backlash. 1) Supreme Court decisions typically return cases back to the lower courts for review; 2) remand instructions are typically vague dictating that “litigation be handled by further ‘proceedings not inconsistent with’” the opinion (p. 24); 3) lower courts are not professionally bound by the Supreme Court. The career paths of lower court judges are not tied to their cooperation with Supreme Court decisions. Murphy argues:

State courts are staffed through a variety of ways; but the judges in these courts do not owe their original appointment or tenure to the pleasure of the Supreme Court. Since they are chosen according to different considerations, it is inevitable that, although Supreme Court and lower court judges share many basic values of American society, they have many different specific values, outlooks, and ambitions which produce conflicting interpretations of law and policy. (p. 25)

Furthermore, the constraints of case review imposed upon the Supreme Court decreases the likelihood for review. The Supreme Court only reviews a handful of cases each year. Finally, 4) lower court justices face the same ethical dilemmas confronted by Supreme Court justices. “A judge who felt that policy endorsed by the Supreme Court in a given field was unwise, unconstitutional or unjust,” may decide to act in accordance with his own moral code or values. (p. 25)

The federal government has more obvious methods of checking the jurisdiction of the judiciary. In addition to overriding judicial decrees through constitutional amendments, the federal government has the power to impeach justices, procedurally bind the courts, “confer or withdraw federal jurisdiction,” (p. 26) decrease funding, and alter the structure of the judicial bureaucracy. Individual politicians may publicly criticize court decisions to placate and galvanize irate constituencies. (p. 26)

State officials can diminish the influence of judicial decisions by refusing or stalling the compliance process. Similar to federal officials, they may stir up opposition “to make the Court’s policy practically unworkable.” (p. 28) Governors and state legislators may also apply pressure to the federal government to alter the outcomes of judicial decisions. Lastly, judges should also consider the reactions of interest groups in their capacity as representatives of the public. (p. 204)

Empirical studies have considered, individually, the reactions to judicial decisions by lower courts, public opinion, federal bureaucracies, and Congress. In a 1998 study, Grosskopf

and Mondak analyze the effects of judicial decisions on public confidence in the Supreme Court. Focusing on *Webster v. Reproductive Health Services* and *Texas v. Johnson*, chosen for their issue salience, Grosskopf and Mondak use Harris polls to demonstrate that “disagreement with one or both decisions substantially reduced confidence in the Court but agreement with both edicts brought only a marginal gain in confidence.” (p. 633) Grosskopf and Mondak find that after *Webster* and *Texas* the percentage of individuals who expressed a great deal of confidence in the Supreme Court decreased from 30.3% to 18.1% immediately after the decisions and 17% one month later. The percentage of individuals with hardly any confidence in the Supreme Court increased from 14.2% to 18% just after the decision and 20.0% one month later. Controlling for other potential causes of changes in Supreme Court confidence, these decreases were caused by the two decisions.(p. 641) Additionally, they find that negative reactions weigh more heavily than positive reactions—that even when individuals agreed with one decision and disagreed with the other, their confidence in the Supreme Court decreased. Declines in confidence among this group are larger than the increases in confidence expressed by those who supported both rulings. (p. 648) Their findings demonstrate that there is reason for the Supreme Court to be concerned with public backlash. That controversial decisions—opinions which run counter to public opinion—“may cause erosion of public support” for the judiciary. (p. 651)

Closely related to public confidence is the response of public opinion to Supreme Court decisions. Public response to court decisions has been difficult to measure and categorize. Most research has focused on reactions to Supreme Court cases, particularly those with high issue salience due to the public’s general lack of interest in or knowledge of the workings of the judiciary. (Franklin and Kosaki, 1989). Positive Response Theorists have asserted that the Supreme Court changes public opinion by establishing the “law of the land.” The public accepts

the Supreme Court ruling and ceases the debate. (Johnson and Martin, 1998, 299) To test their theory, researchers have regarded public opinion as a monolith, disregarding group cleavages. (Franklin and Kosaki, 1989, 753) In doing so, researchers have missed the impact of these decisions on public opinion. In 1989, Franklin and Kosaki developed the Structural Response Hypothesis which states that even if the overall position of public opinion remains the same, Supreme Court decisions may cause shifts in the structure of opponents and supporters. Specifically, they assert that “[a] satisfactory theory of Supreme Court impact must recognize that Court decisions do not necessarily bring about agreement and may instead sow the seeds of dissension.” (p. 754) Franklin and Kosaki test public reaction to *Roe v. Wade* in the immediate aftermath of the decision looking not at aggregate public opinion but at changes in group cleavages. They found that on the issue of discretionary abortions “the Court’s impact was primarily to increase the polarization of groups on the issue” (p. 759) —group intensity became more codified on both sides. For health-related abortions, group differences were unchanged, but there was an overall increase in support for these types of abortions.

Spriggs (1997) measures the responsiveness of federal bureaucracies to Supreme Court orders, testing the theory that bureaucracies “are more likely to comply when...environmental conditions favor the Court’s position because the costs of noncompliance appear higher.”(p. 570) Spriggs tests a set of hypotheses relating to characteristics of the courts, agency profiles and external actors.<sup>5</sup> Spriggs finds that court characteristics do affect the compliance rate of bureaucracies. Agencies were less likely to comply with statutory or constitutional rulings because they require “greater substantive policy change.” (p. 580) Remands “provide

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<sup>5</sup> Specifically, Spriggs’ hypotheses questions the effects of court order specificity; whether the ruling was based on statutory, constitutional, or administrative law; the presence of a remand, the extent of disagreement among the justices; whether the ruling affects a program or a single agency; whether the decision affects rulemaking; the agency’s prior litigative history; the agency’s age; the strength of the opposition; and the number of amicus curiae briefs on the inclination of the bureaucracy to comply.

maneuvering room” (p. 581) and decrease compliance. However, order specificity and disagreement among justices did not significantly affect compliance, nor did agency characteristics. Finally, “agencies with greater amicus curiae support” (p. 581) are less likely to comply. Spriggs, however, did find that, in general, bureaucracies do comply with judicial orders, but that “bureaucracies were more likely to comply with Court opinions if the costs were clearer and more credible.”(p. 584)

Charles Johnson (1979) analyzes the reactions of the lower courts to Supreme Court decisions, testing the assumption that “the greater the original support for a decision at the Supreme Court level, the greater the subsequent compliance with that decision by the lower courts.” (p. 792) He tests the impact of “size of the voting majority,” “the size of the majority opinion,” “dissenting justices and dissenting opinions,” “and majority opinion authorship” (p. 793) on lower court compliance or resistance to Supreme Court decisions. He classifies reactions from lower courts into three categories: “compliant treatment or reactions, evasive treatment or reactions and discord or agreement within multi-judge courts” (p. 794) and separates the lower court judicial bureaucracy into two categories: Court of Appeals and Federal District Courts. Johnson finds “that the degree of Supreme Court support or nonsupport for a particular case has little or no bearing on the eventual treatment of that case by the lower courts.” (p. 802) Johnson does not factor in the behavior of state courts.

Ignagni and Meernik (1994 and 1995) analyze the response of Congress to Supreme Court decisions affecting both federal and state law. In cases of federal law they look at both individual as well as institutional motivations—hypothesizing that “electoral considerations and the need to safeguard congressional power” (1994, 353) impact the likelihood that Congress will overturn Supreme Court decisions affecting federal legislation. Specifically they test the

influence of public opinion, amicus curiae briefs, decisions during election years, ideological differences, unanimous Court decisions, age of the legislation and invitations by the Supreme Court to review legislation. They find that public opinion, an increase in amicus briefs, unanimous decisions<sup>6</sup>, relatively current legislation, and an invitation to review significantly increase the likelihood that Congress will attempt to overturn judicial decisions.

Ignagni and Meernik (1995) employ a similar methodology in their study of state legislation to that used in the analysis of federal law. Changes to the model include the deletion of ideological cleavages, age of legislation, and invitation for review but the addition of issue salience, whether the Federal government files an amicus briefs, and the presence and quantity individual or multi-state amicus briefs. They find that when a majority of the public is opposed to a Supreme Court decision the likelihood of Congressional response increases by 43%. An increase in the number of amicus briefs filed increases the probability that Congress will respond. (1995, 55) Issue salience also plays a role. When national interests are at stake and the federal government and/or multiple states file amicus curiae briefs Congress is likely to respond. (1995, 56) Ignagni and Meernik also provide important reasons for analyzing responses to court decisions involving state law—an area typically ignored by researchers. Supreme Court decisions typically impact state law and the more controversial decisions—abortion, school desegregation, gay marriage—typically involve state rather than federal legislation. (1995, 44)

### **Case Studies: *Roe v. Wade* and *School Prayer***

*Roe v. Wade* and the major school prayer decisions provide the perfect lens through which to study the incidence and nature of anti-judicial backlash. Both the abortion and school

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<sup>6</sup> Most scholars argue that unanimous decisions decrease the likelihood of opposition from Congress. Ignagni and Meernik argue that unanimous decisions pose a greater threat to the legislature and therefore would invite reversal.

prayer debates are among the most contentious in recent U.S. history due in large part to judicial decisions. Both cases also share similar attributes to the current debate around gay marriage: opposition in each case tend to be religiously motivated, each case concerns arguments of Federalism, and public opinion on each issue was at best deeply divided.

### *Establishing Typologies*

Organizing backlash into a set of clearly defined typologies will help demonstrate the patterns of active opposition to judicial decisions within a dynamic, democratic, pluralist society. These typologies help identify the actors who can obstruct judicial efficacy, the nature of their opposition and their motivation.

*Lower Court:* Discussed by Murphy and tested by Charles Johnson, lower court backlash consists of decisions instituted by the lower courts that challenge the language of a Supreme Court decision. Challenging a decision includes direct refusal to implement the decision and attempts to evade the language of court decisions by finding loopholes in the language.

*State/Local Backlash:* As Ignani and Meernik argue, state or local governments are often the units on trial in Supreme Court cases. *Roe* overturned state legislation criminalizing the procedure of abortion. The School Prayer Cases addressed state and local policies regarding religion in the schools. These case studies will identify manners in which states or localities challenge the Supreme Court directives by refusing to implement changes or looking for alternative venues to argue their claims.

*Congressional Backlash:* Above I summarize Walter Murphy's outline of the manners in which Congress can curtail the authority of the Supreme Court. These cases will provide anecdotal evidence to support Murphy's theory.



*Peer Backlash:* Unmentioned in the literature above, peer backlash consists of backlash publicly expressed by legal scholars attacking Supreme Court decisions and may significantly impacting the court's reputation.

*Interest Group Backlash:* This type of backlash is characterized by the impact that a court decision has on mobilizing existing opposition or creating new opposition. According to Flemming, Bohte and Wood (1997) opinions that redistribute benefits "often expand the scope of conflict by activating new groups and accentuating old rivalries." (1225)

*Supreme Court Backlash:* The Supreme Court frequently revisits issues that they have already addressed. Often parties ask the Court to address a specific set of issues previously unresolved in preceding decisions. On other occasions they ask the Court to resolve divergent lower court interpretations of Supreme Court decisions. In some cases the Court is asked to revisit the exact same set of issues. Supreme Court backlash, therefore, occurs when the Supreme Court revisits an issue and decides not to support its prior decision. This can be demonstrated directly through reversals of previous decisions, or indirectly by refusing to hear a case that would resolve inconsistent lower court interpretations of previous Supreme Court decisions.

*Bureaucratic/Organizational Backlash:* The success of Supreme Court opinions may hinge upon organizational compliance with the decision. This can involve the creation of procedures, programs, or institutions that would facilitate implementation of the decision or may require modification to procedures, programs or institutions already in place. Bureaucratic/Organizational backlash occurs when organizations create obstacles preventing the creation or modifications of these components.

*Media:* As the conveyor of public opinion as well as a source of information that helps shape public opinion, media reactions to Supreme Court opinions may have significant effects on the impact of specific decisions. Media backlash consists of negative print media or television news coverage that articulates the feelings of an unhappy public or seeks to educate the public on the malfeasance committed by the court. Media backlash can propel other forms of backlash.

In addition to analyzing backlash through the lens of specific institutions it is valuable to identify and study the reasons for the opposition. While ideology is the most obvious root of opposition, these case studies demonstrate that institutions which are ideologically supportive of decisions may still deeply disapprove and disagree with the decision. Institutions or individuals may oppose Court decisions because they believe that the Court has usurped authority and deprived democratically elected officials from exercising the will of the people. Lastly, opponents may also take issue with the language used in drafting the opinion. These critics will recognize that court decisions are not mere judgments of “right” or “wrong.” They often provided lengthy and detailed proscriptions of how legislation should be interpreted or implemented. Opponents, while being ideologically congruent with the courts, may disagree with the opinion’s details.

### *Roe v. Wade*

On February 26, 1973 the Supreme Court ruled in favor of a woman’s right to choose to have an abortion. In addition to permitting abortions for women whose health is in danger or for pregnancies due to rape, *Roe* provided latitude for any woman to access an abortion. The opinion also established a schedule to determine when states had the authority to interfere in a woman’s right to choose. The court determined that as of the 26<sup>th</sup> week the state could exercise

the right to protect the life of the fetus and regulate abortions. Prior to the 26<sup>th</sup> week it was the woman's choice regardless of circumstance. The decision unleashed a torrent of backlash that has maintained consistent strength to this day. Abortion is typically the most highly contested issue during Presidential elections and is the subject of great debate during Supreme Court appointments. Courts have been mired in cases regarding access to abortions, the ability to express opposition to abortion and the rights of abortion providers to be free from terrorism.

This essay will concentrate on the backlash waged against the decision immediately after the decision was announced and within the succeeding five-year period. Backlash concerning recent legislation or court cases will not be examined. The most visible forms of backlash that emerge in this time period are Interest Group, Peer Group, Congressional, Bureaucratic/Organizational, State/Local, Lower Court, Media and Supreme Court.

The most prominent expression of backlash to *Roe v. Wade* came in the form of organized interest group backlash. Prior to the 1973 ruling, public support for abortion was high; states were already in the midst of modifying or repealing abortion statutes. After *Roe*, public opposition grew. (Rosenberg, 182) Virtually non-existent prior to the 1973 ruling, the pro-life movement got its start in reaction to the Court's controversial ruling—a phenomenon that many pro-choice advocates feared prior to the ruling. (Garrow, 409) Opposition to *Roe* was not black and white. Most dissenters reacted intensely to the potential for “abortions on demand” but did not take issue with a woman's right to choose when her life was in danger or if she was the victim of rape or incest. (Rosenberg, 188) The pro-life movement originated as a factious, loosely organized coalition of individuals, led by vocal religious leaders across denominations, in response to the decision. In the Fall of 1973 the National Conference of Catholic Bishops called for a “grassroots pro-life organization” to demand a constitutional amendment

establishing a “right to life.” (Garrow, 617) Though many within the Catholic Church were unconvinced of the need for this approach, in early March a Senate subcommittee “opened hearings on the right to life constitutional amendment” (Garrow, 617) that had been proposed one year prior. Among those who testified were Catholic Cardinals from Boston, Chicago, Los Angeles, and Philadelphia, marking “the first time in American history that such high-ranking church officials had appeared before Congress.” (Garrow, 617) In 1975, in response to the defeat of a Senate bill to terminate Medicaid funding for abortions, New York Archbishop Terence Cardinal Cooke announced the church’s conclusion that it was “absolutely necessary to encourage the development in each Congressional district of an identifiable, tightly knit and well-organized pro-life unit.”(Garrow, 619) Despite these strong showings, the pro-life movement got a slow start and didn’t make any noticeable political progress until 1978—five years after the decision. However, they continue to be a strong force in electoral politics at the local and national level and are beginning to make headway in more firmly establishing “rights” for the unborn.

Interest group backlash is ideologically motivated. In addition to religious motivations, many pro-life activists are identified as “married women of modest educational backgrounds who had children and were not employed outside their home.” (Garrow, 633) Activism for these women, say scholars, is a “symbolic defense of traditional conceptions of morality...[and] a hostility to freer sexual standards.” (Garrow, 633) The principles of these activists and the pro-life movement is based on “a conservative traditional notion of the role of the family and of women in society...This is accompanied by a corresponding disrespect for and hatred of the modern woman as depicted by the feminist movement.” (Garrow, 633)

Some of the most outspoken critics of the court's decision in *Roe* were legal scholars and peers in the legal community. Situated across the ideological spectrum, critics of the decision were pro-choice, pro-life, democratic, republican, liberal and conservative. Scholars disagreed with the court's ideology, their institutional usurpation and the specific language utilized in the opinion. John Hart Ely was one of the most prominent opponents to the *Roe* decision. A former law clerk for the Warren Court and a contributor to *Griswold*, upon which *Roe* is based, Ely delivered what is referred to as "the classic diatribe against *Roe*" shortly after the decision was published.

"The Wages of Crying Wolf", published in the *Yale Law Journal*, refers to *Roe* as "a very bad decision." Ely, admittedly pro-choice, questions the court's usurpation of authority, stating that "the Court has no business getting into that business." (Ely, 1973, 926) He distrusts the court's use of the constitution to justify the arguments purported in *Roe*, sound as they may be. Referring to the Court's concern about the impact the state would have on a pregnant woman's life if the state blocked her attempt to access an abortion, Ely states that "this...ought to be taken very seriously. But it has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests." (p. 932) "What is unusual about *Roe*," Ely explains,

is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus's existence is unable to overcome it—a protection more stringent...than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment. What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value from the provisions they included, or the nation's governmental structure.(p. 935)

In other words there is no justification, and more importantly, no authority for the Court's decision.

Ely also criticizes the technical aspects of the court's opinion—specifically, the court's focus on establishing a timeline for viability.

Exactly why that is the magic moment is not made clear. Viability, as the court defines it, is achieved some six to twelve weeks after quickening. (Quickening is the point at which the fetus begins discernibly to move independently of the mother and the point that has historically been deemed crucial—to the extent any point between conception and birth has been focused on.) But no, it is viability that is constitutionally critical: the Court's defense seems to mistake a definition for a syllogism. (p. 924)

In the end, although agreeing with the sentiments of the court, Ely summarizes his critique in one concise statement.

It is, nevertheless, a very bad decision. Not because it will perceptibly weaken the court—it won't; and not because it conflicts either with my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be. (p. 947)

Others took issue with the timing of the Court's decision stating that “the Court forestalled the development of one of its traditional aids for deciding difficult questions—a thoughtful lower court case law...[and] thrust itself into a political debate and stunted the development” (Garrow, 613) of critical lower court jurisprudence.

Opposition to the decision was not male-dominated. Some female scholars shared sentiments similar to Ely concluding that the Court “fail[ed] to yield a reasoned justification of the constitutional basis for protection of the woman's interest in terminating her pregnancy.” (Garrow, 612) Ruth Bader Ginsburg, who in 1973 directed the ACLU's Women's Rights Project, stated that the Court had gone too far and without justification. A better approach, says Ginsburg, would have been to simply overturn the Texas statute. Instead the court used “heavy-handed judicial intervention” which “appears to have provoked, not resolved, conflict.” (Perry, 166) Ginsburg also criticized the court's focus on medical autonomy in its language stressing

the role of the physician “to the exclusion of a constitutionally based sex equality perspective.” (Perry, 166) Sylvia Law developed a similar argument stating that the court had “falsely cast[ed] the abortion decision as primarily a medical question.” (Garrow, 614) Barbara Ehrenreich stated in the *New Republic* that the decision had “cut off what might have been a grassroots pro-choice movement...*Roe v. Wade* was tragically premature.” (Garrow, 616)

Mary Ann Glendon, of Harvard Law School, echoed Ehrenreich’s criticism, stating that “the process of legislative reform...was already well on the way to producing...compromise statutes that gave very substantial protection to women’s interests.” (Garrow, 616) In *Abortion and Divorce in Western Law* Glendon expounds upon her view attacking the decision through a comparative analysis and demonstrating that the United States is alone in providing such latitude in the provision of abortions. (Glendon, 22) Glendon regards the American approach to abortion as an unbalanced or overzealous approach to abortion rights at the expense of potential legislative considerations for the fetus. Glendon asserts that this approach—which was initiated through the court’s decision—prevents a reasoned dialogue regarding the provision of abortions.<sup>7</sup> Glendon calls for a middle of the road approach, stating that “at a minimum, replacing the right to abortion with a compromise should help to replace strident discord with reasonable discussion about the grounds and conditions under which abortion might be permitted.” (p. 60)

The root of what some regard as the failure of *Roe* to increase access to abortions is bureaucratic and organizational backlash to the decision. In *The Hollow Hope*, Gerald

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<sup>7</sup> In making her argument, Glendon asserts that statutory language—and by implication judicial language—has great symbolic as well as pragmatic value. (pp. 58-59) French legislation establishing waiting periods for abortions may not be taken seriously, argues Glendon, “but it does communicate a message which may enter along with other social forces into the way in which French men and women think.” (p. 15) A similar piece of Akron legislation—which was overturned by the Supreme Court in 1983—required that the mother “be given information concerning the physical characteristics of the fetus...and emphasized information about the risks to the woman of the surgical procedure.” (p. 19) Glendon concedes that the tone of this legislation is more “anxiety provoking than the French legislation which is clearly meant to be helpful.” (p. 20)

Rosenberg reviews the response of the medical community to *Roe*. He finds that hospitals are not in the business of providing abortions. “Despite the relative ease and safety of the abortion procedure,” states Rosenberg, along with support from the Supreme Court “both public and private hospitals throughout America refuse to perform abortions.” (p. 189) Furthermore, this refusal is not the work of religiously-affiliated hospitals. According to Rosenberg’s figures, between 1973 and early 1974 an overwhelming majority “of public and private non-Catholic hospitals did not perform even a single abortion.” (p. 189) Time did not serve as a remedy. A Planned Parenthood study discovered that as of May 1977 “approximately 80 percent of all public hospitals and 70 percent of non-Catholic private hospitals had never performed an abortion.” (p. 190) Studied regionally, this lack of hospital cooperation renders entire states without abortion resources. In 1973 eleven states lacked any facility that performed abortions. Two states, New York and California, provided 37 percent of the abortions in 1973. By 1976 three states had never performed an abortion and in thirteen states only 10 percent of public hospitals performed abortions. (p. 191) When studied by county the situation is equally ominous. “From 1973 on” says Rosenberg, “at least 77 percent of all U.S. counties have been without abortion providers.” (p. 193) Access to abortions is also localized, with the majority of service providers located in large cities. Furthermore, this lack of access appears to be worsening. Despite the frequency of this procedure relative to others performed on women, “an increasing percentage of obstetrics and gynecology residency programs do not provide training for” abortions. (p. 194) Consequently, women are required to travel, often to other states, to obtain an abortion.

Congressional opposition to *Roe* was persistent, though not zealous. Disinterested in pursuing a constitutional amendment defining a right to life—despite pro-life pressures—



Congress did try several methods to curtail access to abortion procedures by withholding federal funds. In 1975 the Senate defeated the first attempt since *Roe* to “terminate[ ] federal Medicaid funding for abortions.” (Garrow, 619) In 1976 Illinois Republican Henry J. Hyde introduced a rider to the appropriations bill to deny Medicaid funding for abortions. The rider passed the House in June but was defeated by the Senate in June and in August. In September the House and Senate agreed to pass a slightly weaker version of the rider which added an exemption for women whose life was in danger from the pregnancy. (Garrow, 627) The rider, however, was put on hold pending judicial review. In 1977, after the Supreme Court, in *Maher v. Roe*, supported a Connecticut regulation limiting Medicaid funding to abortions which were “medically necessary,” a rider similar to the 1976 attempt was passed and immediately went into effect. (Garrow, 628)

While most states reacted to *Roe* by dismantling their abortion statutes, a few directly opposed the ruling. Both Minnesota and Rhode Island created legislation declaring that life begins at conception. Lower Courts overruled these statutes. (Garrow, 617) Similar to the states, lower court backlash was rare. However there were isolated instances where the lower courts challenged the meaning and the spirit of *Roe*. A Massachusetts court—and a “mostly Catholic” jury (Garrow, 618) —convicted Dr. Kenneth Edelin, chief resident for obstetrics and gynecology at Boston City Hospital, of criminal manslaughter for performing an abortion on a 24-week old fetus. The jury found that the fetus was viable and was, therefore, entitled to “the full legal standing of a human being.” (Johnston and Herron, 167) Edelin was sentenced to one year probation. The decision was overruled two years later by the Massachusetts Supreme Judicial Court but provided great momentum for pro-life activists. (Garrow, 618)

The elite media was generally supportive of the Court's decision in *Roe*. However, as David Garrow finds in his comprehensive history of *Roe*, "[t]he worst casualties of the excessively negative but nonetheless pervasive consensus about *Roe*'s wrongheadedness... journalists." (Garrow, 616) *The New Republic* and *Newsweek* both criticized the court's intervention as being untimely, unnecessary and inappropriate. *The New Republic* indicted the court for "killing the [pro-choice] movement." (Garrow, 616) *Newsweek* asserted that abortion would not have been so controversial if the issue had been resolved by the legislature instead of the courts.

The Supreme Court was given many opportunities to revisit the argument they developed in *Roe*. In most cases they affirmed their decisions, but there were a few important occasions where the justices seemed to contradict their ruling. In *Beal v. Doe*, the Court ruled that "a state participating in the Medicaid Program was not required by Title XIX to fund the cost of nontherapeutic abortions." *Maher v. Roe* upheld a Connecticut statute refusing to provide state funds for "nontherapeutic abortions." The majority opinion held that "the exclusion of nontherapeutic abortions did not impinge upon the constitutional right of a woman" to choose to have an abortion and that states "having an unquestionably strong and legitimate interest in encouraging normal childbirth, could rationally encourage childbirth by subsidizing costs incident to childbirth while not subsidizing nontherapeutic abortions." In *Poelker v. Doe*, the Court ruled against a woman who sued a public hospital for refusing her request for an abortion.

## School Prayer

If backlash to *Roe* can be described as intense and extreme, backlash to the School Prayer Cases can be characterized as dogmatic and persistent. In 1962 and 1963 the Supreme Court heard two cases on the issue of school prayer: *Engel v. Vitale* and *Abington v. Schempp*. Though the debate regarding the separation of church and state predates these cases by more than a century, *Engel* and *Schempp* are often cited as *the* landmark school prayer decisions—solidifying the judiciary’s “wall of separation.”

In 1962 the Supreme Court addressed a case involving the recitation of a prayer in New York public schools. The prayer—a twenty-two word statement starting with the sentence “Almighty God, we acknowledge our dependence upon Thee” was stated at the beginning of each day. It was established by the Board of Regents (Powe, 186) as part of their “Statement on Moral and Spiritual Training in the Schools”—a program established to combat communism. (Powe, 186) Writing on behalf of the majority, Black states clearly “We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.” Justice Black continues by stating that

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies...There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer.

Justice Black also anticipates assertions that the decision is anti-religious and states that “[n]othing, of course, could be more wrong.”<sup>8</sup>

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<sup>8</sup> Justice Black states: “Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that “More things are wrought by prayer than this world dreams of.” It was

The following year, the court delivered a second blow to the religious community in *Abington School District v. Schempp—Murray v. Curlett*. These companion cases addressed the issue of bible reading and the recitation of the Lord’s Prayer in public schools in Pennsylvania and Baltimore. State and city statutes required the reading of bible verses and/or the recitation of the Lord’s Prayer at the commencement of each school day. Both statutes permitted students to be excused with the permission of their parents.<sup>9</sup> The Schempps who were Unitarians filed suit against the Abington School District contending that their rights under the Fourteenth Amendment were being violated by the requirement of these bible verses. The Murrays filed suit stating that the rule

threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith. (*Abington School District v. Schempp*)

Writing on behalf of the court, Justice Clark stated that the religious exercises did violate the petitioners’ rights and that these exercises were not “mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.” Addressing allegations that the statement of a school prayer is a minimal violation, Clark states “the breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, “it is proper to take alarm at the first experiment on our liberties.” Just as Justice Black did one

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doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose.”

<sup>9</sup> The city of Baltimore allowed students to be excused only after the Murrays issued a complaint.

year earlier, Clark writes in anticipation of allegations that the decision attacks religion stating that “we cannot accept that the concept of neutrality... collides with the majority's right to free exercise of religion.”<sup>10</sup> Justices Douglas, Brennan, Goldberg, Stuart concurred in separate opinions demonstrating the cross-denominational commitment of the court to the separation of church and state.

Opposition to *Engel* and *Schempp* took the form of Congressional, State and Local, Bureaucratic/Organizational, Interest Group, and Media backlash.

Congressional reaction to *Engel* was “one-sided” and “violent.” (Beaney and Beiser, 477) In the first few days after *Engel* was announced, individual members of Congress on both sides of the aisle publicly vilified the court’s decision and drafted proposals to overturn the decision and reprimand the Court. A total of 56 proposed amendments—by 22 Senators and 53 Representatives<sup>11</sup>—were introduced (Flemming, et. al 1246). Congressman Talmadge (D. Georgia) characterized the decision as “unconscionable...an outrageous edict.” Congressman Williams (D. Mass) stated that it was “a deliberately and carefully planned conspiracy to substitute materialism for spiritual values and thus to communize America.” Congressman Becker (R. NY)—the leader of the opposition—asserted that it was “the most tragic decision in the history of the U.S.” (Alley, 109) These feelings were not only translated into proposed constitutional amendments to overturn the decisions, but into symbolic institutional actions that demonstrated their oppositional solidarity. For example, the House voted unanimously to place “In God We Trust” behind the Speaker’s desk. One member circulated a bill to purchase each justice a bible. (Beaney and Beiser, 477)

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<sup>10</sup> Justice Clark states: “While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.”

<sup>11</sup> Beaney and Beiser, 479.

Though Congressional opposition was primarily ideologically based, some opponents voiced strong opposition to judicial activism in general. Congressional hearings, for example, provided a platform for individuals to air their grievances with, what they perceived as, the Court's overzealousness. (Beaney and Beiser, 480)

Finally, Congress recognized that *Engel* was only a preview of things to come. They knew that bible readings and prayer recitations would soon be on the judicial chopping block. In anticipation of these future cases Congress proposed amendments to protect these religious activities from judicial annihilation. (Beaney and Beiser 479)

Initial outrage to *Schempp* was not as violent, perhaps due to its close proximity to *Engel* and the fact that the Court had already shown its hand. However, twice as many members felt compelled to introduce proposed amendments after *Schempp* as compared to *Engel*. Just under 150 amendments were introduced as of March 24, 1964 (Beaney and Beiser, 492)—primarily in response to a barrage of angry constituent letters. The most serious contender was the Becker Bill, introduced by Congressman Becker from New York. Originally, prospects for the Becker Bill were slim. Many thought that individual members would be hesitant to “sign a discharge petition on any subject” and would be especially cautious about confronting the Judiciary Committee. However, Becker made headway, scaring off already hesitant “neutral” parties by threatening to actively campaign against any member who opposed the bill. (Beaney and Beiser, 495) Becker bill opponents remained quiet, fearful of appearing to vote “against God” in an election year. (Beaney and Beiser, 495) Active opponents to the bill formed an ad hoc committee to defeat the bill. They succeeded by recruiting religious leaders who supported the Court's decision in order to provide coverage for House members who feared electoral retaliation. (Beaney and Beiser, 497)

Many state and local governments were equally distraught over the decisions. In several cases school prayers were required by state statutes. In response, state and local governments opposed *Engel* and *Schempp* through noncompliance and active support of proposed constitutional amendments. In the absence of any “institutional” mechanism for assuring compliance with the decisions—except through monitoring by local residents<sup>12</sup>, states were free to actively defy the decision. As Dolbeare and Hammond state, “With the prospect of no rewards and few punishments, local elements were especially free to exercise their own discretion.” (p. 136) Alabama Governor George Wallace, expressed his opposition to *Engel* by threatening to pray in a classroom. His state’s required daily public school Bible reading did not end until 1971 after a ruling by a federal district court. (Sorauf, 295) Just one month after *Engel* a Governors’ Conference in Pennsylvania voted unanimously to support a Constitutional Amendment to overturn the decision. Only Rockefeller of New York abstained. (Beaney and Beise, 480) Local city councils pledged to continue school prayers. (Sorauf, 295)

*Schempp* was more nationally applicable and therefore incited more state and local backlash.<sup>13</sup> As expected, Southern states refused to comply with the ruling. The Kentucky State Superintendent of Public Instruction encouraged schools to “continue to read and pray until somebody stops you.” However, those outside the south also joined the opposition. In Rhode Island, the State Commissioner of Education pledged to residents that he did “not now or in the future intend to prostitute the office of the Commissioner of Education, to further the cause of the irreligious, the atheistic, the unreligious, or the agnostic.”(Beaney and Beiser, 487)

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<sup>12</sup> Dolbeare and Hammond argue that “[i]n a socially homogeneous, small community, it takes great psychic motivation to break out of the mold of acquiescence and conformity with the decisions of dominant elites; starting a lawsuit or other movement to force change in a policy preferred by the local majority may cause social isolation or even ostracism, and it would not be lightly undertaken.” (137)

<sup>13</sup> *Engel* could have been construed to apply solely to New York—or a school prayer similar to New York’s. *Schempp* had further reaching implications due to the similarity of other state and local statutes to Pennsylvania and Baltimore’s.

Some states attempted to evade the ruling by distinguishing their statutes from those under scrutiny in *Schempp*. Creative state legislatures introduced alternative mechanisms for promoting “spirituality” such as reciting “America” during class, using hymns as part of music appreciation, studying the Bible during literature classes (Beaney and Beiser, 485) or using meditation instead. (Beaney and Beiser, 489) Among the most defiant were states, including... who publicly refused to modify their statutes without explicit court orders. ( Beaney and Beiser, 488) In the Fall of 1963 among the ten states where bible readings were still performed in the schools, three states, Arkansas, Alabama and Delaware, still required religious instruction in their public schools. (Beaney and Beiser, 490)

Bureaucratic/organizational backlash to the school prayer cases came in the form of non-compliance by local elites and teachers. The success of court decisions often relies on the actions of local elites. Argue Dolbeare and Hammond, “If local elites are acquiescent, effectuation of the Court policy is more likely. If they are opposed, effectuation may be a long time in coming.” (p. 23) School boards, superintendents and teachers exercised a great degree of autonomy when deciding how to proceed with school prayer. Without direct and local pressure to modify school prayer policies many local elites felt untouched by *Engel* and *Schempp*. (Dolbeare, 137) As of the Fall of 1962, just a few months after *Engel* was handed down, prayer and Bible readings were still being performed in many public schools. (Sorauf, 296) After *Schempp*, a number of states counted on schools and school districts to come up with their own responses to the court decisions. Oklahoma, Ohio and New Hampshire each publicly delegated the option of continuing school-based religious practices to teachers and school administrators. (Beaney and Beiser, 488) Many schools responded by continuing to promote religious practices. The *Des Moines Register* reported that as of the Fall following *Schempp* the majority of Iowa



public schools had no intention of modifying their policies in light of the court decision. School boards in Georgia were “unofficially” encouraging schools to continue their school-based religious practices. In Indiana, over 50% of public schools allowed some sort of Bible reading or school prayer during the school day. (Beaney and Beiser, 490) Dolbeare and Hammond found, in their study of “Midway,”<sup>14</sup> that 95% of superintendents had not made any changes to policies in light of *Engel* and *Schempp*. In surveys, Midway teachers stated that they would not make any changes to classroom religious practice unless “undue pressures” were applied. The following is a typical survey response:

I feel that the teacher, on her own volition, may use religious readings, prayer, etc., as long as it is not offensive to the child. In that event, I think the child can be excluded for that portion which is offensive to him. We plan to continue until forced to stop. (Dolbeare and Hammond, 42)

School boards, superintendents and teachers, similar to states, introduced alternate mechanisms for promoting spirituality in the classroom. Dolbeare and Hammond found that 80% of the school districts in Midway distributed Gideon bibles to their students and 52% reported the singing of religious hymns. (44)

As with *Roe*, the school prayer cases incited strong interest group backlash motivated by religious leaders.<sup>15</sup> Conservative Christian groups publicly opposed the decisions and pressured Congress to pass amendments overturning the decisions. Through the massive organization of outspoken religious elites the debate was transformed to one of “believer vs. nonbeliever, God vs. anti-God” (Sorauf, 278) causing many who supported the decision to remain silent. Immediately following *Engel* religious leaders publicly voiced their outrage. Cardinal McIntyre of Los Angeles characterized the decision as “shocking and scandalizing to one of American blood and

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<sup>14</sup> Dolbeare and Hammond conduct a study of five towns in the state of “Midway” that have continued to practice school-based religious activities.

<sup>15</sup> Religious groups were split. Jews supported, Protestants were split, Catholics opposed. However, those who were opposed were the most outspoken. (Beaney and Beiser, 482)

principles” (Alley, 109) and likened the decision “to imitation of Soviet philosophy, of Soviet materialism, and of Soviet regimented liberty.” (Sorauf, 295) Cardinal Spellman was “shocked and frightened” by the Supreme Court’s action. (Alley, 109) By mid-July opposition from religious leaders was still going strong. During a speech to a San Francisco men’s club, Episcopal Bishop James A. Pike declared that “the court had ‘just deconsecrated the nation.’” (Alley, 110) Though Congressional attempts to overturn *Engel* and *Schempp* have failed, the decision did give rise to an organized conservative religious front that, some have argued, formed the seeds of the Christian Coalition (Flemming et al., 1246) and the backbone of ardent pro-life and anti-gay movements.

The media played an important role in shaping and reinforcing public reaction to both *Engel* and *Schempp*. As Johnson and others argue, media headlines provide individuals with cues on how to respond to stories. Individuals are primed to adopt a certain attitude through cues in the headline despite the balance of content within the article. (Johnson, 73) Media outlets, in many cases, highlighted negative reactions to *Engel* and *Schempp* while downplaying the responses of court supporters. In his study of the two cases, Johnson found that newspaper response to *Engel* was immediate and negative. Headlines focused on irate elites and an angry public. Elite newspapers such as the *Boston Globe*, the *Chicago Tribune* and the *LA Times* criticized the court’s decision. (Beaney and Beiser, 480) UPI and AP articles, reproduced across the nation, contributed to the backlash. One UPI article, entitled “Prayer Decision Stirs Anger: Greatest Controversy Since Racial Decision” highlighted the opposition of political and religious elites, and the initiation of several constitutional amendments to nullify the ruling. Headlines such as “Court Ruled Against God: Goldwater;” “Lawmakers Seethe over Prayer Ban;” and “Prayer Ruling Stirs Caldron of Criticism” set the tone for how the public would

perceive the decisions. (Johnson, 74) Other articles misrepresented the scope of the decision—contributing in large part to the public’s misunderstanding and misgivings about the decision. In many cases articles only presented a few lines of the opinion, denying readers the opportunity to fully comprehend the applicability of the decision. (Johnson, 70) Supreme Court Justice Clark was so dismayed by the media coverage that he felt compelled to correct the media and summarize the opinion in a speech presented to San Franciscans just days after the ruling. (Johnson, 70) Not surprisingly, religious media published articles openly condemning *Engel*. An article in the *Pilot*, the country’s oldest Catholic newspaper, described the decision as “stupid...a doctrinaire decision, an unrealistic decision, a decision that spits in the face of our history, our tradition, and our heritage as religious people.” (Alley, 110) Media reaction to *Schempp* was more moderate and balanced.

## **Discussion**

The judicial system is one of a range of venues through which individuals and advocates can secure their rights and the rights of those whom they represent. While judicial decisions can affirm rights, the court’s ability to achieve reform may often depend on exogenous factors—the actions of bureaucracies, the attitudes of the public, the reactions of states and feedback from peers. Court decisions are debated, digested and rebuffed. They are subject to interpretation by a whole host of actors and are often partially or entirely returned to the courts for redress or clarification. Individuals who wish to access the courts to exercise their rights—no matter how fundamental these rights may be—must understand the context within which the judiciary operates and, more importantly, the long-term impact that judicial intervention could have on the capacity to actualize these rights.

Johnson, in his analysis of the school prayer cases, states that compliance depends in part on the existence of and access to other formal channels. Along these same lines, backlash is a viable force when opponents are able to activate a wide variety of institutions and actors within the social and political systems. In *Roe* and the School Prayer cases opponents used a range of mechanisms to impede the outcomes of these verdicts.

### *Roe*

Through connections to Congress *Roe* opponents succeeded in limiting funding for abortions. *Roe*, and its concomitant backlash, has made it difficult to train physicians to provide abortion procedures. Discussed earlier, many medical schools refuse to train students in the procedure. Furthermore, threats of violence to abortion providers has steered medical students away from learning these skills. (Arcana, Speech in London) Many hospitals, in their opposition to *Roe*, refuse to provide abortions, making access extremely difficult. Finally, opposition to *Roe* led to the formation of a well-funded, highly organized pro-life movement that has succeeded in elevating the issue in most local and national political races—regardless of office.

However, *Roe* *did* increase access to abortions. As Rosenberg concedes, despite the organizational backlash of hospitals and the legislative backlash, market conditions allowed for the creation of clinics designed specifically to provide safe abortions.

Although the law of the land was that the choice of an abortion was not to be denied a woman in the first trimester, and regulated only to the extent necessary to preserve a woman's health in the second trimester, American hospitals on the whole, did not honor the law. However by allowing the market to meet the need, the Court's decisions resulted in at least a continuation of some availability of safe and legal abortion. (198)

It could be argued, therefore, that backlash to *Roe*, is irrelevant. Where hospitals were resistant, clinics filled in the gap. But how successful have clinics been at reaching women in need of abortions? Judith Arcana, a former “Jane”<sup>16</sup> argues that “[i]ndividual clinics...tend not to take chances, so even where there are not very restrictive laws, where perhaps a law is just suggested or lobbied for, clinics will be cautious, and fewer will offer abortion services.” According to the most recent NARAL statistics, 87% of all counties in the United States have no abortion provider. By 2001 only 603 hospitals in the United States provided abortions—leaving women in rural areas, where clinics are scarce, without access to abortions. Even if clinics are willing to provide abortions, perhaps this substitution of clinics for hospitals is inefficient. It seems reasonable to surmise that hospitals are better equipped to provide abortions at a lower cost, in conjunction with other “women’s health” services and to a broader range of individuals. The time and money spent developing these “duplicate” institutions could surely be better spent on other worthwhile health issues.

Limited funding for abortions has significantly impacted the ability of low-income women to access abortions. Says Arcana:

One of the first backlash decisions following *Roe* was that the federal government does not have to pay for Medicare abortion, so poor women have to scramble for the money or bear a child they can’t afford to raise in good health.

A recent study of Medicaid patients found that women residing in states where abortions are covered by Medicaid were 3.9 times more likely to have an abortion than non-Medicaid individuals. In states where abortions were not funded, Medicaid clients were only 1.9 times more likely to receive abortions than their non-Medicaid counterparts. According to a 1983 study, women who were unable to obtain Medicaid funding for their abortions used money earmarked for rent, utility bills, food and clothing for their children to pay for their abortions.

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<sup>16</sup> “Janes” were a group of women in Chicago who provided safe abortions prior to *Roe*.

Just under 60% of the participants in the study stated that “paying for the abortion entailed serious hardship.”<sup>17</sup>

Interest Group backlash has made the act of providing and receiving an abortion dangerous. Women who enter clinics are harassed and subjected to cruelty. Clinic staff and abortion providers live in fear of clinic bombings and violence to themselves and their families. Between 1977 and 2003 there were over 80,000 acts of violence perpetrated against clinics, their staff and their clients—including 361 death threats and 590 bomb threats. Individuals were subjected to over 10,000 incidences of hate mail or harassing phone calls. On more than 78,000 occasions, individuals were confronted by picketers upon entering the clinic.<sup>18</sup>

In the case of abortion rights, the Supreme Court did legalize a woman’s right to have an abortion. However, this victory may have come at the expense of funding, access, client and provider safety, and long-term movement sustainability.

### *School Prayer*

The School Prayer opinions did not solidify the “wall of separation.” Instead, the cases incited a never-ending cycle of Church v. State cases, over 600 proposed constitutional amendments, and became a launching point for the Christian right. (Flemming et al., 1247)

Through non-compliance, “backlashers” have kept the debate alive and well, refusing to take judicial decrees as “gospel.” As Sorauf explains:

In beginning the litigation, the plaintiffs control the options. But it is the defendants, and the majorities for whom they often speak, who control the initiatives in compliance. What results is a politics of constitutional compliance almost completely different and quite separable from the politics of constitutional litigation.

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<sup>17</sup> The Allan Guttmacher Institute, [www.agi-usa.org](http://www.agi-usa.org).

<sup>18</sup> NARAL Pro-Choice America, [www.naral.org](http://www.naral.org).

Despite an abundance of case law supporting and clarifying *Engel* and *Schempp*, many supporters of school prayer are still searching for ways to promote religion in the schools. In 1975 the New Hampshire State Legislature passed a bill allowing school districts to authorize the recitation of the Lord's Prayer. In 2002, although the bill was amended to include the Pledge of Allegiance, the language on the Lord's Prayer remained intact.<sup>19</sup> In March, 2000 the Kentucky General Assembly passed a joint resolution that requires public elementary and secondary schools to display a copy of the Ten Commandments on the wall of each classroom.

Those who initiated the debate have left monitoring compliance and controlling backlash up to other institutions and individuals. Frank Sorauf explains:

Of the major litigating groups, it can safely be said that they are far more effective in the bringing of cases than they are in the enforcement of the separationist decisions they have won....They have limited resources and other causes in which to invest them. They therefore largely leave the legal "mop-ups"—the constitutionally less important and rewarding enforcement actions—to the uncertain zeal and resources of local groups and parties. (301)

In recent decades the religious right has gained momentum—becoming a strong political force. Responsible for the success of a number of politicians—including our President, supporters of school prayer have access to a number of formal and informal venues through which to champion school prayer and other religious causes. Bob Dole publicly supported a school prayer amendment during his campaign against President Clinton. While treading carefully on the issue of school prayer, President Bush has heavily courted the Christian Right during his tenure. During his first term Bush created the White House Office of Faith-Based and Community Initiatives which has significantly increased access to federal funds for faith-based initiatives and has "encouraged" partnerships between Federally funded agencies and faith-based organizations.

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<sup>19</sup> HB 1446, enacted on July 17, 2002, stipulates that recitation of the lord's prayer must be voluntary and that students must be informed that the prayer is not meant to influence their religious beliefs.

Backlashers have also altered the nature of the debate. Although the cases were originally framed as an “establishment clause” issue, *Engel* and *Schempp* opponents shifted the discussion towards “religious freedom,” arguing that the cases stripped their right to exercise religion without state interference. (Dolbeare and Hammond, 43) Those who supported the establishment clause argument were accused of being “anti-God” and un-American. The Christian Right has adopted this “rights” rhetoric in its most recent—and highly effective—campaign strategies. (Rozell and Wilcox, 272.)

Although *Engel* and *Schempp* did establish guidelines for maintaining a separation between church and state, in some important ways the opinions were purely symbolic. States and localities have identified alternative methods for promoting religion in school—or have ignored the rulings outright. Without “institutional support” to enforce compliance, state legislatures, school boards, superintendents and teachers were able to continue providing school-based religious practices. (Dolbeare, 136) As the “right to religious freedom” becomes an increasingly potent force the “wall of separation” could be dismantled.

### **Same-Sex Marriage: A Preliminary Analysis**

While response to the same-sex marriage debate is still unfolding there is some evidence of backlash at the state and Federal level to recent court decisions. On May 5, 1993 the Hawaii Supreme Court ruled in favor of same-sex marriage. In response to the decision the state legislature derided the court for “overstepp[ing] its bounds and...not respecting either the state legislature or the will of the people.” (Reed, 927) Aware of the declining support for gay marriage among Hawaiians since the case had been filed, state legislators proposed that a state constitutional amendment banning same-sex marriage be included on the ballot. In November,



1998 the citizens of Hawaii voted to ban same-sex marriage. In exchange for Democratic support for the marriage ban, the amendment included an option for gay couples to be considered as “registered partners” and receive over fifty state benefits. However, through subsequent legislation many of these benefits have eroded. (Reed, 928)

**Table I. Timeline of Current Federal Same-Sex Marriage Debate**

<b>Date</b>	<b>Event</b>
<b>May, 2003</b>	Musgrave Amendment Proposed: Defines marriage as between a man and a woman
<b>June, 2003</b>	<i>Lawrence v. Texas</i> : Overturning laws criminalizing sodomy
<b>November, 2003</b>	<i>Goodridge v. Department of Public Health</i>
<b>November, 2003</b>	Bush responds to <i>Goodridge</i> decision
<b>November, 2003</b>	Kerry responds to <i>Goodridge</i> decision
<b>November, 2003</b>	Wayne Allard Amendment introduced to ban same-sex marriage
<b>December, 2003</b>	Bush announces he could support a constitutional ban.
<b>January, 2004</b>	Ohio Super-DOMA: One of the most restrictive DOMAs in the United States. Denying domestic partner coverage for state employees
<b>January, 2004</b>	State of the Union: Bush to protect sanctity of marriage
<b>February, 2004</b>	Opinions of the Justices to the Massachusetts Senate: Stating that they will accept nothing less than same-sex marriage.
<b>February, 2004</b>	Bush asks Congress to approve a constitutional amendment to ban same-sex marriage.
<b>February-April, 2004</b>	“Civil disobedience” in San Francisco, Portland.
<b>April, 2004</b>	Georgia legislature adopts constitutional ban on same-sex marriage.
<b>July, 2004</b>	Marriage Protection Act
<b>August, 2004</b>	Missouri Referendum to Ban Same-Sex Marriage passes (71%)
<b>September, 2004</b>	Louisiana Referendum to Ban Same-Sex Marriage passes (78%)
<b>November, 2004</b>	OR, MI, KY, UT, AR, GA, OH, OK, MT, ND, MS Referenda Pass

*Goodridge v. Department of Public Health* has incited backlash at the state and national level. (See Table I) After the Massachusetts court handed down the initial decision and, even moreso, after the court delivered their second opinion to the Senate, national leaders weighed in on the debate. Under pressure from religious leaders the President made a public declaration of war against the courts and the gay community stating that if the courts continued to act against

the interests of the public he would pursue a constitutional ban on gay marriage. On February 24th the President officially announced his intention to support a constitutional amendment and urged Congress to do so as well. Although still heavily debated, several drafts of such an amendment are currently being reviewed in Congress. State legislatures have responded to *Goodridge* by developing DOMAs or state constitutional amendments. Interest groups initiated and succeeded in passing bans on same-sex marriage in 11 states on November 2, 2004 along with several other state bans earlier in the year.

It is difficult to determine whether the proposed constitutional amendment and the ballot initiatives are a direct response to the Massachusetts ruling or to the groundswell of support from mayors across the country. However, the President and interest groups have cited the Massachusetts ruling as one major component of their efforts to constitutionally ban gay marriage and leave courts with little recourse. One religious leader in Louisiana stated, in defense of their initiatives in Louisiana, “We’re casting this as: Either the people of Louisiana decide, or some federal or state court in another state decides.” (Washington Post, August 5, 2004) Furthermore, the most recent proposed Constitutional Amendment—The Marriage Protection Act—directly implicates the courts by attempting to bind the ability of federal courts hear cases regarding same sex marriage. Although it did not receive the 2/3 vote it needed in the House, both members of Congress and the President sent clear messages to opponents that “without a constitutional amendment, judges and local officials could continue redefining marriage.” (Legislative Bulletin, September 30, 2004)

*Goodridge* set off this current iteration of the gay marriage debate and propelled the issue onto Presidential campaign agendas. Furthermore, rather than coordinating with gay rights advocates to develop a deliberate and incremental movement-based strategy to promote the issue

among legislators and the American public, the couples in *Goodridge* elected to use legal advocacy. In so doing, the debate has been largely controlled by opponents—the President, Congress, state governments and religious leaders—leaving gay rights activists in the position of attempting to *prevent* a constitutional ban rather than *promoting* the benefits of same-sex marriage. It is likely, as states continue to be embroiled in litigation over the recent issuance of same-sex marriage licenses, that the Supreme Court will be forced to address the issue in the next few years. How the Court will respond is unclear. However, what we can learn from *Roe*, the School Prayer cases and recent responses to *Goodridge* is that opposition to court decisions can undermine the impact of these decisions in significant ways—and can create unanticipated obstacles and set-backs.

### **Closing Remarks**

Readers may be tempted to view this essay as a critique of the judiciary or an indictment of legal advocacy. However, it is not my intention to advance an argument against the use of the judiciary—or to argue, as Rosenberg does, that the judiciary is ineffective in promoting issues of social justice. Rather, my goal is to facilitate a deeper discussion about the long-term consequences of legal advocacy. The judiciary is an important and effective tool for protecting the interests of individuals and has played a significant role in securing the rights of many marginalized individuals in our nation's history. However, the judiciary is one among many players in a complex network of interconnected institutions that shape and govern social policy. As such, it should be used deliberately, strategically and with an eye towards its broader impact.

## Bibliography

### BOOKS

Alley, Robert S. *School Prayer: The Court, the Congress and the First Amendment*. Buffalo, NY. Prometheus Books. 1994.

Bickel, Alexander. *The Morality of Consent*. New Haven, CT. Yale University Press. 1975.

Bork, Robert. *The Tempting of America*. New York, NY. Free Press. 1990.

Dolbeare, Kenneth M. and Phillip E. Hammond. *The School Prayer Decisions: From Court Policy to Local Practice*. Chicago, IL. The University of Chicago Press. 1971.

Ely, John Hart. *Democracy and Distrust*. Cambridge, MA. Harvard University Press. 1980.

Estlund, David M. and Martha C. Nussbaum. *Sex, Preference and Family*. New York, NY. Oxford University Press. 1997.

Garrow, David J. *Liberty and Sexuality*. Berkeley, CA. University of California Press. 1994.

Glendon, Mary Ann. *Abortion and Divorce in Western Law*. Cambridge, MA. Harvard University Press. 1987.

Johnson, Richard M. *The Dynamics of Compliance: Supreme Court Decision-Making from a New Perspective*. Evanston, IL. Northwestern University Press. 1967.

Koppelman, Andrew. *The Gay Rights Question in Contemporary American Law*. Chicago, IL. University of Chicago Press. 2002.

Muir, William K., Jr. *Prayer in the Public Schools: Law and Attitude Change*. Chicago, IL. The University of Chicago Press. 1967.

Murphy, Walter F. *Elements of Judicial Strategy*. Chicago, IL. University of Chicago Press. 1964.

Perry, Michael J. *We the People: The Fourteenth Amendment and the Supreme Court*. New York, NY. Oxford University Press. 1999.

Powe, Lucas. *The Warren Court and American Politics*. Cambridge, MA. Harvard University Press. 2000.

Rosenberg, Gerald. *The Hollow Hope*. Chicago, IL. University of Chicago Press. 1991.

Sorauf, Frank. *The Wall of Separation*. Princeton, NJ. Princeton University Press. 1976.

## ARTICLES

Beaney, William M. and Edward N. Beiser. "Prayer and Politics: The Impact of Engel and Schempp on the Political Process." *13. J. Pub. L* 475 (1964)

Ely, John Hart. "The Wages of Crying Wolf: A Comment on Roe v. Wade," *82 Yale L. J.* 949 (1972-1973).

Eskridge, William N. "Lecture: Equality Practice: Liberal Reflections On The Jurisprudence Of Civil Union," *64 Alb. L. Rev.* 853, 2001.

Flemming, Roy B., John Bohte and B. Dan Wood. "One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States 1947-1972." *American Journal of Political Science*, Vol. 41, No. 4. (October, 1997), 1224-1250.

Franklin, Charles H. and Liane C. Kosaki. "Republican Schoolmaster: The U.S. Supreme Court, Public Opinion and Abortion," *The American Political Science Review*, Vol. 83, No. 3 (Sep., 1989), 751-771.

Grosskopf, Anke and Jeffrey J. Mondak. "Do Attitudes toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court," *Political Research Quarterly*, Vol. 51, No. 3 (Sep., 1998), 633-654.

Ignagni, Joseph and James Meernik. "Explaining Congressional Attempts to Reverse Supreme Court Decisions," *Political Research Quarterly*, Vol. 47, No. 2 (Jun., 1994), 353-371.

Ignagni, Joseph and James Meernik. "Congressional Attacks on Supreme Court Rulings Involving Unconstitutional State Laws," *Political Research Quarterly*, Vol. 48, No. 1 (Mar., 1995), 43-59.

Johnson, Charles. "Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination," *American Journal of Political Science*, Vol. 23, No. 4 (Nov., 1979), 792-804.

Johnson, Timothy R. and Andrew Martin. "The Public's Conditional Response to Supreme Court Decisions," *The American Political Science Review*, Vol. 92, No. 2 (Jun., 1998), 299-309.

Johnston, Donald and Caroline Rand Herron. "Ideas and Trends: Education, Science, Agriculture," *New York Times*, April 14, 1974, ProQuest Historical Newspapers The New York Times, p. 167.

Lindgren, Janet. "Beyond Cases: Reconsidering Judicial Review." *1983 Wis. L. Rev.* 583.

Reed, Douglas. "Popular Constitutionalism: Toward a Theory of State Constitutional Meanings." *30 Rutgers L. J.* 871 1999

Rozell, Mark J. and Clyde Wilcox. "Second Coming: The Strategies of the New Christian Right." *Political Science Quarterly*, Vol. 111, No 2 (Summer, 1996), 271-294.

Spriggs, James F. II. "Explaining Federal Bureaucratic Compliance with Supreme Court Opinions," *Political Research Quarterly*, Vol. 50, No. 3 (Sep., 1997), 567-593.

## COURT CASES

*Beal, Secretary, Department of Public Welfare of Pennsylvania, et al. v. Doe et al.* 432 U.S. 438, 1977

*Engel v. Vitale*, 370 U.S. 421 (1962)

*Goodridge v. Department of Pub. Health*, 440 Mass. 309 (2003)

*Maher, Commission of Social Services of Connecticut v. Roe et al* 432 U.S. 464 (1977)

*Poelker, Mayor of St. Louis, et al. v. Doe* 432 U.S. 519 (1977)

*Roe, et al. v. Wade, District Attorney of Dallas County* 410 U.S. 959 (1973)

*School District of Abington Township, Pennsylvania, et al. v. Schempp et al.* 374 U.S. 203 (1963)

## OTHER

Arcana, Judith. Abortion Speech in London, October, 1999.