

Examining “Backlash” and Attacks on Landmark Decisions from *Brown* to *Roe* to *Goodridge*

Panel Discussion at 2007 ACS National Convention Featuring
Edward Lazarus, Scott Lemieux, Robert Post, Jeffrey Rosen,
Reva Siegel and Roger Wilkins*

MR. EDWARD LAZARUS: Good morning. My name is Eddie Lazarus, and it is my distinct privilege to be the moderator of this panel, “Examining ‘Backlash’ and Attacks on Landmark Decisions from *Brown* to *Roe* to *Goodridge*.” Certainly, a very timely panel. We’ve just finished up a Supreme Court term in which the attacks on landmark decisions were quite evident from the late-term abortion case to the school pupil assignment cases from Seattle and Louisville, but I think beyond just thinking about this in terms of last year’s Supreme Court session, this is really a topic of broad significance for the progressive movement. It really boils down to the question of what role courts should play in the progressive agenda. Baby boomers like myself have grown up in the shadow of the Warren Court thinking about the Supreme Court in particular as an agent for social reform, but in more recent times, a wide body of scholarship has grown up suggesting that those judicial victories were in many respects Pyrrhic victories because of the political backlash that these various decisions have created.

And we have with us a very distinguished panel with wide-ranging views on this subject to discuss this issue with us today. I could take up pretty much all 90 minutes just reciting the credentials of the various people up here on the panel with me. I’m going to give a very abbreviated version with apologies for leaving out many of their extremely significant achievements. And I’m going to introduce them in the order in which they’re going to make presentations. After they give their set pieces, I’m going to invoke the moderator’s prerogative of asking a few questions of my own, but we’re also going to take questions from the studio audience.

First up today will be Jeffrey Rosen, who is well known I’m sure to all of you as professor of law at George Washington University Law School, long time legal affairs editor of the *New Republic* magazine, frequent contributor to many other publications, and he’s written, most recently *The Supreme Court: The Personalities and Rivalries That Shape America*, but perhaps more salient for this discussion today was his previous book, *The Most Democratic Branch: How the Courts Serve America*.

* This is an edited transcript of a panel discussion that took place at the Fifth Annual ACS National Convention, on July 27, 2007 in Washington, D.C. The discussion was moderated by Edward Lazarus, Akin Gump Strauss Hauer & Feld LLP. The panelists were: Scott Lemieux, Professor of Political Science, Hunter College; Robert C. Post, Professor of Law, Yale Law School; Jeffrey Rosen, Professor of Law, George Washington University Law School; Reva Siegel, Professor of Law, Yale Law School; and Roger Wilkins, Professor of History and American Culture, George Mason University.

Next up will be Scott Lemieux, who is an associate professor of political science at Hunter College in New York. His key areas of study are traditional politics and comparative constitutionalism and reproductive rights. He's written frequently for *The American Prospect*. He's an extremely well known and well respected blogger, and he's written some of the most thorough and thoughtful and empirical analyses of this issue of backlash.

We have a dynamic duo from my alma mater, the Yale Law School, Reva Siegel, who's the Nicholas deB. Katzenbach Professor of Law. Her academic work focuses on how courts interact with representative government in interpreting the Constitution. She is the co-author of the leading treatise, *Processes of Constitutional Decision Making*, and sits on the board of the American Society of Legal History. And particularly salient for this discussion, she is the co-author with Robert Post of an article called "Roe Rage," which examines the issue of backlash.

Robert Post is the David Boies Professor of Law at Yale. He teaches many subjects including constitutional law and legal history. He has a Ph.D. from Harvard in history of American civilization. He also is the author of many, many well received books, and as his most recent project, he is writing—and this is a very, very high honor in legal academia—he is writing a volume of the Oliver Wendell Holmes Devise, I believe it's volume 10, that will be dealing with the Taft Court.

And batting clean-up for us, Roger Wilkins, Robinson Professor of Humanities and Social Science at George Mason University. Most salient for the purposes of this discussion—this is someone who has not just written and studied the idea of backlash; this is someone who has lived backlash. He was, among other things the assistant attorney general of the Johnson administration, he is a Pulitzer Prize winning journalist for the editorials he wrote for the *Washington Post* during the Watergate era, he's written a fascinating autobiography called *A Man's Life*, and he also—just as a little side point in his career—interned with Thurgood Marshall at the NAACP during *Brown v. Board of Education*.

So you can see you're in for a real treat this morning. And with that, I'd like to turn it over—opening remarks of roughly seven minutes. I'm not like the chief justice; I will not slam my hand down on the table at exactly seven minutes, but somewhere around there. Jeff, would you start it off for us?

MR. JEFFREY ROSEN: Thank you so much, Eddie, and it's always a pleasure to be here at the American Constitution Society. When this panel was first convened several months ago, liberals were worried about the possibility of a backlash against liberal decisions, such as *Roe v. Wade* and *Goodridge*. But now, at the end of a bitterly divided Supreme Court term, liberals are in the mood for a backlash of a different kind—namely a backlash against the conservative excesses of the Roberts Court, and just yesterday, in *The New York Times*, Jean Edward Smith, author of the superb and definitive biography of John Marshall, wrote: "if the current five-man majority persists in thumbing its nose at popular values, the election of a Democratic president in Congress could provide a corrective."

I've come to rain on the parade of liberal as well as conservative backlash enthusiasts with a point that may be so obvious, that I hope you'll forgive me for belaboring it, and here it is: the court only provokes intense national backlashes when it does things that intense national majorities intensely oppose, and there have been only three periods in the court's history when the backlashes it's provoked have been intense enough to lead the justices to abandon their views. As for the Roberts Court, as long as it's led by Justice Kennedy, who has his antenna tuned to the attitude of the media

and the American voter with exquisite precision, it's unlikely to provoke significant national backlashes. Still, if the Roberts Court continues down this path and starts striking down laws that Americans do care intensely about such as environmental laws and health and safety laws, it could indeed provoke a backlash of national proportions.

What's the historical point about the relationship between backlash and popular opposition? Gerald Rosenberg makes it well. He notes three periods in the court's history when there's been an intense reaction to its decisions that's led the Court to abandon its views. First, the Marshall Court's response to the Jeffersonian Republicans attempt to curb its jurisdiction; second, the response to Dred Scott and Lincoln and Johnson between 1858 and 1869; and finally, the New Deal Court's switch-in-time in 1937—in all those cases, very unpopular decisions, congressional backlash and the court abandons its views.

But there are less dramatic backlashes. There have been three other periods, Rosenberg notes, when there's been less intense national opposition that's led the court to modulate its views without abandoning them entirely, and those include the resistance to the Marshall Court's nationalizing decisions at the beginning of the 19th century; the assault on the Warren Court's efforts to defend the free speech of communists and anti-communists in the 1950s; and finally, and we'll talk more about this today, the response to *Roe v. Wade*.

In other periods, opposition's been so diffuse that's it hasn't led to a meaningful change in the court's views and that's the response to *Lochner* by the progressives or the response to the Warren Court's school payer decisions by social conservatives in the '60s. There was opposition, bills introduced in Congress, but it wasn't focused enough to actually lead the court to change its views and the court stood its ground.

What about *Brown* and *Roe* and *Goodridge*—the topic of our conversation? Let me just make the obvious points quickly. *Brown*, as Michael Klarman has argued, was popular with 54 percent of the country when it came down in 1954, it inspired opposition mostly among Southern minorities. Its main effect was to galvanize the civil rights movement, Klarman argues, which was set on by police dogs in the South. Those television pictures were broadcast to the nation provoked so much national outrage that finally Northern voters were galvanized and the Civil Rights Act follows. But the idea that *Brown* by itself led to meaningful integration is not a case that can easily be sustained.

What about *Roe v. Wade*? Since *Roe* came down, the Gallup polls haven't changed much. Two-thirds of the country has consistently supported the right to choose early-term abortions. By the same token, larger super majorities, 70 or 80 percent oppose the right to choose in the second and third trimester. Those numbers have been remarkably consistent. When *Roe* came down then, the central holding, that first-term choice should be protected, wasn't unpopular. It was popular with 52 percent in the Harris Poll. It was *Roe*'s efforts to rule out of bounds more popular and more modest restrictions on late-term abortion including parental consent periods and waiting periods that proved nationally unpopular.

Between 1973 and 1982, Congress enacted 30 laws restricting abortion. *Roe* also galvanized the pro-life movement, it led to the creation of interest groups on both sides of the political spectrum that dedicated themselves to preserving and overturning it. And the important point here is the court modulated without abandoning its views—in *Casey v. Planned Parenthood* in '92, Kennedy and O'Connor and Souter, with exquisite sensitivity to public opinion, precisely embody it. They said early-term choice has to be protected, but late-term choice may be restricted.

As for *Carhart*, the recently decided partial-birth case, despite its unnecessary and paternalistic lucubrations about the need to protect women against so-called abortion trauma decision, its central holding was not especially counter-majoritarian because partial-birth abortions, especially in the late term, are opposed by bipartisan majorities of Democrats and Republicans in every state in the nation and in the Congress. To the degree that *Carhart* affects pre-viability abortions, it gets a little trickier—but the fact that as the court itself conceded the law would not ban any actual women from having actual abortions, because it assumed the availability of an equally safe procedure in all cases makes it foolish to hope that *Carhart* itself will provoke a dramatic national backlash.

And what of *Goodridge*? *Lawrence*, the sodomy decision, was popular with 60 percent of the country in a Gallup poll. There's no constituency even among most conservatives for banning consensual sodomy. By contrast, gay marriage is a position rejected in national polls by two to one when *Goodridge* was decided. There was a localized backlash to *Goodridge*: 13 states added to their state constitutions amendments that banned gay marriage even though before *Goodridge* only four states had those on the books. Some analysts think it may have made the difference for Kerry and states like Ohio, others dispute this. The point of *Goodridge*, certainly like *Roe* or perhaps even more like the school prayer decisions, a state court decision, not national, didn't provoke a national backlash, but had moderate backlashes and counter-backlashes.

So that's the obvious point. Only when decisions are really intensely unpopular with national majorities is there a big backlash that leads the court to change its views. Where does that lead the Roberts Court and liberals and progressives who are concerned, as Jean Edward Smith put it, that the court may be thwarting the views of popular majorities? Alas, I have to report that when I survey the leading decisions of the last term, I find it hard to conclude that they were intensely countermajoritarian. The partial-birth decision wasn't for the reasons I've already described. Affirmative action, a trickier case; there are backlashes and counter-backlashes. When the Court upheld the University of Michigan Law School's affirmative action program in 2003, Michigan voters repudiated it in a referendum, but there were also backlashes in the opposite direction. When a Texas court banned affirmative action in the '90s, the Texas legislature resurrected it with the so-called "10 percent plan."

As for the Seattle case, these programs exist in very few school districts in the country—around 5 percent according to estimates on both sides. Many believe that even in places like Seattle and Louisville, administrators that are determined to keep them going may be able to do so. So the practical effect of the decision may be limited. For all these reasons, although I found the Seattle decision an unconvincing and an example of conservative judicial activism, I wouldn't bet on it provoking a backlash. And then think of the rest of the cases: Kennedy's decision upholding the power of school principals to discipline students and limiting challenges to public funding of religion—these aren't likely to provoke a widespread rebellion either.

But the future is not entirely bleak for liberals who hope for the possibility of a backlash. Right now Kennedy is in the driver's seat, but it's not at all inconceivable that there could be six-man or six-person majority to join Justices Scalia and Thomas in their crusade in the future. And if that's the case, I could imagine the Court doing things that national majorities intensely oppose. If the court overturned *Casey* and said that early-term choice may be restricted, this position—unpopular with two-thirds of the country—might lead moderate GOP men and women to desert the party

in droves. And in a country of parity, that could make the difference for the Democrats which is why many of us pro-choice, Democratic critics of *Roe* think that the demise of *Casey* might ironically be one of the better things that could happen to the Democratic Party. That could provoke a backlash.

And then think about the cases associated with the movement that some of us have called the constitution in exile. Cass Sunstein and I were chastised a couple of years ago for suggesting that the conservatives were on a crusade to reverse environmental laws and health and safety laws. But as the recent decisions involving the Clean Air Act suggest, our fears are by no means hypothetical. And I could imagine that if it were not Kennedy but a reliable conservative who was running the show, the Court might actually strike down laws that people care intensely about. At that point especially with a Democratic president and Congress, I could imagine a meaningful confrontation between the Court and the political branches in a way that we haven't seen certainly since *Roe* and maybe even since the New Deal. So there may be hope or trouble ahead on those lines.

But the broad point, and I'll now conclude, is that it would be foolish for liberals to put too much faith in the courts right now. And they don't have to, because on many of the great issues that are most contested now, abortion, I think ultimately affirmative action, campaign finance, and environmental laws and health and safety regulations, we have public opinion on our side. We no longer need judges to fight our battles for us. And to the degree that judges thwart these intensely held national views by unwisely resorting to conservative judicial activism, liberals can respond with the cool and convincing voice of bipartisan judicial restraint. Thank you so much.

MR. LAZARUS: Yes, I give you fair warning that I'm sure some of the panelists are—and if they don't, I will, going to probe your views about some of the more activist liberal decisions and your criticisms of them. But you've given a wonderful historical description of the backlash phenomenon. And Scott, I have a feeling, since I've now read a couple of hundred pages of your work, that you will probably take issue with a few of the things Jeff has said empirically.

MR. SCOTT LEMIEUX: What's amazing is that when I started this interminable work many years ago, I was actually a believer in the backlash thesis. I expected to find that litigation would actually produce more opposition than other forms of change. And as I looked into it with respect to the issue of abortion—and the backlash thesis is believed by people on both the left and right—I found that it was a pretty convincing thesis, and the only things wrong with it were that there was no theory and there's no evidence. Other than that, it was completely airtight. But those are the only two flaws.

I won't talk in my initial remarks about my own reflection that I did not really find it theoretically convincing—because I know professors Post and Siegel have some interesting things to say about that. And I think it will come out in the discussion. So what I'll do is briefly explain the reasons why I think that empirically the idea that courts produce a greater backlash than other political changes achieved through other institutions is not an empirically solid thesis. And this is not to say that decisions like *Brown* and *Roe* and *Goodridge* don't produce a backlash. We know that they do. But if that's all that we're arguing, that's a fairly trivial claim. We can avoid backlashes by just never winning, and sometimes it seems like that is our strategy—but obviously nobody advocates that. So the real question is: does using the courts produce more of a backlash than using other institutions? And on this issue, unfortunately or fortunately or whatever, I actually don't really buy it. And I should say that I think this is

not only true of decisions I approve of, but I also think this is true, regrettably, of many decisions that I don't approve of. I wish that Professor Rosen had been right when he said that after *Bush v. Gore* the Court had committed suicide. But the decision didn't seem to produce as much of a backlash as might have been expected. So this isn't just about whether I agree with what the Court is doing or not, but I think that the idea of the courts producing unique backlash isn't very well founded.

So let me explain some of my reasons for this. When it comes to *Roe v. Wade*, the key obviously is to look at what was going on at the legislative level before *Roe*. If the backlash thesis is correct—and this my biggest misunderstanding, that I kind of bought this romanticized idea of what was going on before *Roe*, which is that state legislatures were slowly but surely moving towards liberalization and the Court may have sped things up a bit, but it did so by provoking a big backlash.

What I think a lot of people don't understand is that for all intents and purposes, abortion legalization at the state level had stopped by 1973—that most of the initial liberalization came during a brief flurry in 1967 before the pro-life movements got organized, and you had some states liberalizing entirely, only four, sometimes provoked by state litigation, and you had some other states engaging in compromise legislation that would insulate doctors from prosecution but would still criminalize abortion in some circumstances. But by 1973, abortion was still illegal, was not fully decriminalized in 46 states and was still illegal entirely in 37 states despite public opinion very similar to today, and it wasn't really getting any better. By the time of *Roe*, pro-life groups were extremely well mobilized, reform attempts after reform attempts were failing, referendums were losing. So essentially the movement was largely dead by 1973. And there are a variety of reasons for that, but the most important are that America's legislative institutions are not particularly majoritarian, especially when it comes to changing the status quo—that it's much harder to get legislation repealed once it's entrenched.

And the second problem where abortion is concerned is that for all intents and purposes, abortion laws are only applied against poor women—that affluent women in urban centers almost always have access to safe abortions anyway. So the people who have the biggest stake in decriminalization are the women with the least political power. So because of this arbitrary enforcement, it's harder to get abortion legislation repealed even when public opinion supports it. So for that reason, it's simply not true to say that *Roe* created the pro-life movement or that there was sort of an inexorable wave towards legalization before *Roe*. Basically the movement had stopped and it was going to be difficult, once we cherry-picked the most liberal states, to liberalize a lot more states. And I think without *Roe*, abortion would still be illegal in somewhere between 15 and 25 states today. So that's my first argument.

There are a variety of other pieces of evidence we can look at. Unfortunately, there wasn't a well developed conservative media then as there is now. But one interesting thing is that if you look at the *National Review* at that time, you'll find that there were more articles about abortion in the three years before *Roe* than in the three years after *Roe*. So this is clearly something that was on the agenda of movement conservatives, and if you read these articles, it's pretty remarkable. Bill Buckley is writing these editorials like: here's out four point plan for stopping abortion, we're going to picket clinics, we're going to write op-eds, we're going to compare them to the people running Auschwitz, et cetera, et cetera, et cetera, et cetera.

So movement conservatives were very aware of this issue; it's connected to a lot of their broader concerns, and they were clearly conscious of it and mobilizing about it

before *Roe*. *Roe* made it national but that's only because, again, it was a victory. But there clearly was a lot of counter-mobilization at the state level that was in fact very effective. And as Professor Rosen noted, public opinion on abortion has been relatively consistent. The backlash hasn't shown up in terms of increasing opposition to legal abortion. And I think perhaps the most interesting fact, if we're considering whether overturning *Roe v. Wade* would be good for reproductive freedom in general, is that *Roe* if anything actually polls better than its underlying policy goals. *Roe* is consistently supported by a two to one majority, and you can see this during presidential debates and confirmation hearings. Democratic candidates are very explicit: our candidates will support *Roe v. Wade*. When you ask Bush about *Roe*, he looks like someone's approaching with a cattle prod and starts babbling about slavery, whatever. So conservatives are not explicit about wanting to overturn *Roe* because they know it's not popular, which I think is inconsistent with the idea that resolving these through the courts was really damaging to reproductive freedom. So for all these reasons, although it's hard to know, I don't think that the backlash to *Roe* was—or the backlash to abortion rights was created by *Roe v. Wade*. And I certainly don't think that it would be better for reproductive freedom were *Roe v. Wade* to be overruled.

When it comes to *Goodridge*, again, I think what happened recently in Massachusetts is quite remarkable. If the backlash thesis was correct, we would expect the cause of gay marriage to have been set back both in Massachusetts and throughout the country. Instead what's happened is that gay marriage has become more popular in Massachusetts after *Goodridge*. And we went from having a majority of legislators opposed to gay marriage to not even be able to get 25 percent of the vote to bring a constitutional amendment that would repeal it. So that's quite a remarkable shift which is precisely the opposite of what the backlash thesis would predict. Gay marriage has actually become more popular, and legislators, even if they weren't crazy about giving the rights in the first place, are very reluctant to take them away, which is an interesting dynamic. And some other states have continued to enact civil unions. And in the states where there were referendums passed after *Goodridge*, these were all states for the most part in which there weren't civil union or gay marriage rights, in which there was no prospect of it.

So particularly since state constitutional amendments could be overturned like ordinary statutes for the most part, it's not clear how much this hurt the status quo. It hurt it a little but not an enormous amount. And I think a majority of the voting behavior analysis suggests that gay marriage was not a decisive issue in the 2004 election. And you may recall some people saying that when the New Jersey courts mandated civil unions before the 2006 election, that this was going to be a disaster to Democrats, it would mobilize social conservatives, and you're probably not hearing much about that now for obvious reasons. So I guess one problem I have with the backlash thesis is that some of its proponents have predicted eight of the last two backlashes. So it's important to remember when predicted backlashes don't happen.

And just very briefly, another thing I did in my dissertation was to try to bring some comparative perspective. One reason I have trouble convincing people about the American case is that people can see that there was a reaction to decisions like *Goodridge* and *Roe*. And we could play a counterfactual game, but it's still hard to know what would have happened otherwise; maybe a whole bunch of states would have liberalized without *Roe*, we don't know. So one thing I've done is looked at our neighbor to the North to see what's happened there: that if the key variable is litigation, this should show up in countries other than the United States.

What's interesting is that Canada, first of all, has the most liberal or one of the most liberal abortion regimes in the Western world. It's almost unregulated, state funded, and this was created by a decision—a Canadian Supreme Court decision about 20 years ago. And despite this, abortion is not a particularly salient issue in Canada, the policy has been completely stable, it hasn't been especially divisive. So in that case, litigation doesn't seem to have produced a major backlash. And similarly, Canada had a very litigation-driven legalization of gay marriage at the federal level. And there was recently an election—a new conservative government came in—they made one desultory attempt to repeal the ground of gay marriage. Several members of Prime Minister Harper's own cabinet voted against it. And Harper said right afterwards, after his attempt to repeal it had failed, that we don't plan on ever bringing this issue up again. Essentially for us, it's closed. So again, it seems that the litigation driven creation of gay marriage in Canada has not produced any kind of backlash. And in fact, gay marriage continues to be more popular and entrenched.

So I should in conclusion say that this is not to say that I'm completely Pollyanna about litigation. As will come out in discussion, I do agree with some aspects of what people like Professor Rosen and Gerry Rosenberg and Michael Klarman have argued. But on this narrow issue, my view is that issues like abortion and gay rights and civil rights are divisive because they're divisive. And this divisiveness was not created by litigation, nor do I think that this divisiveness will go away if progressives unilaterally disarm.

MR. LAZARUS: Thank you, Scott. And I'm going to turn now to Reva who has looked at this issue from not only an empirical standpoint, the way Scott has, borrowing I think on some of Scott's work, but also very much from a theoretical point of view of really what role should courts play in constitutional interpretation and what is the interplay between those courts and any backlash that does occur.

MS. REVA SIEGEL: Okay. So what I'm going to do is something near to impossible, which is—I was told that I had three minutes to speak—because Robert and I are presenting together here, so I'm going to give a very short account of the first half of a paper that we've recently done, which is called *Roe Rage: Democratic Constitutionalism and Backlash*.¹

The paper starts by examining a very common view of backlash, namely that it's bad. It's bad either because it involves popular resistance to authority, or because this popular response is itself a sign of judicial overreaching. It is this second understanding that Jeff is speaking from now—the idea that backlash occurs when courts have strayed from their proper role and entrenched upon popular consensus.

Our paper offers an alternate view of backlash. Rather than starting from the assumption that backlash is a social ill or a wrong that needs to be remedied or avoided, we are writing from the view that backlash is a normal part of the constitutional order in which we're living and that it has many benefits as well as some obvious and indisputable costs.

On what do we base this alternative understanding of backlash? We begin by considering the Constitution's authority. The Constitution's authority in the end is democratic. The Constitution is authoritative to us because we recognize it as *our* Constitution. It does not have authority except as we recognize it in those terms. The question then becomes: how is it that the Constitution's democratic authority is

¹ Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

sustained over time, from generation to generation? There is a conventional answer to that question, which grounds the Constitution's democratic authority in the authority of lawmaking. The founders went through a procedure. And in fact, if we want to change the Constitution that we've inherited from them, we have available to us the procedures of Article Five to alter the Constitution.

In *Roe Rage* and in other of our work, we observe that the lawmaking paradigm is insufficient to account for how the Constitution's democratic authority is sustained from generation to generation. This claim is not normative. We're observing something about the nature of the constitutional order in which we're all participating, namely that there are multiple mechanisms and feedback loops that sustain the authority of the Constitution over time. Formal constitutional lawmaking is supplemented by electoral controls over judicial nominations and appointments, which provide a crucial form of democratic input into the constitutional order. Once you begin to look, it is easy to identify other practices that provide courts democratic input. Think about threats of jurisdiction stripping or, in *The New York Times* recently, court packing.

You might also think about the role that state legislation and state constitutional interpretation plays in beginning to articulate or to question norms in the federal system. Or, you can think about other mechanisms of norm contestation in civil society: protest movements, civil disobedience, the like—the sit-ins, what have you. There are a variety of these feedback mechanisms, through which backlash is conducted.

Now, let's return to the question of whether we understand backlash as a sign of something gone awry or instead as normal and perhaps even valuable part of our constitutional order. It's plain that backlash is a threat to a Constitution that vindicates values associated with the rule of law as well as democratic self-governance. It is a threat to the authority of judges and it tears at the social fabric. We do not mean to minimize the cost of what happens when the various forms of interaction that we refer to as backlash occur. We're not disputing this.

The question is: is anything gained through this, is anything of social value or system value produced through it? And what we argue in this paper is that, indeed, there is. These goods will not be visible to us if we start from the assumption that the Constitution already has authority or that it sustains its authority simply by reflecting what are the homogenous views of the American people. This is the consensus account that Jeff is offering, namely that there is always a consensus out there and the Constitution, rightly interpreted, reflects that consensus, and that's that. Backlash will not appear to produce any social goods if we think that there is a simple, static consensus for the Constitution to reflect, or that, when there is no consensus, we think that people should just defer to authority, so that when they're told what the Constitution means they should listen and submit. If that posture is acceptable normatively, then indeed, backlash will appear socially destructive.

On the other hand, if you start to question any of these positive or normative assumptions, you begin to see why it is that backlash, not only inflicts costs, but also has social goods to contribute. These goods will be perceptible if you pay attention to the fact that each of us did not participate in the framing of the Constitution and the question of how it's "ours" has always been an issue for us. These goods will be perceptible if you pay attention to the deep normative heterogeneity of the American polity, and notice that people disagree with each other quite passionately about matters of constitutional moment. If you pay attention to all this, then you can see that the question of sustaining the Constitution's authority over time is much more

important and much more complicated than we conventionally acknowledge. In fact our constitutional order has complex social mechanisms for achieving this.

Since I'm doing the three-minute presentation of half our paper before Robert speaks, I'll just say two more things here. Our paper offers an account of how it is that backlash could have constructive social effect. There are forms of communicative action going on when there's popular resistance to judicial overreaching, as Jeff is pointing out. So backlash promotes what I call democratic "steering." Backlash also promotes forms of solidarism and "attaching." People are struggling to speak to each other about the meaning of a shared tradition. They're struggling to speak in the name of "We, the People." Therefore, they have to render themselves intelligible to one another and that struggle, that debate, that attempt to make a claim on a shared history and shared modalities of interpretation and to say what the Constitution, rightly understood, means is itself a form of community in conflict. That is the core, the foundational frame, of this paper.

Not only are there system goods produced through constitutional conflict, but there may also be goods for *liberals*, if you'll excuse the phrase here. We understand much liberal writing on backlash as an effort to cope with the rise of the new right—as reflecting dread about the forms of social practice that put the Second Reconstruction and the Great Society in peril. But these forms of retrospective mastery may not provide liberals what they need in their relationship to the courts in the coming decades. It may be time to look back at what it is that conservatives did in the 1970s when they faced a judiciary that was construing the Constitution in ways that felt normatively alien to them. And here I'm going to turn this over to Robert.

MR. ROBERT POST: Thank you. So I'm going to pick up from where Reva left off and very, very quickly discuss some implications of this analysis for the question of abortion. If you think back about 10 years ago, you can probably remember that progressives regarded courts as the fora of principle, where rights were vindicated. By contrast how do progressives regard courts now? We have popular constitutionalism, we have minimalism, we have liberals turning away from courts. The question is: why is this so?

One is that we've been traumatized by the rise of the new right. We are so afraid that if courts become too assertive they will provoke a reaction that will strip us of what we've gained through litigation. That trauma is the subject of my talk. It is absolutely explicit in writers like, for example, Cass Sunstein, who believe that one goes too far, and attempts decisions like *Roe*, one will provoke a backlash that will sweep away everything one wanted to accomplish. I want to ask whether, historically, this is true. I want to inquire into the actual backlash that surrounded *Roe* and to ask after its normative implications at for us now?

When *Roe* was decided in 1973, there was, as Scott says, opposition to the liberalization of abortion. The mobilized opposition was chiefly Catholic, and it was opposition that applied equally to legislative liberalization of abortion. It wasn't specifically related to anything judicial. It was opposition to abortion per se. If you read Jerry Falwell's autobiography, he says at the beginning of it something to the effect that: "I woke up one morning the day after *Roe* was decided and I read about this baby killing machine. I knew I had to be in politics." But as far as we can tell, this story is not true. Immediately after *Roe* there wasn't major organized opposition to *Roe* among protestants. It took about three or four years for major backlash to the decision to arise. And why is that?

One account, the liberal account that you will read endlessly in the pages of liberal academics, is that the court in *Roe* overstepped its proper boundaries, that it made judicial mistakes, that it didn't offer a correct explanation of its decision, that it went off on due process instead of equal protection, or that it went too far, etc. etc. These are certainly questions that academics talk about to each other. But they are not questions that create a social movement. People in the world don't care whether Blackman got his reasoning exactly right. They don't go into the streets to protest mistakes of judicial craft. Why then did they go into the streets after *Roe*? We point to three phenomena.

The first is that abortion was in the process of changing its meaning in the 1970s. When *Roe* was decided, it was written from the point of view that abortion was largely a doctor's issue. But in the 1970s the women's movement was in the process of transforming abortion into a woman's issue, of asserting that women had the right to end their pregnancies. This change in the meaning of abortion was emphasized in the debates over the ratification of the Equal Rights Amendment, when Phyllis Schlafly observed that the ERA would mean abortion on demand. Abortion came to stand for the social fact of women leaving home and becoming independent wage earners. So opposition to abortion became, in effect, opposition to women acting independently outside of the family.

The ERA was attacked as an assault on the role of women as wives and mothers; it was said to promote federal daycare centers for babies instead of homes and to promote abortions instead of babies. Government day care centers and abortions were attacked together. This conjunction continuously recurs, so by the time abortion entered the Republican Party platform in 1980, we find the party's pledge "To work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent life." This same pledge has remained virtually unchanged to the present. The "sanctity of life" and "traditional family values" are yoked together because from the point of view of social mobilization they are the same issues. Abortion became a woman's issue, so that by the decade's end mobilization against *Roe* was mobilization against women's equality. That's point number one.

The second point: There is a second strand to the mobilization against *Roe* which concerns religion. Catholics and evangelical Protestants have never been allied in the United States. But they came together in the late 1970s over abortion. Although at the time of *Roe* Falwell wasn't preaching against abortion, and although at that time the Baptist Convention didn't oppose abortion for therapeutic purposes, by 1976–77 Catholics and evangelical Protestants came together in a joint attack on secular humanism. They meant that the state had been taken over by secular forces who want to read religious values out of government and out of public policy. And in this context mobilization against abortion and against *Roe* began to stand for opposition to the loss of religious values in public life.

The third point is that this alliance between evangelical Protestants and Catholics, which is a new phenomenon in American politics, was brokered by Republican Party operatives like Paul Weyrich and Howard Phillips, who meet with Falwell in 1979 in Virginia to propose the formation of a mass political movement that would be allied with the Republican Party. Abortion was proposed as a central link that would unite evangelical Protestants with working class Catholics and so break apart traditional Democratic constituencies. This alliance was brokered as a conscious political deal.

This means that the backlash to *Roe*, which is connected to the rise of the new right, is really the expression of a coherent constitutional vision—the expression of what

Robert Cover used to call “nomos.” That constitutional vision concerns traditional family values—the idea that women should stay in at home—and the affirmation of a religious state—one in which the Bible would not be taken out school. The Warren Court’s bible decisions are actually a major source for the rise of the religious right.

Now I ask you—Is minimalism a plausible way to fight a constitutional vision of this depth and power? This constitutional vision is inspiring great numbers of people to elect Presidents who will appoint judges to interpret the Constitution in light of this vision. And does one fight a constitutional vision like this? Not by minimalism. The only way is to counter a conservative nomos with a progressive nomos. So don’t imagine that by abandoning *Roe* we going to succeed in placating the conservative assault. That assault is about values that far transcend abortion. It is about the meaning of gender equality. About the role of religion and the persistence of the secular state. That vision has to be fought both politically and judicially. It has to be fought with both a politics and a jurisprudence. And that, for us, is the implication that liberals ought to take from the backlash to *Roe*.

MR. LAZARUS: Thank you, Robert. I was interested in your summation, before I turn it over to Roger, in that Cass Sunstein, while being the author of minimalism has also called for a new progressive vision. And I wonder how, if he were up here, he would reconcile those two ideas—and perhaps we can talk more about that as we get to the questions. Roger, the floor is yours.

MR. ROGER WILKINS: Thank you. I think there is a need on this panel for a plaintiff to speak. And since I am not a gay man nor am I a lesbian, nor am I a lesbian—get that, hear it? And I am not a poor pregnant teenager. So for the purpose of this discussion, I’ll pretend to be black. The work that I object to is done by University of Virginia Law Professor Michael Klarman who among other things suggests that *Brown v. Board* might well have been a mistake, that progress was being made in the South and that *Brown* elicited a massive backlash which has been destructive of the interest of *Brown* ever since.

Brown was a shot at segregation. Let me tell you something. I’m going to describe your plaintiff a little bit for you. I am a 75-year-old natural born citizen of the United States if you can call natural born being born in a segregated hospital, in a segregated town, in a segregated state, in the middle of the country—Kansas City, Missouri. My understanding of what segregation meant, I got from the strongest human beings I knew and that was my parents and their friends—all college graduates, all as I now understand it with their lives being defined, squashed, and diminished. And I learned what I learned about segregation from listening to them as they sat and talked to each other. And almost always, in their social discussions, ultimately the crushing, soul-breaking weight of segregation became the central subject of the conversations. As I grew up, I learned that my parents and their friends were right. I learned because of segregation or the racism in Grand Rapids, Michigan, where I ultimately grew up, that your soul could be shattered by any white person who just happened to be having a bad day and didn’t like black people and decided to do something nasty, whether it was clerk in a store or a policeman or just an adult dealing with a kid.

Segregation wasn’t just in the South. It was in the North too. I went to the University of Michigan for seven years, college and law school. Now, don’t get me wrong, I love the University of Michigan. And I am totally convinced of the source of all evil in the world is located in Columbus, Ohio. But I went to the University of Michigan for these seven years, 1949 to 1956, and I was never assigned a book, a poem, a short story, an essay, or a play that was either written by a black person or suggested that any

black people had ever done anything constructive in the history of the written word with one exception. In law school, we studied *Brown v. Board*, which had just come down the previous year. Well, there's a black guy who had done something named Thurgood Marshall.

I say those things to suggest to you that the real result of segregation was to put black people in a defensive crouch in our souls, all the time. And in a country where robust, vigorous, unending effort is required for success, I want to tell you, a defensive crouch is not really the way to begin any day that's going to be successful. *Brown* cracked segregation. Sure there was a backlash, but there's always been a backlash in this country when something good happens for black people. There was a movement after the revolution in the 18th century for Northern states to abolish slavery. Now, yes, what happened was that the Southern states began to import more and more slaves and send them down to the Southwest of the South; the slave trade became more vigorous. But the fact is that lots of black people in the North became free, not all of them, but lots of them. I don't think that those black people who became free in the 18th century would have had a tradeoff—"Oh, we will stay in slavery so there won't be a backlash and it will all be quiet the way it's always been."

Of course, in the 19th century, there was First Reconstruction and then there was about the most vicious backlash you can imagine, Ku Klux Klan, Knights of the White Camellia—a terrorism of a degree and kind that you just cannot in your mind think of being a part of the fabric of American culture but there was. But did black leaders decide that the thing that they wanted to do to stave off this backlash was to go to the Congress and say: "Gee, it would be a good idea if you got rid of the 13th, 14th and 15th Amendments." They didn't, and of course, they were right.

Then in the 20th century, there was *Brown* and the aftermath. I can tell you I do not believe that had *Brown* not come down that the Montgomery Bus Boycott, which followed the next year, would have occurred. As I matter of fact, I knew Mrs. Parks and one day I asked her, I said: "Mrs. Parks"—now she was the secretary of the NAACP branch in Montgomery. I said, "Mrs. Parks what made you do what you did that day?" And she said: "Well, you know, we had been trying to take a stab at the segregation for a long time. And we started to try it once, but it didn't work out." And she said: "You know, I think it was *Brown* that just made me say, 'This stuff has got to stop.' And that was the day that I kept my seat." *Brown* produced Martin Luther King. *Brown* produced an awful lot.

Now, Klarman says: "Well, it didn't produce a lot of desegregation." Well, that's true. But one of the reasons that it didn't produce a lot of desegregation in the schools was that the chief law enforcement officer of the United States neglected and ignored his duty. And he was Dwight David Eisenhower, he didn't support the Court. He was the most popular man in the United States. And if he said: "*Brown* is the law. I believe in the law. I believe that we ought to abide by what the court has done. And if it comes to it, I will of course use my powers as a law enforcement officer to do what is necessary to see that the court is obeyed." He didn't say that. On the contrary, he leaked it out that he was opposed to *Brown*, and thought that—as his words appointing Earl Warren chief justice was the biggest damn fool thing—mistake he'd even made.

Ultimately, I as your parent—plaintiff, sorry. Parent—I'm old enough to be a parent to most of you. But as your plaintiff, I will say this. *Brown* absolutely changed my life. It made the career that you heard about a few minutes ago possible. Had it not been for *Brown*, I would probably now be a retired lawyer who had spent his whole life practicing law between Grand Rapids and Detroit. But *Brown* made the whole world

open to me and to all kinds of people in my generation and it has rolled down. Would we give up what we've gained in order to avoid the backlash? No way. What you do in struggle is to struggle for justice from the day you're tall enough to understand what's going on till the day you die and the struggle—the struggle is not a sprint. Some people in the civil rights movement, the old people died in a—were sad and depressed because it all hadn't been achieved in their lifetimes. So I began to think of it as—not a sprint but a relay race and not a short relay race but a long-distance relay race.

So I am buoyed by the strength of my slave ancestors who believed that one day their children would be free and so they held it together and taught their children as best they could. And I hope that, in my lifetime, I am setting an example for my great grandchildren who have yet to be born that we did the struggle. Now, these kinds of struggles aren't for the faint of heart, they're not for scaredy-cats, and they are for people who know that these kinds of struggles are tough—that sometimes you lose and sometimes it hurts. So you go to bed and you get up the next day and you go out and fight some more. That's the way you do it and you don't worry about backlash and you treasure the achievements that your movement has produced. I can't speak for gays, lesbians, and pregnant youngsters, but I believe that they would agree with me. Thanks very much.

MR. LAZARUS: Thank you, Roger. And I am now going to display my cruel streak. And I'm going to turn to Jeff and going to note that you have sometimes written admiringly of Professor Klarman's work and have taken a somewhat different view, not of *Brown*, but of some of the decisions that we've been talking about. And in particular, you've written about the fact that there is an important categorical difference between judicial decision making and legislative decision making and that the quality of judicial decision making also matters. And I'm wondering if you could talk a little bit about your views on those topics and perhaps talk about whether all backlashes are created equal or whether some of the things we've been talking about our, with respect to one decision like a *Brown*, are different from your views with respect to a decision like *Roe*.

MR. ROSEN: Those are all good questions. But I'd like to get to the heart of the matter, because this debate was fascinating. Judicial craft matters to lawyers. So when I went to law school, I was upset about judicial activism not because I was traumatized by the prospect of living under a conservative judiciary—because this was the 1990s and such a judiciary didn't exist. I was upset because I found it difficult to accept decisions whose result I agreed with like *Roe* but whose reasoning I was unable to find persuasive. And I took that sort of stuff seriously. Does that matter broadly? No. Most people don't read Supreme Court decisions, and they don't care about the reasoning.

But to the degree that *Roe* in Robert and Reva's fascinating account precipitated—although it didn't cause this principal political backlash motivated by views of traditional women and of religious views about the nature of personhood, it was able to have the political influence it did only because of *Roe*. The truth is that only 20 percent of the country, even in the most conservative states, accepts these views of the role of women and wants to ban abortion in all circumstances.

The new right loses when they're subject to political tests. It was only because, first of all, *Roe* by protecting early-term choice allowed pro-choice women and men to vote for the GOP without fearing that abortion rights will be threatened, and more importantly, because the new right could portray *Roe* plausibly as an enemy of the late-term restrictions on abortions that most Americans, most Democrats and Republicans,

many people even in this room—if the polls are to be believed—support moderate late-term restrictions on abortions.

By painting *Roe* as a radical decision, the decision transformed our politics in a way that's been a disaster for Democrats. It has made every judicial confirmation hearing into a referendum on a decision whose reasoning many of us are unable to accept but we have to plead allegiance to. It's transformed the Senate and the House, whose leaders are persuaded to pander to their extremist bases—these interest groups which rose in response partially to *Roe*, weren't caused by it, didn't arise immediately afterward—but arose because *Roe* nationalized the abortion debate and has distorted this presidency and led us to live for the past two terms under a president whose more concerned about pandering to this anti-Democratic conservative base that has no national majority than he is about representing the views of the majority as a whole.

Was this all caused by the Supreme Court? Of course not. Of course it wasn't. But the Supreme Court, as Reva and Robert suggested, played a role in this dialogue, and the question that you put on the table, Eddie—here, I don't mean to dismiss your latest questions. But the first one you posed is the central one and I want to answer that: should liberals resurrect this heroic view of courts, look for a new vision as Robert suggested, and imagine that by embracing some kind of robust, new judicial liberalism they can fight conservative judicial activism? This seems to me completely implausible. The Supreme Court is going to be in the hands of conservatives for the foreseeable future, even if a Democrat wins the next time around. The idea that there could be a meaningful strong, five-vote liberal majority is a fantasy, so judicial activism will only redound to harm Democrats. And more importantly, it's always been a disaster for political movements that can win their points in the political arena, as the Democrats can.

I'll close by saying this: I do have a vision. I think of it as a heroic one. It's really not mine but I was inspired by it in law school, and I'm still inspired by it. It's a vision of bipartisan, judicial restraint. I write for *The New Republic* magazine where I'm the legal editor. The founders of *The New Republic* included Holmes and Frankfurter and Learned Hand who thought of themselves as progressives and were upset by conservative judicial activism. And by resisting expansive uses of the courts thought they could defend progressive values. This vision was continued through the 1960s by people like Alexander Bickel with *The New Republic* who opposed *Roe's* reasoning, Eddie, as you suggest, but supported its result. And I've tried to keep it going till then.

Whether you want to embrace this vision for reasons of strategy or for principle, it seems to me obvious that in an era where conservatives will control the courts for the foreseeable future, liberals should focus their energies on winning their points in the political arena. They've proved their ability to do so. And by wasting our time imagining, hoping, yearning for judicial salvation that never comes, we risk shooting ourselves in the foot.

MR. LAZARUS: Well, Jeff, I appreciate—the battle is now joined. I had thought that the remarks you just made might have been your opening remarks, and I'm delighted you made them now. And Robert, I think I'm going to turn to you since it was your vision that I think Jeff was targeting right there.

MR. POST: I think Jeff has made a very eloquent statement, and I guess I'm going to respond in two ways. The first is: I don't think one should imagine this as a question that is either judicial or political. The tradition of *The New Republic* that I would identify with is that of Brandeis, who precisely didn't make a sharp distinction

between law and politics, and who precisely saw judicial rights as flowing from a vision of the state, which, as you know, was connected to his ideal of Athenian democracy.

So I would resist this premise of bifurcation. I would say: “Yes, of course we’re not going to control the Supreme Court for the next couple of years. But the question is how the next progressive judge who gets appointed is going to form his or her jurisprudence. Will that jurisprudence come from the striking and ineffectual posture adopted by the left in the context of the Roberts and Alito nominations, a posture that did not stress a constitutional vision but instead stressed issues like judicial independence, the rule of law and super-precedents? I don’t think so.”

Instead of stressing legal process values, the left should have been stressing a substantive constitutional vision. It should have arguing that the right has the wrong idea of courts; that they’ve got the wrong idea of what access to courts a democracy requires; that they’ve got the wrong idea of how equality and liberty should be protected. That’s what our opposition to the Roberts and Alito nominations should have been. But we didn’t come through, because we haven’t yet developed a convincing progressive constitutional vision that is politically effective. I suggest that we cannot have a constitutional vision until we first have a political vision. And this means that successful constitutional law is not bifurcated between the judicial on the one hand and the political on the other. They flow seamlessly together. It is exactly this sort of constitutional vision that the right has made. The right has mobilized in the name of a political vision that focuses on the need for religion, traditional family values, and the rights of property. And from that political vision has grown a judicial philosophy which they call originalism, but which of course has nothing to do with originalism. It’s just a brand that signals the nature of the conservative political philosophy that is being expressed. We need to create a similar vision and a similar brand. .

MR. ROSEN: Could I respond just very briefly. I embrace the resistance to bifurcation entirely. I was just responding to the way that Eddie phrased the question in a Manichean way to get us going.

MR. LAZARUS: That’s my job, Jeff.

MR. ROSEN: I know. I appreciate it. You’re doing very well. Brandeis is a model I’d be happy to embrace, too, because he really was ultimately a Democratic constitutionalist who believed strongly in certain values—First Amendment values that ultimately the public was willing to accept. He embraced a dialogue between the court and the public because he was essentially a restraint man—sensitive to state experimentation, deferential to Congress, and never making the mistake of imagining that judicial salvation could substitute for political activism. So I’m happy to join you on that one.

MS. SIEGEL: I just want to say one thing in response to Jeff’s vision of a social change emanating from *Roe* and that is to invite you to read the history section of our *Roe Rage* article, in which we explore whether and how *Roe* caused conservative counter-mobilization. It’s plain that *Roe* played an enormous, symbolic role in this mobilization. For a variety of reasons, *Roe* came to stand for values that many Americans thought insufficiently respected by the Court and the country. Groups that opposed the ERA and were concerned about the school prayer decisions, et cetera, came to talk about the abortion decision as a symbol of a court that was wrong—not just because it exceeded its proper role—but also because it imposed values that these Americans thought not theirs. Right?

It’s important to tease these two objections to *Roe* apart. When you do, you’ll see something that goes to the bifurcation point. Even though we talk about the Court as

a counter-majoritarian institution and judicial decisions as ending politics, it turns out that decisions like *Brown* and decisions like *Roe* and decisions like *Bowers* actually play an enormous role in distilling normative questions for a democratic polity and moving people to make claims on the meaning of their constitutional tradition. So that in fact, Supreme Court decisions can, and in a deep way, do lead to this integrated response: they provoke democratic deliberation and participation that finds expression in political and majoritarian arenas as well as in adjudicative fora.

MR. LAZARUS: One of the things that Reva just mentioned is the symbolic power of *Roe* and I would say there are perhaps a few other iconic decisions that get held up the same way whenever I'm driving across middle America and listening to talk radio. *Roe* is mentioned with remarkable frequency, and it does have this media generated power especially on the right. Scott, one thing I wanted to ask you—just to pick up on the theme that's been an undercurrent here a little bit—is: Okay, if we're facing a court that might turn radically to the right, do you think in the modern era that progressives are capable of generating backlash or has this really become a one-way ratchet and that the backlash phenomenon is really a right-wing phenomenon in this country?

MR. LEMIEUX: My—and hopefully we won't find out, but my guess is that it would not be one-way ratchet—that if you had a Supreme Court that legitimately was to find a constitution in exile to strike down major parts of the New Deal regulatory state, I am quite convinced that that would have major electoral implications.

MR. LAZARUS: So you think 1937 could happen again, in essence?

MR. LEMIEUX: That would be my guess, yes. Now, I think that's one potential danger, though of the kind of clever minimalism of the Roberts Court. It's that you're much less likely to get a backlash if you kind of hollow out precedents from the inside rather than overturning them explicitly. Overturning *Roe v. Wade* and *Casey* would have a major backlash, which isn't the same as saying, "we're not deciding anything about *Roe*. We're just saying that no abortion regulation is ever unconstitutional." That may produce less of a backlash in a way. And I do think that we should consider that as a major democratic cost of minimalism.

I sort of agree with Scalia in the campaign finance case that if you're going to logically overturn a precedent, you should be explicit about it. I think the real minimalists like Professor Sunstein would say that that's not real minimalism at all—that it's phony or whatever. But I do think that one thing to worry about with Roberts and Alito is that precisely because they're not as explicit and kind of abrasive as Thomas and Scalia, they may be able to get away with a lot more. Although that couldn't extend to actually striking down the Social Security Act or something like that. That would produce a backlash. I would hope.

MR. LAZARUS: I'd like to make sure to get to some of the questions that have come from the audience here. And Roger, I have one here that I think is well addressed to you which really has to do with a distinction between principles announced and means adopted. And that is: when we think about backlash, especially perhaps in the context of *Brown*, was the backlash—is the focus on backlash really about the principle that was announced or was it exacerbated substantially by the means used such as forced busing or other aspects of social engineering to achieve some of the broader-base social goals?

MR. WILKINS: I think the backlash was essentially against the principles enunciated. The methods used, particularly the attacks on busing and affirmative action, were tactical. Look, Klarman is right that you could not have gotten out of the

Congress of the United States in 1954 federal legislation that decreed that schools should be desegregated. There were goons from the South in all the congressional spots where you could throttle legislation and so—but these people, just a lot of the backlash people could not envision black kids and white kids going to school together and it wasn't just Southern. There was a lot of feeling like that in the North—in Michigan, for example, where I grew up to the extent that now, the state of Michigan is one of the most segregated places in the country. So no, I think it was there—I hate to tell you a secret, but there are a lot of white people still in this country who really just don't like black people. And that's the truth.

MS. SIEGEL: One way of thinking about this is that, through *Brown*, the courts succeeded in altering the debate in such a way that opposition to *Brown* got deflected onto busing, where it was still permissible to resist the courts. It is deep evidence of *Brown's* success that now everyone's fighting to control the meaning of *Brown*. That's what we've seen in the recent desegregation cases. The whole question is whether you can express your world view through a vision of *Brown* itself.

Brown's history shows us one way that the Supreme Court exercises authority in areas of ongoing public debate. Supreme Court decisions can structure debates without settling them. Neither *Brown* nor *Roe* settled debate. But as *Brown* and *Roe* illustrate: the struggle to control a decision's meaning changes the world as it existed before the Court handed down the decision—no matter how tattered and torn debate leaves the decision. A Supreme Court decision announces some set of understandings whose meanings still have to be vindicated in politics.

MR. LAZARUS: Right. I think one of the defining movements in 1986 at the Rehnquist confirmation hearings, was when he had to embrace *Brown*, a decision that as a younger man he had opposed. But what we now see as you say is the reinterpretation of *Brown* to fit a very different jurisprudential worldview. I suppose it's appropriate given that this is an ACS event that several questions have focused on the Federalist Society, and I'm trying to coalesce the suggested questions into a single one. And I think it might run something like this, and I'll pose it to Reva and Robert, which is the suggestion that legal reasoning doesn't matter because people ultimately care about results and the ultimate values announced in the decisions. But haven't there been now more than one generation of law students inspired by a sense of intellectual betrayal with the court where it's not just a question of disagreeing with bottom lines, but that in fact, there's a bankruptcy about the liberal enterprise that has driven a very large cadre of younger law students and now not so younger law students who are in the executive branch and on the bench to create what is—I don't know if I'll call it backlash, but I'll just say a deep retrenchment and reversal. And so, doesn't legal reasoning matter?

MR. POST: I spend my life teaching legal reasoning. I certainly believe it matters. The question is: for what does it matter and in what context? As professionals who want to instantiate the rule of law, legal reasoning matters—it is our craft. It matters that legal reasoning is done right because integrity matters, as do the standards of the legal profession. But when one talks about the boundary between law and politics and how law comes to express political vision, which it must do if law is going to be democratically accountable, then we are talking about a different question.

Why does law carry authority? Is it because somebody says, "This is the law"? That picture may tell us about why we stop at red lights in the middle of the night. But it will not tell us much about constitutional questions that matter, and about the way that controversial constitutional values acquire authority. That only happens if we

have some degree of trust in the judge announcing the values, if we come to believe that judges are speaking for us in some way. This means that law and politics cannot be opposed as simple opposites. Law has to take politics inside. If one looks at the actual sociological and historical mechanisms by which this happens, one can see that it is a mistake to think that the boundary between law and politics can be determined merely by professional craft. That boundary is determined by very deep concerns of political vision and ideology. The task of professional craft to shape these concerns through professional reason. The Federalist Society did not arise because judges were sloppy, but because people wanted a different form of politics and they wanted to create a different form of law that would express that politics.

MS. SIEGEL: I think it's really important, first, to disaggregate professional from popular response, and to give each their due. People know that there are norms of craft that give us the ability to distinguish better and worse, good arguments and bad arguments; from an internal perspective, we can make these discernments. Nothing we're saying calls that into question. But if the professional sphere is distinct from the popular, there are also bridges between them. These bridges are easy to find, once we look for them. Lawyers will assess the quality of an opinion, and eventually Jeff will tell us whether it's well reasoned or not. Meaning that there are mediations between these worlds. Another obvious example: law students going through school learn respect and disrespect for different judges and different opinions, and these will ultimately reverberate in the world.

Professional judgment has its own integrity, without being wholly insulated from the political. We don't think it makes sense to exempt the domain of professional reasoning—law school, litigation, and all—from the sphere of *nomos* and social value that the public is in. Social norms have their pull on lawyers as well. Why is it that the sex discrimination intermediate scrutiny cases, which have struck down every sex-based restriction on marriage that existed on the books in the recent past, have never touched sex restrictions on access to marriage, sex restrictions in the very definition of marriage itself? Why is it that intermediate scrutiny obliterated every single sex-based distinction in the law of marriage but this one? That is professional reasoning reflecting something about, if you will, the heterosexism of the social order that we're in. People have an understanding of what's plausible to argue to a bench, what's plausible for courts to find in the Constitution lest they, as Jeff would tell us, make a declaration of meaning so deeply at odds with social understanding that their interpretation will not look like a constitution that represents the understanding of "We, the people." So I think that there are ways in which these domains are distinct and that rationality deeply matters, and yet, rationality is unfolding within a space that's deeply social.

MR. LAZARUS: Jeff, did you want to add anything?

MR. ROSEN: Just one point which is I think the Federalist Society offers a cautionary tale obviously in many ways for the American Constitution Society but in one way in particular that's relevant to this discussion. When I was in law school, I took seriously the promise of the Federalist Society which was just getting up and running to actually separate its jurisprudential conclusions from its political agenda. And I admired the promise of originalism that it could actually achieve that goal. I was disappointed, to say the least, when I noted that in many of the important cases where the conservatives' history clashed with their policy preferences, the policy preferences won. And their failure to respond to the challenge of liberal originalists who pointed their errors didn't increase my faith in the enterprise.

Now, you've been given an inspiring challenge by two of the most inspiring law professors in the country which you should take seriously. And Robert and Reva have told you: go develop your own vision, American Constitution Society. As you do that, take seriously the distinction between law and politics and don't see yourself at least in this respect as purely driven by ideology. Your goal as scholars and thinkers about the law shouldn't merely be to achieve liberal results but actually to come up with methodologies that might in important cases lead your policy preferences to clash with your jurisprudential conclusions. That was the lesson of Brandeis who was much more concerned about state experimentation because of his commitment to federalism than with achieving liberal results in every case. That was Holmes at his best as well. And regardless of whether you join my quixotic devotion to bipartisan restraint, I'd at least hope that you'll take seriously the promise of the constraining rule of law.

MR. LAZARUS: Jeff, as someone who admires your attempt to achieve golden rules, I will applaud you. And I want to end with a practical question for Roger to bring it down from the theoretical. A question from the audience which is: in essence, do you think it's time in light of the school decisions from this last term to change strategies and to think about a legal regime based more on class difference than race differences or would that be abandoning a moral high ground that we simply must keep?

MR. WILKINS: I think that white people and black people and Hispanic people and Asian people in America don't know each other well enough. I think that the most important educational lesson I ever had was when I was 12-years-old and moved to Grand Rapids, Michigan and was enrolled in a high school with 1,200 white students and one black student. It was pure hell for a long time, and then it got better and then it got better, but it was never perfect. But of all the periods of education I have had, that time in that school with those white kids taught me the most invaluable lessons I will ever learn. Number one: there's no master race. Number two: us black folks have a lot of things to teach other folks, which if they will listen and pay attention they will find have enriched them.

So do I believe that we should still try to integrate our schools? Yes. And do I believe that the class-based solution would achieve the ends that I have in mind? I don't think so. On the other hand, because the education of the poorest black kids in this country, the poorest kids—but particularly the poorest black kids—should be an enormous issue for us. I do think we have to take class into consideration when we assign kids to public schools, but essentially I think I really am an integrationist. Because I think we all can learn from each other and we ought to try very hard to do that.

MR. LAZARUS: Well, our time has expired. We could go one for quite some time. This has been a wonderful panel. Thank you.