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Gay marriage case in shadow of Roe v. Wade

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By Adam Liptak

New York Times

WASHINGTON — When the Supreme Court hears a pair of cases on same-sex marriage on Tuesday and Wednesday, the justices will be working in the shadow of a 40-year-old decision on another subject entirely: Roe v. Wade, the 1973 ruling that established a constitutional right to abortion.

Judges, lawyers and scholars have drawn varying lessons from that decision, with some saying that it was needlessly rash and created a culture war.

Justice Ruth Bader Ginsburg, a liberal and a champion of women's rights, has long harbored doubts about the ruling.

"It's not that the judgment was wrong, but it moved too far, too fast," she said last year at Columbia Law School.

Briefs from opponents of same-sex marriage, including one from 17 states, are studded with references to the aftermath of the abortion decision and to Ginsburg's critiques of it. They say the lesson from the Roe decision is that states should be allowed to work out delicate matters like abortion and same-sex marriage for themselves.

"They thought they were resolving a contentious issue by taking it out of the political process but ended up perpetuating it," John C. Eastman, the chairman of the National Organization for Marriage and a law professor at Chapman University, said of the justices who decided the abortion case.

Ginsburg has suggested that the Supreme Court in 1973 should have struck down only the restrictive Texas abortion law before it and left broader questions for another day. The analogous approach four decades later would be to strike down California's ban on same-sex marriage but leave in place prohibitions in about 40 other states.

But Theodore Boutsos, a lawyer for the two couples challenging California's ban, said the Roe ruling was a different case on a different subject and arose in a different political and social context. The decision was "a bolt out of the blue," he said, and it had not been "subject to exhaustive public discussion, debate and support, including by the president and other high-ranking government officials from both parties."

"Roe was written in a way that allowed its critics to argue that the court was creating out of whole cloth a brand new constitutional right," Boutros said. "But recognition of the fundamental constitutional right to marry dates back over a century, and the Supreme Court has already paved the way for marriage equality by deciding two landmark decisions protecting gay citizens from discrimination."

In Ginsburg's account, set out in public remarks and law review articles, the broad ruling in the abortion case froze activity in state legislatures, created venomous polarization and damaged the authority of the court.

"The legislatures all over the United States were moving on this question," Ginsburg said at Princeton in 2008. "The law was in a state of flux."

That general view is widely accepted across the political spectrum, and it might counsel caution at a moment when same-sex marriage is allowed in nine states and the District of Columbia and seems likely, judging from polls, to make further gains around the nation.

"Intervening at this stage of a social reform movement would be somewhat analogous to Roe v. Wade, where the court essentially took the laws deregulating abortion in four states and turned them into a constitutional command for the other 46," Michael J. Klarman, a law professor at Harvard, wrote in a recent book, "From the Closet to the Altar: Courts, Backlash and the Struggle for Same-Sex Marriage."

But an article that will appear in Discourse, an online legal journal, proposes a different account. "The Roe-centered backlash narrative, it seems, is the trump card in many discussions of the marriage cases," wrote Linda Greenhouse, a former New York Times reporter who covered the court and now teaches at Yale Law School, and Reva B. Siegel, a law professor there.

"Before Roe," they wrote, "despite broad popular support, liberalization of abortion law had all but come to a halt in the face of concerted opposition by a Catholic-led minority. It was, in other words, decidedly not the case that abortion reform was on an inevitable march forward if only the Supreme Court had stayed its hand."

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