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Movement Litigation and Unilateral Disarmament: Abortion and the Right to Die

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Detractors have long criticized the use of courts to achieve social change because judicial victories tend to provoke counterproductive political backlashes. Backlash arguments typically assert or imply that if movement litigators had relied on democratic rather than judicial politics, their policy victories would have been better insulated from opposition. We argue that these accounts wrongly assume that the unilateral decision by a group of movement advocates to eschew litigation will lead to a reduced role for courts in resolving the relevant policy and political conflicts. To the contrary, such decisions will often result in a policy field with judges every bit as active, but with the legal challenges initiated and framed by the advocates' opponents. We document this claim and explore its implications for constitutional politics via a counterfactual thought experiment rooted in historical case studies of litigation involving abortion and the right to die.

INTRODUCTION

The use of courts to achieve social change has long been criticized on the grounds that judicial victories tend to provoke counterproductive political backlashes. Building on classic critiques of judicial power as countermajoritarian (Bickel [1962] 1986), backlash arguments describe rights-protecting court decisions as not only democratically illegitimate but also counterproductive, in the sense that courtroom victories encourage opponents to shift the conflict to political terrain on which lawyers and judges cannot effectively compete. These accounts typically include a (sometimes implicit) causal claim that if social movement actors replaced litigation with alternative strategies for policy change, their policy victories would be more widely accepted and hence more secure. We argue that this causal claim includes an oft-overlooked intermediate step, as follows: if social movement actors replaced litigation with alternative strategies for policy change, the courts would play a lesser role in settling the policy conflict at issue; if courts played a lesser role in settling the policy conflict at issue, the adopted policies would be more widely accepted and hence more secure. A number of

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scholars have questioned the second half of this causal chain, arguing that controversial rights-protecting policies emerging from legislative institutions tend to provoke backlashes similar to those that follow controversial rights-protecting judicial decisions (Lemieux 2004; Keck 2009; Fontana and Braman 2012). In this article, we challenge the first half of the causal chain, contending that if any given set of social movement actors abandons litigation, there is no reason to suspect that courts will play a lesser role in settling the policy conflict at issue. To the contrary, those actors' ideological and political opponents will likely continue litigating the issue, with the result that the conflict is still resolved at least in part by courts, and on terms that have been framed to the detriment of the original set of advocates. In other words, the backlash critique amounts to a call for social movements to engage in unilateral disarmament[1] by abandoning a significant venue for achieving policy change while their opponents continue to exploit that venue.

To support this argument, we use two counterfactual thought experiments, supported by detailed narrative case studies of prominent examples of movement litigation that have been targets of the backlash critique. In the early 1970s, reproductive rights advocates turned to the federal courts in an effort to win judicial protection of a constitutional right to choose abortion. Backlash proponents have long criticized this strategic choice, contending that *Roe v. Wade* (1973) sparked a massive countermobilization by prolife advocates and hence that abortion rights supporters would have been better served by pursuing an incremental, state-by-state strategy of legislative reform. Skeptics of the backlash account have argued that the prospects of such a legislative strategy were significantly less promising than backlash proponents suggest. Here, we argue that even if abortion rights advocates had followed the legislative course exclusively, judicial institutions would still have played a significant role in the conflict. We frame this inquiry as a counterfactual thought experiment—imagining a world without *Roe*—but it is rooted in a careful analysis of actual events. Prior to *Roe*, abortion rights advocates did pursue a strategy of state legislative reform, with their successes on that front prompting legal challenges from their opponents on behalf of a fetal right to life.

A generation after *Roe*, advocates for terminally ill patients experiencing great pain and suffering turned to the federal courts in an effort to win judicial protection of a constitutional right to determine the time and manner of one's own death. The Supreme Court declined to recognize such a right in *Washington v. Glucksberg* (1997), and this decision prompted praise from critics who saw the right-to-die movement as replicating the perceived errors of *Roe*. With the judicial door closed, backlash proponents expressed hope that right-to-die advocates would do what their abortion rights predecessors should have done; that is, pursue their claims via an incremental strategy of state legislative reform. As we note below, right-to-die advocates have indeed done so, and as with their abortion rights counterparts, their efforts have regularly been met by litigation from their right-to-life opponents. Thus, in a counterfactual world in

1. With apologies for the martial metaphor as applied to a fundamentally peaceful process of civil dispute resolution, we note simply that the political process is often usefully understood as a battle between two or more groups for advantage in defining public policy.

which the *Glucksberg* case had never been filed, judicial institutions would still play a significant role in the conflict.

These historical cases provide a useful vantage for exploring what might have happened if left-liberal social movements had heeded the lesson of the backlash account by refraining from litigation altogether. We are aware of no actual social movements that have done so, but movement actors have regularly refrained from litigating particular claims at particular times on the grounds that such claims might provoke significant countermobilization.[2] And virtually all movements that have engaged in litigation over an extended period have also relied at times on legislative strategies. By identifying two movements that have engaged in high-profile litigation, but shifting our focus to their less widely studied legislative efforts, we can assess the likely reactions that would have followed if these movements had pursued legislative reform exclusively. As such, these case studies comply with two primary criteria of counterfactual analysis (Capoccia and Kelemen 2007, 356; see also Tetlock and Belkin 1996, 16–31). First, each case study is theoretically consistent in that the option to disarm unilaterally (i.e., to refrain from litigating while their opponents continue to do so) was present. Second, each complies with the "minimal-rewrite rule" of historical consistency in that the relevant movement achieved significant legislative victories. By tracing the process of responses to those actual victories, we illuminate what might have happened if the movements had not simultaneously pursued their policy goals in court.

THE BACKLASH THESIS

With regard to judicial politics in the post-World War II United States, the backlash critique has been developed at some length with respect to racial segregation, abortion, and same-sex marriage decisions. In an influential critique of *Brown v. Board of Education* (1954), Gerald Rosenberg (1991) argued that the decision was more or less irrelevant to the actual on-the-ground progress of school desegregation in particular and civil rights more generally. In a subsequent account, Michael Klarman painted a picture that was, in some ways, even worse, with the *Brown* decision not irrelevant but actually counterproductive, at least in the short run. Klarman argued that, prior to *Brown*, racial moderates were on the rise and slowly reforming southern segregationist politics, but that *Brown* preempted this incremental progress by clumsily inserting a broad judicial mandate for radical change. This mandate sparked an increase in white supremacist activism across the South, thereby undermining the movement's goal of desegregation. Klarman's story turns brighter in the long run, emphasizing that the escalation of white supremacist violence eventually galvanized the northern political will to enact sweeping federal civil rights laws, but the most striking feature of his account remains its emphasis on short-term segregationist countermobilization in response to *Brown* (Klarman 2004, 344–442; see also Powe 2009, 250–51).

2. Note, for example, the decision by California LGBT rights advocates to refrain from pursuing marriage equality via litigation in the late 1990s and early 2000s and the decision by the leading national LGBT rights organizations to refrain from pursuing a federal constitutional challenge to Proposition 8, which banned same-sex marriage in November 2008. In each case, such challenges were eventually filed, each time against the wishes of the leading right advocates (Cummings and NeJaime 2010; Keck 2014).

The backlash narrative of *Roe v. Wade* likewise emphasizes the danger of preempting legislative reform. In a widely noted 1985 essay, then-Circuit Judge Ruth Bader Ginsburg observed that "[i]n 1973, when *Roe* issued, abortion law was in a state of change across the nation. There was a distinct trend in the states, noted by the Court, 'toward liberalization of abortion statutes'." But by "ventur[ing] too far in the change it ordered," the Court "stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures. In place of the trend 'toward liberalization . . .' noted in *Roe*, legislatures adopted measures aimed at minimizing the impact of the 1973 rulings." If the Court's decision had been more incremental, "the legislative trend might have continued in the direction in which it was headed in the early 1970s," with majoritarian institutions acting on the concerns of reproductive rights advocates. In this context, "[h]eavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict" (1985, 379–82, 385–86).

Other judges have echoed this general account (Wilkinson 2009, 293–95), as have a number of prominent scholars. Cass Sunstein has suggested that the reproductive rights movement had no reason to engage in judicial politics because "states were moving firmly to expand legal access to abortion, and it is likely that a broad guarantee of access would have been available even without *Roe*" (1991, 766; see also Silverstein 2009, 271). Instead of barging into the debate with a sweeping intervention, the "Court should have allowed the democratic processes of the states more time to adapt and to deliberate, and to generate solutions that might be sensible but that might not occur to a set of judges" (Sunstein 1999, 54). Legislative resolution would have allowed more complete hearing of the issues because "legislatures can assess competing factual claims, unconstrained by judicial rules on standing and evidence" (Wilkinson 2009, 290). Instead, court action "shut down [the] process of legislative accommodation, polarizing the debate and making future compromise more difficult" (Wilkinson 2009, 293). Gordon Silverstein (2009, 119–24) painted a somewhat more complex picture, but concluded that the failing of *Roe* was largely that the Court acted against rather than together with democratic politics. Had it relied on narrower grounds, the Court could have entered into dialogue with state and federal legislatures and achieved a compromise more acceptable to the American public. Along similar lines, Mary Ann Glendon (1987) has argued that abortion is less controversial in nations where it has been resolved through democratic politics than where it has been resolved through courts.

Finally, critics have leveled the same basic charge against the landmark same-sex marriage (SSM) decisions issued by state high courts from 1993–2009. Rosenberg argued in 2008 that the SSM movement was a failure because it had not achieved full marriage equality nationwide. While state judges had provided some limited victories, these victories spawned a nationwide backlash that resulted in "more legal barriers to same-sex marriage after the litigation than there were before it" (2008, 416). Rosenberg attributed this counterproductive result to the facts that movement litigators went to court too soon, abandoned the more appropriate democratic process, and jumped over the achievable compromise position of civil unions directly to full marriage equality (2008, 416–17). Klarman likewise criticized the reliance on courts in this context because here, as elsewhere, litigation tends to "produce backlashes by

commanding that social reform take place in a different order than might otherwise have occurred" (2005, 477). Keck (2009) challenged Klarman for suggesting, without evidence, that political backlashes tend to be worse in response to sweeping judicial victories than they would have been in response to equally sweeping legislative victories. After all, while the California Supreme Court's legalization of SSM in May 2008 famously provoked a backlash at the polls, with the state's voters banning SSM by enacting Proposition 8 later that year, the Maine legislature's legalization of SSM in May 2009 provoked exactly the same reaction. More recently, Klarman has clarified that his "point is not that court decisions generate greater backlash than identical legislative policy resolutions would have, but rather that courts may issue unpopular decisions that legislatures . . . would have avoided" (2013, 167–68). In sum, the backlash thesis can be boiled down to a simple proposition: social movements should avoid reliance on judicial politics because such strategies will be ineffective at best and counterproductive at worst; in other words, they will often spark political countermobilization that will set the movement further back than where it started.

A number of scholars have criticized this thesis. David Fontana and Donald Braman (2012) reported the results of a survey experiment that found little evidence to support the view that legislatively enacted policies are more acceptable to opponents than judicially enacted policies. David Garrow (1994) objected to Rosenberg's oversimplification of the process of historical change, and Scott L. Cummings and Douglas NeJaime (2010) argued that even the Prop. 8 story in California—a poster child for the unnecessary judicial provocation of political countermobilization—turns out to fit the backlash narrative poorly. Judicial politics and democratic politics are not mutually exclusive and, in fact, often reinforce one another, serving as alternative or even complementary avenues to a given set of goals (Post and Siegel 2007; Cummings and NeJaime 2010). Under certain conditions, litigation can improve the odds of legislative reform by pushing the policy envelope and shifting the terms of compromise (Keck 2009). Finally, the definition of democracy used by backlash critics is usually quite narrow (if even specified); these accounts generally fail to attend to scholarship demonstrating that elected elites sometimes find it advantageous to delegate complicated policy disputes to the courts (Graber 1993; Gillman 2002; Lovell 2003; Whittington 2005; Lemieux and Lovell 2010).

We emphasize here an additional dimension of the story too often overlooked. In particular, we argue that the constant admonition that social movements should abandon judicial politics in favor of democratic politics rests on a naïve assumption that it is possible to remove courts from the US policy process. Put another way, from the advocates' perspective, the critique of litigation amounts to a call for unilateral disarmament. In any given legal and political conflict—at least any protracted conflict sustained over a period of years—the likely result of a decision by one side to abandon litigation is not that the issue will be settled by legislative debate (let alone by an idealized deliberative democratic seminar); rather, the likely result is that advocates on the other side will have free rein to pursue the issue in court, framed in a way that is most favorable to their cause.

Social movements seek social change and their opponents naturally resist, striving to maintain the status quo or even to push change in the opposite direction. Contrary

to backlash critics who frequently assume that movements seek change only in the courts, most movements employ "multidimensional advocacy . . . across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education)" (Cummings and NeJaime 2010, 1242). Moreover, assuming that they do not have the policy field to themselves, any given set of movement advocates is likely to face an array of opponents who are engaged in such multidimensional advocacy as well. LGBT rights advocates have supported sympathetic candidates for elected office, lobbied legislative institutions, engaged in social protest, exploited a range of mass communications media, and litigated to achieve their policy goals. Their opponents on the religious right have simultaneously engaged in the same tactics in an effort to prevent achievement of LGBT goals. If proponents of LGBT rights discarded one item in this multidimensional toolkit, there is no reason to think that their opponents would do the same. From this angle, backlash arguments ignore the empirical reality that courts are an ever-present aspect of the US policy process (Keck 2014).

The design of US political institutions makes political action difficult by putting multiple veto points in the way of movements seeking social change (Krehbiel 1998). Movements must overcome each veto point while their opponents mobilize those barriers against them. In any given case, movement leaders have the option of seeking policy change through the courts or through legislatures, but a decision to eschew litigation does not guarantee lack of court involvement because their opponents remain free to litigate whenever and wherever they choose. As such, the choice faced by movement leaders is not whether courts will play a role in resolving the issues they care about; the choice, rather, is whether these issues will be brought to court, and hence legally framed, by themselves or by their adversaries. In this light, the backlash thesis represents a call for political movements to abandon one viable means of achieving change and protecting their interests, even though their opponents will continue to exploit that means. Instead of legitimizing the movement's victories, refraining from litigation is likely to open those victories to legal challenges framed by their opponents. Left unchecked, their opponents' litigation efforts might thwart their own legislative efforts in the short run and, over the longer term, might even push the policy status quo in the opposite direction.

In this article, we explore this dynamic of unilateral disarmament by examining two cases in which proponents of the backlash thesis have criticized left-liberal social movements for unnecessarily abandoning democratic politics and turning to court: abortion rights, with particular attention to the legal and political conflicts in New York in the early 1970s, and the right to die, with particular attention to the legal and political conflicts in Oregon in the 1990s. In both cases, contrary to conventional backlash arguments, the left-liberal movements employed a variety of tactics, including both judicial and legislative politics, and in both cases, their opponents did likewise. In both cases, conservative right-to-life advocates responded to democratic defeats by turning to litigation. These conservative legal challenges were ultimately unsuccessful, but in each case, they garnered some judicial support. In a counterfactual world in which abortion-rights and right-to-die advocates followed the advice of backlash theorists, their issues would still be in court, but in a situation in which their opponents dominated the legal field.

ABORTION IN THE 1970S

As we have noted, *Roe v. Wade* has been a common target of backlash critics, who complain that reproductive rights lawyers pushed too hard, too fast for radical social change, thereby instigating a massive public backlash. This judicially imposed change was particularly unnecessary, Ginsburg and her followers have maintained, because democratic politics was already solving the issue that the litigators and judges were trying to address.

In several key respects, the reality of abortion politics in the 1970s was more complex than the critics acknowledge. First, prochoice activists did not abandon democratic politics in favor of the courts; rather, they used both avenues in a multidimensional advocacy campaign (Lemieux 2004, 221–39). Second, as Linda Greenhouse and Reva Siegel (2011) demonstrate, significant countermobilization by prolife advocates predated *Roe*; therefore, the Court's decision could not have caused the antiabortion backlash. Third, on Greenhouse and Siegel's account, political polarization over abortion emerged not from popular reaction to a controversial Supreme Court decision but from calculated efforts by Republican Party strategists to persuade socially conservative working-class voters to abandon the Democratic Party. The Court served as a convenient bogeyman in the story told by these partisan elites, but if state or federal legislative institutions had legalized abortion, the GOP strategy would likely have been the same. Fourth, the prospects of such legislative legalization were less rosy than Ginsburg and others suggest. As Gene Burns (2005) and Scott Lemieux (2004, 214–57) emphasize, by 1970, the framing of abortion reform had shifted from a question of medical procedure to one of conflicting moral absolutes, a shift that effectively stalled the legislative reform movement several years before *Roe*.[3] The Court did not cause this heightened moral conflict, and arguably it was the only institution able to settle the issue after the legislative battles pushed the debate to such extremes (Burns 2005, 228).

In addition (and previously unremarked in the literature), the choice faced by prochoice groups in the early 1970s was not whether courts or legislatures should settle the abortion conflict, but when and how the courts would be drawn into the conflict. Prolife organizations were ready and willing to invoke judicial politics to attack legislatively initiated abortion repeal because such groups "were concerned primarily about the substantive law of abortion, not about questions of judicial technique or even about the proper role of courts in a democracy" (Post and Siegel 2007, 410–11). Had prochoice groups ceded the venue of judicial politics, that strategic decision *might* have reduced the role of courts in settling the issue; alternatively, it might have left the courts just as involved, but with their options defined and framed by the advocates' prolife opponents.

New York's abortion politics proceeded along similar lines to those of many other states in the late 1960s. Starting in 1965, Assemblyman Albert Blumenthal introduced a reform bill following the American Law Institute's recommendation to widen the definition of therapeutic abortions to include those necessary to prevent risk to the mother's physical or mental health, instances wherein the child would be born with

3. Florida adopted a liberalization statute in 1972, but only under the influence of a recent state court decision and not voluntarily (Garrow 1994, 538).

grave physical defects, or when the pregnancy was the result of rape or incest (Nossiff 2001, 35). Though introduced every year, the reform bill was bottled up in committee and kept from a vote in the first few attempts. Opposition largely came from the Catholic Church, which in 1967 issued a pastoral letter to its New York congregants stating that "[s]ince laws which allow abortion violate the unborn child's God-given right, we are opposed to any proposal to extend them. We urge you most strongly to do all in your power to prevent direct attacks upon the lives of unborn children" (cited in Nossiff 2001, 80). In 1968, Blumenthal succeeded in getting the reform bill out of committee, but in the face of certain defeat, he moved to recommit the bill before the roll call vote was finished. Public polling at the time indicated broad majority support for reform, and during the same year, a commission appointed by Governor Nelson Rockefeller endorsed the reform path as well (Lader 1973, 122). Convinced that he had the necessary seventy-six votes for enactment in 1969, Blumenthal pushed his bill forward again. During the debate, however, Martin Ginsberg, believed to be committed to the bill, gave an impassioned speech linking the fetal deformity provisions to his disability caused by polio (Lader 1973, 122; Nossiff 2001, 95). Lawrence Lader asserts that Ginsburg's defection was "partly due to Catholic pressure on suburban counties," but whatever the reason, it led to the defeat of Blumenthal's bill by a vote of 69–78 (1973, 123).

In the wake of this defeat, prochoice reformers became increasingly pessimistic about the prospects of incremental legislative reform. With the Catholic Church's unyielding position "preclud[ing] the possibility of any compromise," the appeal of full legalization, achieved either legislatively or judicially, began to increase (Nossiff 2001, 88). In 1969, abortion-rights advocates filed four separate lawsuits challenging New York's restrictive abortion law (Greenhouse and Siegel 2010, 140). The following year, a legislative repeal bill, which had previously drawn limited support, garnered more than twenty cosponsors, including Blumenthal, by this point disillusioned with the reform position as a result of the 1969 defeat (Garrow 1994, 385, 408; Nossiff 2001, 89). In January 1970, Governor Rockefeller stated that he would "probably" sign the repeal bill if it passed (Lader 1973, 128), and in February, the Senate Majority Leader announced that he would allow a floor debate. With supporters calling on senators to "separate their religious beliefs from their votes" and presenting abortion in a rights framework, the Senate passed the repeal bill, 31–26 (Nossiff 2001, 98). During a vigorous debate in the Assembly, the bill's sponsor, Assemblywoman Constance Cook, accepted a compromise of a twenty-four-week time limit on permissible abortions. On April 9, with the vote deadlocked, 74–74, Assemblyman George Michaels, representing a heavily Catholic district in Central New York, rose to switch his vote, saying "[w]hat's the use of getting elected if you don't stand for something. I realize, Mr. Speaker, that I am terminating my political career, but I cannot in good conscience sit here and allow my vote to be the one that defeats this bill" (Lader 1973, 143).[4] With passage assured, the Speaker added his vote for a final tally of 76–73. The Senate then quickly passed the

4. Michaels's assessment of his political future proved correct. After his county's Democratic Committee rejected him, he lost the primary and then lost in the general election running on the Liberal ticket (Lader 1973, 146–47).

bill with the twenty-four-week limit intact, and Governor Rockefeller signed it into law, marking the biggest prochoice policy victory in the country to that point.

But legalization hardly quelled the debate. Prolife forces rallied in opposition and, after the 1970 elections, prepared for another legislative battle, this time to repeal the repeal bill. In April 1971, Rockefeller had to accept a ban on Medicaid funding for abortions to pass his budget, and prolife groups achieved passage of a number of local restrictions requiring abortions to be performed in hospitals, effectively outlawing lower-cost abortion clinics (Lader 1973, 157, 159–61). Prochoice advocates responded with litigation aimed at clearing away the new restrictions. The NY Court of Appeals invalidated local restrictions on abortion as inconsistent with the 1970 legalization bill, but litigation over the Medicaid limitation was less successful with the Court of Appeals summarily upholding the restriction in 1972 and the federal courts eventually reaching the same conclusion.[5] In that climate, prochoice advocates worried that the repeal law itself was in jeopardy in 1971, especially when Rockefeller announced his support for rolling back the law to twenty weeks, though he also indicated that he would veto any full repeal of the 1970 law (Garrow 1994, 483).

After the 1971 session ended without a repeal vote, the Catholic Church increased its pressure and was joined by a group representing Orthodox Jews, which had previously remained neutral in the debate. On April 16, 1972, Cardinal Cooke declared a "Right to Life Sunday," wherein every priest at mass attacked the abortion law in prelude to a major antiabortion parade in New York City (Lader 1973, 196). Shortly after this demonstration, Rockefeller again announced his willingness to compromise by lessening the time limit to sixteen weeks (later increased to eighteen), though he reiterated his promise to veto a complete repeal of the 1970 law (Lader 1973, 200; Garrow 1994, 546). After a vigorous legislative debate, with one member displaying a fetus in a jar and five members who supported the 1970 law switching sides, the Assembly voted 79–68 to reinstate the criminal prohibition on abortion (Garrow 1994, 546). The Senate passed the same bill by a three-vote margin the following day, but on May 13, Rockefeller delivered on his promise to veto the bill. Though not naming the Catholic Church directly, Rockefeller noted that "the extremes of personal vilification and political coercion brought to bear on members of the Legislature raise serious doubts that the vote to repeal the reform represented the will of a majority of the people of New York State" (Greenhouse and Siegel 2010, 159). While expressing respect for diverse moral views, the governor rejected the arguments presented primarily by the Catholic Church: "I do not believe it right for one group to impose its vision of morality on an entire society. Neither is it just or practical for the State to attempt to dictate the innermost personal beliefs and conduct of its citizens" (Greenhouse and Siegel 2010, 160). Opinion polls at the time found that approximately 60 percent of New Yorkers supported the 1970 law, justifying Rockefeller's skepticism of the legislative action, but prochoice groups did not expect the repeal attempts to end and were especially concerned about what would happen once Rockefeller left office (Garrow 1994, 547).

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5. *Robin v. Incorporated Vill. of Hempstead*, 30 N.Y.2d 347 (N.Y. 1972); *City of N.Y. v. Wyman*, 30 N.Y.2d 537 (N.Y. 1972); *Toia v. Klein*, 433 U.S. 902 (1977).

While the legislative repeal debates were unfolding, prolife groups also prepared a judicial assault on the 1970 legalization act. In 1969, the Catholic magazine *America* had published a comment calling for prolife litigation to protect the rights of fetuses. As the abortion issue moved into the courts, the comment's author noted, the interests of fetuses must be represented by more than hospitals or prosecutors who may not truly care how the case comes out. "What the unborn child needs is the additional right to present evidence and to cross-examine the opposing witnesses. Without a full-scale, honestly adversary presentation of the facts and issues, the courts cannot properly resolve the constitutional aspects of abortion law debate" (*America* 1969, 515). The comment specifically endorsed the idea of appointing guardians to protect fetal interests.

While we cannot know if this call influenced him, Fordham Law Professor Robert M. Byrn took up the challenge in late 1971. Byrn had published an attack on the liberalization movement of the 1960s, and in 1963, had founded the Metropolitan Right to Life Committee with its office in the headquarters of the Archdiocese of New York (Byrn 1966–1967; Merton 1981, 58). He also wrote the minority report for Governor Rockefeller's 1968 Abortion Commission report, in which he objected to any reform of New York's abortion law, and he had described himself as "probably New York's No.1 foe of abortion" (Klemserud 1971, 48). For Byrn, the only legitimate abortion was one where the mother's life was at stake. He made no exception for cases of rape because "the wrong to the [woman] has already been done, and . . . we ought not to compound that wrong by killing a life. We ought to bring all of the facilities of society together to help that mother and child" (Klemserud 1971, 48). A devout Catholic, Byrn stressed that his opposition rested on the legal argument that fetuses are persons within the meaning of the Fourteenth Amendment and "has nothing to do with theology" (Tomasson 1971, 29).

In late November 1971, after the legislative session ended without a repeal vote, Byrn filed suit in the Supreme Court, Queens County, seeking appointment as guardian ad litem of all fetuses from four to twenty-four weeks scheduled for abortion in New York City's public hospitals, and alleging that New York's abortion law violated the fetuses' fundamental right to life.[6] In his petition, Byrn complained that the state granted pregnant women "unfettered discretion to terminate the lives of their unborn children" and that over 100,000 "children" had been killed since the law went into effect.[7] He argued that a fetus is an "irreversibly individuated living human being, dependent on his mother only for nourishment and for a place to live, develop and grow" (Record, 23), and to drive home the point, he repeatedly referred to fetuses as "unborn children" or "unborn infants." He insisted that these unborn children were persons within the meaning of the Fourteenth Amendment and thus had all constitutional rights possessed by born persons, including "the right to life itself without which

6. The law firm of Hahn, Hahn, & Ford represented Byrn. While Thomas J. Ford, Thomas Grimes, and A. Lawrence Washburn, Jr., were on the appellate briefs with Byrn, we refer to Byrn, as both client and attorney, alone in the text to simplify the presentation.

7. Appellate record for *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194 (1972), p. 21, obtained from microfilm produced by the William S. Hein Corporation. Electronic copy is on file with authors. Subsequent references to this record are designated "Record" in the text. All briefs mentioned below were available from the same source.

all other rights are meaningless" (Record, 31).[8] To support his claim that fetuses were separate human beings, Byrn presented four affidavits from doctors and biologists who regarded a fetus as a totally separate organism with an independent life history. As support for his claim regarding unfettered discretion, Byrn presented affidavits from five people, apparently employed by the legal firm representing him, who had telephoned twelve hospitals and one clinic.[9] They reported the fees charged, the ease of obtaining immediate appointments, and the fact that "[n]either her husband nor a doctor has to recommend her for an abortion" (Record, 109). Justice Lester Holzman appointed Byrn as guardian ad litem on December 2 (Record, 17).

The suit immediately garnered widespread attention with a number of women's rights groups seeking to intervene in support of the Attorney General and the City's Health & Hospital Corporation. After a failed attempt to change venue to Manhattan, likely out of concern for a bias against abortion in the Queens County bench, the hearing featured an "overflowing" courtroom (*New York Times* 1971, 32). On January 4, 1972, Justice Francis Smith ratified the guardianship and issued a temporary restraining order against the abortion law, pending trial on the facts. While disclaiming any intent to resolve the legal or factual issues, Smith rested the decision to issue a temporary restraining order on the likelihood of Byrn's victory. In justifying the appointment of Byrn as guardian, Smith stressed that the "court's first obligation is to the infant" and "whenever in the course of any action it becomes evident to the court that the person having custody of an infant or representing the infant is unable or unwilling to perform his trust adequately, the court appoints a competent and willing guardian ad litem" and here "it is patently clear that there is a conflict of interest between a woman who desires to abort her child and the child itself" (Record, 301, 302). In assessing the rights of the "unborn child," Smith concluded that the trend in US common law "clearly has been to recognize the existence of both fetal life and fetal rights at earlier and earlier stages" (Record, 309). Smith drew from these rights a recognition that "it is apparent that when the right to life of the unborn child conflicts with some lesser interest of another then, even if his 'other' be the parent, the child's right is uniformly preferred" (Record, 312). Given all the legal rights that had been recognized, it would be unusual to say that the state "can legislate to deprive him of his most precious right—the right to life" (Record, 317). Whatever privacy interests women may have, they cannot outweigh the child's interest in life itself. Smith ordered a trial to hear testimony before issuing a final ruling.

The trial never took place, as prochoice advocates mounted a swift reaction to Smith's order. Representing one of the intervening organizations, Nancy Stearns of the Center for Constitutional Rights stated that if the restraining order went into effect, she would demand that Byrn "put up $40,000 bond for each woman who is forced to have a child" (Brody 1972, 26). The National Abortion Rights Action League (NARAL) released a statement complaining that a "Roman Catholic judge has initiated a disgraceful incident in judicial history. He has followed religious dogma in deciding a case in a court of law" (Brody 1972, 26). The Appellate Division immediately stayed the

8. Byrn's legal briefs cited parallel state constitutional provisions, but he never developed these state constitutional arguments at length. As such, we refer to his challenge as if it were solely federal for simplicity.

9. While not explicitly stated, it appears that each pretended to be pregnant or to be calling on behalf of a pregnant woman.

effect of the order and subsequently held that the facts at the time justified the guardianship appointment but that the substantive conclusions underlying the restraining order were incorrect.[10] The appellate panel held that the law prior to the repeal bill never recognized the full legal personality of fetuses and that the recognition of some fetal rights was best "regarded as benevolent fiction granted in anticipation of the child's birth"; however, if birth did not occur, no legal rights were recognized.[11]

With the legislative repeal effort ongoing, Byrn continued his constitutional assault on the law, filing an appeal with the state high court on April 17, the day after "Right to Life Sunday," with oral arguments heard on May 30, only a few weeks after Rockefeller's veto of the recriminalization bill. The appellate briefs present the most complete picture of Byrn's constitutional claims. After summarizing the medical evidence introduced before the trial court to show that fetuses were distinct human beings, Byrn argued that the law had recently turned toward recognizing fetal personhood. Surveying recent changes in statute, equity, criminal, and tort law, Byrn concluded that "[a]dvances in medical science have persuaded courts to recognize that an individual who is human in fact ought also be human in law."[12] Of particular importance was the abandonment of the old tort rule that injuries to the fetus were unrecoverable because the woman and fetus were one indivisible being (Dubow 2011, 52–54).[13] Byrn turned to international legal norms for further support of fetal personhood, noting that the UN Declaration of the Rights of the Child discussed rights existing before birth. Additionally, he invoked the Nuremberg Tribunal charges of abortion in convicting Nazi war criminals. Those indictments specifically aimed at forced abortions, but Byrn used a selective reading of the arguments made by Justice Robert Jackson to conclude that "[o]n behalf of the United States of America, an American prosecutor condemned the defendants before a court composed of American judges because 'protection of the law was denied to unborn children' " (Plaintiff-Appellant's brief at 49).

Having established his case that the law treated fetuses as persons, Byrn turned to the constitutional claims. Of prime concern was including fetal life within the meaning of persons under the Fifth and Fourteenth Amendments. Drawing on Colonial experience and on Blackstone's Commentaries, Byrn argued that "Jefferson and the other framers of the Declaration of Independence were thinking of both post-natal and pre-natal human beings when they held as self-evident truths 'that all men are *created* equal' " (Plaintiff-Appellant's brief at 77, emphasis in original). Given this fact, the burden should be on the state to show that the Fifth Amendment intentionally excluded fetuses. More importantly, before the adoption of the Fourteenth Amendment, twenty-five states altered their abortion laws by criminalizing abortion prior to quickening: "The whole thrust of the law at or about the time . . . was to protect the unborn child against abortion at all stages of gestation" (Plaintiff-Appellant's brief at 83). As the courts gradually expanded the definition of persons protected, it became increasingly clear that the only acceptable, objective definition of person was to include

10. *Byrn v. New York City Health & Hosps. Corp.*, 38 A.D.2d 316 (N.Y. App. Div. 2d Dep't 1972).

11. *Byrn*, 38 A.D.2d at 329.

12. Brief of Plaintiff-Appellant, *Byrn v. New York City Health & Hosps. Corp.* (Apr. 17, 1972). Subsequent references to this brief are designated "Plaintiff-Appellant's Brief" in the text.

13. *Dietrich v. Inhabitants of Northhampton*, 138 Mass. 14 (1884); *Bonbrest v. Klotz*, 65 F. Supp. 138 (D.D.C. 1946).

all human beings, and thus fetuses. Corporate personhood drew special scorn, with Byrn complaining that it would be "tragically ironic . . . if a corporation in the business of aborting unborn human beings were a person . . . while the unborn human beings were not!" (Plaintiff-Appellant's brief at 80). Given that fetuses were constitutional persons, Byrn insisted that they should have all the rights of any other person, including the right to life. From this point, Byrn's argument became a simple application of strict scrutiny, concluding that none of the asserted state interests were sufficient to overcome the fundamental right to life and the state's duty to protect that life.

Eight amicus briefs supported Byrn's argument. Three of the briefs aimed primarily at the scientific arguments about the safety or medical necessity of nontherapeutic abortion. Two briefs from medical groups—one of them signed by approximately 200 doctors—expanded on Byrn's argument that elective abortions were never necessary because modern medicine left only de minimis risks associated with labor and delivery and because there was significant demand for adoption.[14] A third brief on behalf of the Committee for Human Life challenged the argument that New York's act had reduced maternal mortality rates, infant mortality rates, and the number of criminal abortions, concluding that any minimal benefit remaining was clearly outweighed by the fact that "167,903 unborn children lost their lives in New York" since the law went into effect.[15] The final amici reinforced aspects of Byrn's legal claims with a significant degree of moral attack on abortion. In particular, three amici specifically referenced Nazi Germany. One prolife organization declared that "[t]he Nazi philosophy concerning abortion and euthanasia has many adherents among today's social engineers who advocate both as matters of right and necessity."[16] Another pointed to the slippery slope of allowing abortion to "merely suit the convenience of [the] mother," asking, "[w]here do we go from here—to the senile parent, to the deformed or retarded child, or to the gas chambers of Hitler's Germany?"[17] A separate brief representing a group of poor women on public assistance sought to reinforce this slippery slope argument by contending that elective abortions were the first step on the road to eliminating undesirables from society, primarily poor racial and ethnic minorities.[18] An additional brief filed by a number of leading prolife organizations encouraged the court to adopt an evolving conception of constitutional rights: "[I]t is important to keep in mind that the United States Supreme Court has stated that due process is not frozen within the confines of historical facts or discredited aptitudes, it being of the very nature of a free

14. Brief, Amicus Curiae, for New York State Doctors and Nurses Against Abortion in Support of Plaintiff-Appellant, *Byrn v. New York City Health & Hosps. Corp.* (n.d.); Brief, Amici Curiae, of Dr. Bart Heffernan and Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of Plaintiff-Appellant, *Byrn v. New York City Health & Hosps. Corp.* (n.d.).

15. Brief of Amicus Curiae Committee for Human Life, in Support of Plaintiff-Appellant, *Byrn v. New York City Health & Hosps. Corp.* (n.d.), 16.

16. Brief of Amici Curiae Celebrate Life and Various New York Right to Life Groups in Support of Plaintiff-Appellant, *Byrn v. New York City Health & Hosps. Corp.* (n.d.), 14.

17. Brief of New York State Council, Knights of Columbus and the Supreme Anchor Club of America, Inc., as Amici Curiae in Support of Plaintiff-Appellant, *Byrn v. New York City Health & Hosps. Corp.* (n.d.), 15, 19.

18. Brief, Amici Curiae, for Mrs. Arlethia Gilliam and Certain Other Poor Mothers and Poor Women Receiving Public Assistance and Certain Social Workers and Ministers of Religion Residing in the Bedford-Stuyvesant and Bushwick Areas of Brooklyn in Support of Plaintiff-Appellant, *Byrn v. New York City Health & Hosps. Corp.* (May 22, 1972).

society to advance in its standards of what is deemed reasonable and right. To put it another way, due process representing a living principle is not confined within a permanent catalog of what may at a given time be deemed the limits or essentials of fundamental rights."[19]

Byrn's arguments proved unsuccessful, but they did persuade two of the seven judges on the state high court. The five-judge majority rejected Byrn's claims as a call for a policy judgment on the beginning of life—a call better directed to the state legislature—but Judges Adrian P. Burke and John F. Scileppi dissented vigorously. Scileppi's brief opinion rested on little more than an assertion to support his "firm moral and legal belief that life begins at conception,"[20] but Burke's opinion developed the constitutional claim against abortion legalization at greater length. Burke began by discounting the legislative judgment as a policy established "by one Assemblyman who switched his vote after the resolution was defeated through some unknown influence," and then noted that the legislature had recently voted to repeal the act, though Governor Rockefeller vetoed the action.[21] Rather than relying on a specific constitutional provision, Burke argued that the 1970 statute conflicts with "the American concept of a natural law binding upon government and citizens alike, to which all positive law must conform." This concept of natural law "leads back through John Marshall to Edmund Burke and Henry de Bracton and even beyond the Magna Carta to Judean Law," and it was reflected in Thomas Jefferson's articulation of an unalienable right to life in the Declaration of Independence. In Burke's view, this "Declaration has the force of law and the constitutions of the United States and of the various States must harmonize with its tenets."[22] While the Declaration recognizes the right to life, it is not the source of that right. Judge Burke argued that the right comes "not from the State but from an external source of authority superior to the State," though he was careful to avoid clearly identifying this external source.[23] Having established, at least to his own satisfaction, an overarching right to life that transcends constitutions and positive law, Burke presented elective abortions as driven by expedience and pragmatism, as a decision made by the "particular female's or male's concern to avoid responsibility." While this reference included men as part of the irresponsibility, the thrust of his opinion was to describe women seeking abortions as irresponsible and potentially driven by material gain. Under New York law, a child shares in a deceased man's estate, and this "legislation gives the 'right' to the wife to unilaterally, through abortion, appropriate the husband's entire estate by preventing offspring and depriving the legally wedded husband of transmission of his blood line, name and properties to 'flesh of his flesh': another inalienable right."[24]

Having established abortion as an act of irresponsibility, Judge Burke rejected all of the state's justifications for allowing it. On his reading, in an age of reliable contracep-

19. Brief of New York State Council, Knights of Columbus and the Supreme Anchor Club of America, Inc., as Amici Curiae in Support of Plaintiff-Appellant, *Byrn v. New York City Health & Hosps. Corp.* (n.d.), 14.

20. *Byrn*, 31 N.Y.2d at 213 (Scileppi, J., dissenting).

21. *Byrn*, 31 N.Y.2d at 205, n* (Burke, J., dissenting).

22. *Byrn*, 31 N.Y.2d at 205–07 (Burke, J., dissenting).

23. *Byrn*, 31 N.Y.2d at 208 (Burke, J., dissenting).

24. *Byrn*, 31 N.Y.2d at 209 (Burke, J., dissenting).

tion, there was no excuse for unintended pregnancies. (He did not address pregnancies resulting from rape.) In addition, he asserted, no fetus was unwanted because of the long national waiting lists for adoptions, and because society was already close to zero population growth, there was no need to limit procreation.[25] Throughout this argument, Burke emphasized the connection to Nazi genocide, referring explicitly to Hitler twice, to the Nazis three times, and to genocide five times. He argued that the pragmatic arguments of expedience advanced by abortion rights supporters—such as reducing population growth and the pressure on the welfare system—were also advanced "by Nazi lawyers and Judges at Nuremberg [and] . . . by the Soviets in Eastern Europe."[26] In Burke's view, his colleagues in the Court's majority believed that "the 'state,' as in Nazi Germany, could decide what human beings are persons or nonpersons."[27] New York's abortion law tested the "United Nations Convention against genocide which forbids any Nation or State to classify any group of living human beings as fit subjects for annihilation."[28]

In sum, the experience of abortion in the 1970s looked little like the caricature presented by backlash arguments. Instead of focusing their effort exclusively on the courts, prochoice advocates engaged in a multidimensional campaign and, in New York, achieved their most significant pre-*Roe* victory through the legislative process. Prolife litigators challenged this victory not because they objected to the process of enacting the policy, but because they objected to the outcome of that process—the legalization of abortion. Had prochoice advocates unilaterally abandoned the courts, the issue would still have been settled in part by judges, and their opponents would have had a substantial advantage in framing the legal issue as one of fetal rights under the Fourteenth Amendment and parallel state constitutional provisions. Those opponents might well have succeeded in convincing other state judges to roll back democratically enacted prochoice policies.

ASSISTED SUICIDE IN THE 1990S

Twenty years after *Roe v. Wade*, advocates of terminally ill patients experiencing significant pain and suffering sought to build on that landmark precedent by persuading the Supreme Court to recognize a constitutional right to determine the time and manner of one's own death. When this legal claim began to make headway, its advocates faced the same set of criticisms that reproductive-rights advocates had long faced. Critics of the right-to-die movement objected that the issue of assisted suicide was properly the province of democratic politics and, therefore, that it would be illegitimate for unelected judges to intervene. They also objected that right-to-die advocates were likely to provoke a counterproductive backlash by seeking a premature nationwide judicial resolution of an ongoing democratic debate.

25. *Byrn*, 31 N.Y.2d at 206–07 (Burke, J., dissenting).
26. *Byrn*, 31 N.Y.2d at 205 (Burke, J., dissenting).
27. *Byrn*, 31 N.Y.2d at 211 (Burke, J., dissenting).
28. *Byrn*, 31 N.Y.2d at 208 (Burke, J., dissenting).

In a 1996 amicus brief, for example, constitutional scholar Michael W. McConnell argued that "the laws against assisted suicide have substantial moral and political justifications" and that "[t]he Fourteenth Amendment is not a license for judicial social experimentation." But he also argued that, even assuming that such laws "should be relaxed," "it would be a grave mistake for the federal courts to leap in and attempt, prematurely, to resolve the issue or to accelerate the pace of change." In McConnell's view, "contending social forces are more likely to accept the outcome of a process in which their voices were heard than an imposed solution in which their elected representatives were not entitled to a significant role." Indeed, "[m]any supporters of abortion rights believe that those rights would have been achieved with less contention and greater public acceptance if the matter had been left to the political process, as in other Western nations. There is no reason to repeat those mistakes in this context."[29] Elaborating on those claims in a 1997 article, McConnell again argued that judicial enforcement of a constitutional right to die would be fundamentally undemocratic, but that it should also be avoided because legislatures are better than courts at crafting broadly acceptable compromises that are "likely to reduce social discord" and because "contending social forces are more likely to accept the outcome[s]" of legislative than judicial processes (1997, 682–85, 685–91). He also reiterated, nearly verbatim, the claim that abortion-rights advocates themselves have recognized that *Roe* was counterproductive, citing Judge Ginsburg's influential account in support (1997, 701).

As with abortion rights, however, the actual story of advocacy for and against the right to die was somewhat different than McConnell's account might lead one to expect. Right-to-die advocates relied on a wide range of political strategies, including legislative politics and direct democracy as well as litigation. Their opponents did likewise, with right-to-life advocates opposing assisted suicide via legislative politics and direct democracy, but also resorting to litigation when the democratic channels were not going their way.

In 1991 and 1992, advocates for terminally ill, mentally competent adults tried to legalize assisted suicide in Washington and California via ballot initiatives. Both measures were unsuccessful, with roughly 54 percent of each state's voters rejecting the effort to ensure that certain individuals had greater control over the time and manner of their own deaths. In 1994, Oregon voters went the other way, with 51.3 percent supporting a so-called Death with Dignity Act, but in most states, the electorate remained unwilling to legalize assisted suicide.[30]

Meanwhile, right-to-die advocates explored other potential avenues of change. In 1993, they founded Compassion in Dying, an organization dedicated to expanding end-of-life choices, and in 1994, the group filed federal lawsuits in both Washington and New York, contending that the states' longstanding statutory bans on physician-assisted suicide violated the constitutional right to die. A Ninth Circuit panel rejected this

29. Brief of Senator Orrin Hatch, Chairman of the Senate Judiciary Committee; Representative Henry Hyde, Chairman of the House Judiciary Committee; and Representative Charles Canady, Chairman of the Subcommittee on the Constitution of the House Judiciary Committee, as Amici Curiae in Support of the Petitioners, *Vacco v. Quill* and *Washington v. Glucksberg* (Nov. 12, 1996), 7, 39, 24, 27–28, 51.

30. In 2008, Washington joined Oregon in legalizing assisted suicide via ballot initiative, but similar initiatives found defeat at the polls in Michigan in 1998, in Maine in 2000, and in Massachusetts in 2012. In 2013, Vermont became the first state to legalize assisted suicide via state legislative action.

claim in the Washington suit in 1995, but the following year, an en banc panel reversed, holding in an opinion by Circuit Judge Stephen Reinhardt that "there is a constitutionally protected liberty interest in determining the time and manner of one's own death." In Reinhardt's view, "[a] competent, terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness."[31] Reinhardt's opinion in *Washington v. Glucksberg* (9th Cir. 1996) called explicit attention to "the compelling similarities between right-to-die cases and abortion cases." Citing *Planned Parenthood v. Casey* (1992), he noted that, "[l]ike the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy'."[32]

Three judges dissented and, a few months later, one of them joined with two other circuit judges in bitterly objecting to their colleagues' refusal to reconsider Reinhardt's holding. In this latter round of dissent, Circuit Judge Diarmuid O'Scannlain complained that Reinhardt's opinion amounted to a "shockingly broad act of judicial legislation." Addressing the abortion issue, O'Scannlain described the supposed parallel between a decision to terminate a pregnancy and a decision to terminate one's own life as "absurd." On O'Scannlain's reading, Reinhardt's holding was rooted in nothing more than "the poetic language of *Casey*," a decision that (in O'Scannlain's view) rested "more on the basis of *stare decisis* than on a reasoned reaffirmation of the notion that abortion is a protected liberty interest."[33]

Meanwhile, a unanimous Second Circuit panel handed Compassion in Dying a victory in its New York case as well, though this holding rested on narrower doctrinal grounds than the Ninth Circuit holding in *Glucksberg*.[34] The Supreme Court stayed the Ninth Circuit opinion in June 1996 and granted cert. in both cases in October.[35] With clear implications for the Court's abortion jurisprudence, the cases drew heavy amicus participation from advocates on both sides of that conflict. For example, writing on behalf of the National Women's Health Network and Northwest Women's Law Center, Sylvia Law observed that the states of Washington and New York defended their statutory bans on assisted suicide by arguing that "the Constitution protects only those rights specifically recognized when the Constitution or the Fourteenth Amendment was adopted." From Law's angle, "[t]his wooden, historically frozen concept of constitutionally protected liberty poses a particular threat to women (among other historically oppressed populations) because, both in 1789 and in 1868, our Constitution and laws pervasively and explicitly denied women personal, civil and political rights."[36] Likewise, in a brief for the Center for Reproductive Law and Policy, Janet Benshoof and Kathryn

31. *Compassion in Dying v. State of Wash.*, 49 F.3d 586 (9th Cir. 1995), *reversed by Washington v. Glucksberg*, 79 F.3d 790, 793, 814 (9th Cir. 1996).

32. *Washington v. Glucksberg*, 79 F.3d 790, 800, 813–14 (9th Cir. 1996).

33. *Washington v. Glucksberg*, 85 F.3d 1440, 1441–44 (9th Cir. 1996).

34. *Vacco v. Quill*, 80 F.3d 716 (2d Cir. 1996).

35. *Washington v. Glucksberg*, 517 U.S. 1241 (1996), *cert. granted*, 518 U.S. 1057 (1996); *Vacco v. Quill*, 518 U.S. 1055 (1996).

36. Brief for the National Women's Health Network and Northwest Women's Law Center as Amici Curiae in Support of Respondents, *Vacco v. Quill* and *Washington v. Glucksberg* (Dec. 10, 1996), 6–7.

Kolbert argued that Reinhardt's holding in the Washington case was correct, but that even if the Court were to reverse it, the justices should leave their abortion precedents undisturbed.[37]

The Clinton administration likewise sought to distinguish the two contexts, with Acting Solicitor General Walter Dellinger arguing that "[t]he right to choose an abortion implicates a constellation of liberty and equality rights of fundamental importance that are not implicated here." Dellinger's brief acknowledged that "[a] competent, terminally ill adult has a constitutionally cognizable liberty interest in avoiding the kind of suffering experienced by the plaintiffs in this case," but nonetheless concluded that "[o]verriding state interests justify the State's decision to ban physicians from prescribing lethal medication."[38] In similar fashion, a brief on behalf of fifty bioethics professors urged the Court to reverse the holdings below while "[e]xplicitly recogniz[ing] that rejection of a right to physician assistance in committing suicide in no way affects a woman's constitutional right to determine whether or not to terminate her pregnancy."[39]

On the other side, a variety of leading antiabortion litigators joined the fray as well. On behalf of the American Center for Law & Justice, Jay Sekulow argued that a decision extending *Casey* to include a constitutional right to die "would lead to claims of right to use drugs, and to engage in polygamy, fornication, adultery, divorce, sodomy, bestiality, and consensual sadism. If a person has a constitutional right to have somebody kill him, how can he not have a constitutional right to allow somebody to inflict pain and injury on him?" These claims would lead, in turn, "to one of two results: either the courts will require states to approve of much conduct the states may reasonably desire to prohibit as harmful, in effect imposing a constitutionally mandated moral philosophy on the states; or the courts will arbitrarily pick and choose which activities the states may prohibit, and which activities the states must allow. In effect, the courts will become superlegislatures passing on the wisdom of state laws." As such, the "Court should either overrule *Casey* or decline to extend *Casey*'s definition of liberty" to this new context.[40] Likewise, on behalf of Senator Orrin Hatch and Representatives Henry Hyde and Charles Canady, McConnell argued (in the brief that we quoted at the outset of this section) that "[e]ven apart from the specifics of constitutional doctrine, there is every reason for courts to be wary about overturning duly enacted legislation on the basis of untried and uncertain moral and philosophical arguments, where the result is bereft of support in directly relevant constitutional text or in national experience." Like the Ninth Circuit dissenters, McConnell insisted that the Court had reaffirmed *Roe* in *Casey* solely on the grounds of stare decisis, and hence that there was no justification for

37. Brief of the Center for Reproductive Law & Policy as Amicus Curiae in Support of Respondents, *Washington v. Glucksberg*, No. 96-110 (Dec. 10, 1996), 7–21. Others urging the Court to affirm the decisions from the Second and Ninth Circuits included the ACLU and John Rawls, Ronald Dworkin, and several other leading moral philosophers.

38. Brief for the United States as Amicus Curiae Supporting Petitioners, *Washington v. Glucksberg* (Nov. 12, 1996), 11, 13.

39. Brief for Bioethics Professors as Amicus Curiae Supporting Petitioners, *Vacco v. Quill* and *Washington v. Glucksberg* (Nov. 12, 1996), 48.

40. Brief Amicus Curiae of the American Center for Law & Justice Supporting Petitioners, *Vacco v. Quill* and *Washington v. Glucksberg* (Nov. 12, 1996), 6–7.

extending its logic to new contexts. Indeed, "[t]he abortion cases should serve as a cautionary note rather than a precedent."[41]

From one angle, these amicus briefs in support of the states of Washington and New York represented a straightforward effort by prolife advocates to discourage a new round of judicial legislation akin to that sparked by *Roe v. Wade*. However, it is clear that their chief concern was a substantive one—that is, that assisted suicide should not be legalized—and that they were only secondarily concerned with whether judges or legislators settled policy in this realm. Longtime antiabortion litigator James Bopp, Jr., who served as general counsel to the National Right to Life Committee, filed four separate amicus briefs urging reversal in *Glucksberg*. One brief was filed on behalf of several health care providers and patients with terminal illnesses whom he also represented in a then-pending effort to block implementation of Oregon's 1994 Death with Dignity Act. In the *Glucksberg* briefs, Bopp argued that the federal courts could not legitimately legalize assisted suicide, but in the Oregon briefs, he argued that the electorate could not legitimately do so either.

When the Washington and New York decisions came down in June 1997, the Supreme Court rejected the constitutional challenges to both statutes, thus returning the issue to the political process.[42] With the litigation avenue closed, right-to-die advocates relied almost exclusively on legislative and electoral efforts for the next decade. These efforts were largely unsuccessful, which eventually led the advocates to return to court.[43] Even when they did make headway via democratic channels, however, they inevitably faced legal challenges from the right.

The Oregon story is particularly instructive. As noted above, the state's voters became the first to legalize assisted suicide when they enacted Measure 16, also known as the Death with Dignity Act, in November 1994. Learning from the earlier unsuccessful initiative campaigns in California and Washington, the drafters of Measure 16 restricted its scope by providing for mandatory waiting periods, requiring participating doctors to be licensed in Oregon, and requiring patients to be Oregon residents (Hillyard and Dombrink 2001, 69). These provisions may have mollified some voters' concerns, but immediately upon enactment, a group of doctors, patients, and residential care facilities that objected to the law filed a federal constitutional challenge. Represented by Bopp, these opponents of assisted suicide persuaded Federal District Judge Michael R. Hogan to enjoin Measure 16 before it took effect.[44] A Ninth Circuit panel eventually reversed this decision, but not before the litigation delayed implementation of the Oregon Death with Dignity Act for several years.[45]

The plaintiffs alleged that Measure 16 violated the equal protection and due process clauses, statutory and First Amendment rights to freedom of religious exercise

41. Brief of Senator Orrin Hatch, Chairman of the Senate Judiciary Committee; Representative Henry Hyde, Chairman of the House Judiciary Committee; and Representative Charles Canady, Chairman of the Subcommittee on the Constitution of the House Judiciary Committee, as Amici Curiae in Support of the Petitioners, *Vacco v. Quill* and *Washington v. Glucksberg* (Nov. 12, 1996), 23–24, 46.

42. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

43. See, for example, *Baxter v. State of Mont.*, 354 Mont. 234 (Mont. 2009); *Blick v. Office of Div. of Criminal Justice*, No. HHD-CV-09-5033392-S (Super. Ct., Dist. of Hartford Nov. 19, 2009); *New Mexico v. Brandenberg*, No. D-202-CV 2012-02909 (2d Jud. Dist. Ct. Jan. 13, 2014).

44. *Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995).

45. *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997).

and association, and the Americans with Disabilities Act.[46] Chief Judge Hogan resolved the issue solely on equal protection grounds, at which point the other claims dropped out of the litigation. Hogan adopted a rational basis standard of review and accepted that the state had some legitimate interests in adopting Measure 16, but held that "the procedures designed to differentiate between the competent and incompetent" were insufficient.[47] In particular, Hogan was concerned that the procedural safeguards provided in the assisted suicide law were less robust than those that applied to the civil commitment of mentally ill persons. These inadequate procedures were especially troubling because "[i]t is undisputed that one of the factors that motivates suicide is depression." Terminally ill patients "are susceptible to even subtle suggestions that reinforce" feelings of guilt and worthlessness, and yet Measure 16 did not require a specialized mental health expert to examine a patient before the prescription was issued.[48] Relatedly, the medical standard of care adopted by Measure 16 was "a subjective 'good faith' standard" rather than the usual rule of "objective reasonableness, according to professional standards."[49] In Hogan's view, these procedures failed to meet the state's interest in ensuring that only competent terminally ill patients commit suicide because "Measure 16 singles out terminally ill persons who want to commit suicide and excludes them from protections of Oregon laws that apply to others."[50] On these grounds, Hogan issued a permanent injunction.

On appeal before the Ninth Circuit, Bopp constrained his argument to the narrow grounds adopted by Hogan. He framed Measure 16 as creating "an exception—applicable only to persons diagnosed as having a terminal disease—to the criminal and civil presumptions and protections against self-harm and assisted suicide safeguarding all other persons in Oregon."[51] Echoing the District Court's findings, Bopp alleged "that no safeguards **at all** exist at the crucial time when the lethal prescription is ingested" and that "a request for assistance in suicide nearly always results from a treatable psychiatric condition . . . which renders them incapable of rational decisionmaking. . . . After treatment for the psychiatric condition persons invariably no longer request suicide."[52] These facts derived from the affidavits of various doctors and professionals asserting, among other things, that there was no accurate method of defining a terminal disease; that nonspecialists had trouble diagnosing depression, which was a leading cause of suicide; that treating depression took longer than the fifteen-day waiting period adopted by Measure 16; and that the drugs prescribed to facilitate suicide were unreliable in causing actual death.[53] As noted, Bopp's brief tracked Hogan's opinion closely, arguing that "Measure 16 is founded on the erroneous presupposition that it is 'normal' for terminally ill persons to seek suicide." Because such persons in fact "generally seek suicide only when suffering from depression[, the Act] . . . is irrational for being based

46. *Lee*, 891 F. Supp. at 1431.
47. *Lee*, 891 F. Supp. at 1434.
48. *Lee*, 891 F. Supp. at 1435.
49. *Lee*, 891 F. Supp. at 1436, 1437.
50. *Lee*, 891 F. Supp. at 1438.
51. Appellees' Brief & Cross Appellants' Brief (Jan. 24, 1996), 3.
52. Appellees' Brief, at 3–4 (emphasis in original).
53. Appellees' Brief, at 7–17.

on unscientific stereotypes and erroneous presumptions."[54] Although an "imperfect fit" between the state interest and the legal means might be justifiable in "economic and commercial matters," Bopp concluded, such a lenient version of rational basis was unacceptable in matters of life and death.[55]

The Ninth Circuit declined to address Bopp's argument, holding that his clients lacked standing to bring their claims. The court found that their threatened injuries were too speculative; simply "because the asserted injury is the threat of death does not mean that the plaintiff is relieved from the requirement of asserting some significant possibility of injury."[56] As a result of this holding, followed by the Supreme Court's denial of cert. in October 1997, Bopp's lawsuit was ultimately unsuccessful, though it did delay implementation of Measure 16 for nearly three years.[57] Because the right-to-life advocates, like their right-to-die counterparts, were engaged in a campaign of multidimensional advocacy, they used this time to explore other potential avenues of legal change. One such avenue available under Oregon law was state legislative repeal of the statute enacted via ballot initiative. Led by Catholic groups that had provided 59 percent of the funding to fight Measure 16 initially, opponents of assisted suicide urged the legislature to intervene in 1997 (Ball 2012, 132, 138). Three images were central to this repeal effort, "the needle, the bag, and the Netherlands" (Hillyard and Dombrink 2001, 99). The leading state newspaper, *The Oregonian*, popularized the idea that studies in the Netherlands had found that suicide drugs had a 25 percent failure rate, though Dutch researchers asserted that this claim represented an intentional distortion of their findings to support the newspaper's strong opposition to assisted suicide (Hillyard and Dombrink 2001, 101–02, 108–09). Regardless of the accuracy of the claim, the high failure rate figured prominently in the repeal effort, with the image of *the needle* referring to doctors having to stand by and inject more drugs to finish the job (something that Measure 16 in fact prohibited). One Republican senator deployed the image of *the bag*—suggesting that after the drugs failed, suffocation would ultimately be necessary (Hillyard and Dombrink 2001, 100).

When Governor John Kitzhaber threatened to veto a direct repeal of the Death with Dignity Act, the legislative opponents of assisted suicide proposed returning the issue to the polls instead. This effort succeeded in the legislature, marking the first time in Oregon history that a previously enacted "ballot measure [had] been sent back to voters in its exact form" (Hillyard and Dombrink 2001, 103). The public, however, was strongly opposed. A February 1997 poll found that 80 percent of Oregonians opposed ever returning a successful ballot proposal to the people, and even 55 percent of those who voted against Measure 16 opposed returning the proposal to the people (Hillyard and Dombrink 2001, 102). The repeal campaign, though still dominated by Catholic and religious prolife organizers, focused on the "clinical issues like failure rates and increased suffering" of assisted suicide rather than the moral arguments in strongly secular Oregon (Hillyard and Dombrink 2001, 105). In November 1997, just a week after the injunction against Measure 16 was finally lifted, the state's voters rejected

54. Appellees' Brief, at 23.
55. Appellees' Brief, at 34.
56. *Lee v. Oregon*, 107 F.3d 1382, 1390–91 (9th Cir. 1997).
57. O'Keefe and Green (1997); *Lee v. Harcleroad*, 522 U.S. 927 (1997) (denying certiorari).

Measure 51 by a vote of 40–60 percent, a margin significantly wider than the initial passage of Measure 16.

Having failed to invalidate the measure through both judicial and democratic politics, opponents shifted venues yet again by calling on the federal government to preempt the state law. After the failure of the repeal initiative made it clear that the Death with Dignity law would finally take effect, Senator Orrin Hatch and Representative Henry Hyde wrote to the director of the federal Drug Enforcement Administration (DEA) requesting prosecution of (or other administrative sanctions against) Oregon physicians who participated in assisted suicides. The DEA considered the request, but Attorney General Janet Reno subsequently concluded that federal law enforcement agencies had no authorization to "displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice."[58] Prolife members introduced legislation in the 105th and 106th Congresses that would grant such authorization, and following the 2000 elections, one of the supporters of this legislation replaced Reno as Attorney General. Early in President George W. Bush's first term, Attorney General John Ashcroft announced a new interpretation of the federal Controlled Substances Act (CSA), which would prohibit doctors and pharmacists from prescribing or dispensing controlled substances to assist with suicide, notwithstanding Oregon law.

Joined by several medical professionals and terminally ill state residents, the state challenged the Attorney General's interpretation, and the Ninth Circuit sided with the state in May 2004.[59] When the Supreme Court granted cert. the following February, Bopp "announced . . . that he would coordinate 'an all-out legal effort in support of the Ashcroft directive' " (Greenhouse 2005, A1). Despite this effort, when the decision came down in January 2006, Justice Anthony Kennedy wrote for a six-justice majority in affirming the Ninth Circuit. Among other things, Kennedy objected to the Attorney General's claim of "extraordinary authority," noting that "[t]he structure of the CSA . . . conveys [congressional] unwillingness to cede medical judgments to an Executive official who lacks medical expertise." He held further that the CSA cannot reasonably be read as prohibiting physician-assisted suicide, as "the statute manifests no intent to regulate the practice of medicine generally," and "[t]o read prescriptions for assisted suicide as constituting 'drug abuse' under the CSA is discordant with the phrase's consistent use throughout the statute, not to mention its ordinary meaning." Finally, appealing to "the background principles of our federal system," Kennedy held that the federal government could not displace Oregon's detailed regulatory scheme without a clearer statement from Congress of its intention to do so.[60]

In sum, a policy conflict that began with an explicit effort by assisted-suicide advocates to pursue their goals through the democratic process nonetheless wound up in court—first because their opponents filed suit on behalf of a constitutional right to life and second because the assisted-suicide advocates themselves had to resort to litigation to prevent federal interference with enforcement of the policy that they had enacted via state democratic channels.

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58. *Gonzales v. Oregon,* 546 U.S. 243, 252–53 (2006).
59. *Oregon v. Ashcroft,* 368 F.3d 1118 (9th Cir. 2004).
60. *Gonzales v. Oregon,* 546 U.S. 243, 262, 266, 270, 274 (2006).

Cummings and NeJaime (2010) tell a similar story with regard to same-sex marriage advocacy in California, and even in the assisted suicide context, the Oregon story is not unique. When assisted suicide supporters launched a similar initiative campaign in neighboring Washington, the Coalition Against Assisted Suicide filed a preelection challenge alleging that the ballot language and the state's official voters' pamphlet were misleading because they lacked the term "physician-assisted suicide" and were insufficiently clear about the process for obtaining a lethal prescription (Roesler 2008). A state trial judge rejected this challenge in February 2008 and the Death with Dignity Act was enacted as Initiative 1000 the following November. Likewise, when right-to-die advocates launched an initiative campaign in Massachusetts, seeking placement on the November 2012 ballot, opponents filed a preelection challenge to the initiative language. The legal challenge was unsuccessful, but the initiative was defeated at the polls.[61] To the extent that other courts adhere to the Ninth Circuit's standing analysis in *Lee v. Oregon* (1997), substantive challenges to assisted suicide initiatives will continue to face long odds. But preelection procedural challenges remain an attractive avenue for right-to-life advocates and, indeed, an increasingly common tactic in state initiative politics more generally (Ellis 2002, 148–57). In sum, in a counterfactual world in which *Glucksberg* and like claims had never been litigated—with right-to-die advocates relying exclusively on legislative politics and direct democracy—the issue of assisted suicide would still be settled in part by judges because right-to-life advocates would continue to challenge their legislative defeats—and even potential legislative defeats—in court.

UNILATERAL DISARMAMENT AND CONSTITUTIONAL POLITICS

Backlash theorists regularly advise social movements to abandon the courts in favor of democratic politics on the grounds that legislative resolution is less likely to anger opponents (because their voices will at least have been heard in the legislative process) and is more likely to lead to broadly acceptable compromises (because of courts' supposed bias toward principled rules over and against workable solutions). The empirical support for these claims is mixed at best, but even if they are both true, these arguments ignore the fact that abandoning the courts does not remove judicial politics from the process. It simply leaves the legal options in the hands of reformers' opponents. These opponents will sometimes persuade courts to veto (or at least delay) the policy changes that the reformers won legislatively, and with the legal field to themselves, they may sometimes win even broader victories, framing the constitutional issue in terms that preempt the reformers' future legislative efforts as well.

Rosenberg (1991) framed his influential assessment of social movement litigation as an evaluation of the relative merits of the NAACP Legal Defense Fund's litigation campaign and the boycotts, sit-ins, and other direct action tactics employed by other

61. Kelly v. Coakley, SJ-2012-0216, docketed at http://www.ma-appellatecourts.org/search_number.php?dno=SJ-2012-0216&get=Search. In May 2013, Vermont became the first state to adopt physician-assisted suicide through the legislative process, and the law does not yet appear to have faced a legal challenge.

movement organizations. However, as Randall Kennedy has noted, the leading example of direct action protest—the Montgomery bus boycott—was nearly derailed by litigation initiated by the boycott's opponents. In response to a request from city officials, a segregationist local judge issued an injunction preventing the boycotters from continuing to operate a system of organized car pools that was necessary to the bus boycott's success. On the same day, however, the US Supreme Court decided a federal constitutional challenge initiated by the boycotters themselves, holding that the Fourteenth Amendment prohibited Montgomery from operating segregated buses.[62] In the absence of the boycotters' own litigation, the courts would still have been involved, and the outcome of the conflict may well have been different (Kennedy 1989, 1029–30, 1046–47; see also Cummings 2013, 195).

The stories of prochoice and prolife litigation in New York and Oregon likewise illustrate the dangers that unilateral disarmament may have for social movement groups. Contrary to the narrative of movements captured by the allure of litigation, left-liberal advocates of abortion rights and the right to die pursued their desired reforms via democratic as well as judicial channels and, indeed, achieved some significant democratic victories. But if these advocates had pursued their claims *only* via democratic channels, these victories would have remained vulnerable to legal challenges from the opposition. Even in the face of extensive prochoice legal advocacy prior to *Roe*, Byrn's legal framing persuaded a state trial judge and two members of the state high court to endorse a fetal right to life. Similarly, Bopp's legal challenge to Oregon's Death with Dignity Law persuaded Chief Judge Hogan. In a counterfactual world without the sort of litigation that led to *Roe* and *Glucksberg*, federal courts would still have played a role in resolving these issues and may well have proven more sympathetic to calls for constitutional limits on the legislative authorization of abortion and assisted suicide.

Whether the federal courts would ultimately have endorsed a constitutional right to life in either context is impossible to assess, but it seems likely that at least some state high courts would have done so. In other words, if *Roe v. Wade* had never been litigated, and if the US Supreme Court had declined to respond to *Byrn*-style suits by endorsing a constitutional right to fetal life, it seems likely that prolife advocates would have responded like so many other advocates who have failed to achieve legal change at the federal level—that is, by pursuing similar change via state constitutional litigation (see Williams 2009, 113–34). Given the conservative partisan and ideological leanings of so many state high courts (Brace, Langer, and Hall 2000), it also seems likely that some of these efforts would have resulted in judicial endorsement of doctrines along the lines of Judge Burke's dissent in *Byrn*. These hypothetical holdings might have produced a variety of criminal abortion regimes across states and perhaps even conflicting interpretations of the very definition of a constitutional person.

Foreign experience with prolife litigation also illuminates what might have happened in a world without prochoice litigation. In the 1975 *Abortion I*[63] case, the German Constitutional Court invalidated a recently enacted liberalization of

62. *Gayle v. Browder*, 352 U.S. 903 (1956).
63. *Abortion I Case* (1975), 39 BVerfGE 1.

abortion law and required the state to criminalize abortion, emphasizing the German constitutional right to life as a necessary "reaction to the 'destruction of life unworthy to live,' the 'final solution,' and the 'liquidations' that the National Socialist regime carried out as governmental measures" (Kommers 1997, 337). The German Court accepted part of Byrn's key claims: "Life in the sense of the developmental existence of a human individual begins, according to established biological-physiological findings, on the fourteenth day after conception. . . . The developmental process thus begun is a continuous one which manifests no sharp demarcation and does not permit any precise delimitation of the various developmental stages of the human life" (Kommers 1997, 337). While the decision still allowed a significant loophole for abortion availability (Eberle 2002, 172), the strong legal condemnation of permissive abortion laws demonstrates the potential for prolife litigators to utilize the courts not only to roll back prochoice victories but to entrench their preferred position constitutionally. Similarly, in 1983, Ireland adopted a constitutional amendment prohibiting abortion in all cases except where the mother's life was in danger.[64] This provision became the basis for an injunction prohibiting a fourteen-year-old rape victim from traveling to England for an abortion. The injunction was reversed only when the Irish Supreme Court held that the girl's suicidal feelings amounted to a threat to her life (Kingston, Whelan, and Bacik 1997, 6–19).[65] These European developments might well have bolstered fetal personhood arguments in the United States. At the very least, they illustrate the sort of legal victories that prolife groups might have achieved in a world without *Roe*.

Had abortion rights supporters in the United States abandoned judicial politics, the courts would nonetheless have been drawn into the conflict by claims like those advanced in New York, Germany, and Ireland. Given the common prolife ideology shared by abortion and suicide opponents, such a state of affairs would likely have altered the assisted suicide debate in significant ways as well. State or federal judicial decisions declaring fetal personhood and a broad right to life would likely have fueled the prolife opposition to suicide and provided stronger arguments than the relatively mild rational basis fitness claims that Bopp advanced.

In sum, on contentious aspects of public policy, advocacy organizations should take warnings of court-inspired backlash with a grain of salt. Countermobilization is a natural aspect of any major social change and may be unavoidable in most cases. There is no good reason to suspect that opponents are more likely to accept change that comes about through democratic rather than judicial politics and, in any event, most long-running policy conflicts are likely to be fought in multiple venues and at multiple levels of government. Advising advocates seeking to change the status quo that they should unilaterally abandon some of these venues is like advising one army to lay down its guns while the other keeps shooting. It is not surprising that social movements on both the left and the right have ignored this advice for so long.

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64. Constitution of Ireland Art.40.3.3: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

65. *Attorney General v. X* [1992] 1 I.R. 1.

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