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Bridging the Great Divide—A Response to Linda Greenhouse and Reva B. Siegel's Before (and After) *Roe v. Wade*: New Questions about Backlash

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**BRIDGING THE GREAT DIVIDE—A RESPONSE
TO LINDA GREENHOUSE AND REVA B. SIEGEL'S
*BEFORE (AND AFTER) ROE V. WADE:
NEW QUESTIONS ABOUT BACKLASH***

LOLITA BUCKNER INNIS*

ABSTRACT

This essay discusses the history of Roe v. Wade as recently addressed by Linda Greenhouse and Reva B. Siegel. Going beyond their assertions, I suggest that an additional, more encompassing inquiry focuses on what factors are implicated in the politics of abortion and how these factors relate to larger social, political, and cultural conflicts both before and after Roe. By naming party politics and the Catholic Church, Greenhouse and Siegel posit two crucial elements that shaped the abortion debate. I assert, however, that what is not discussed in their Article is the way numerous other factors have figured into the debate, race and class being two of the most salient. Race, class, and abortion have interacted in complex and numerous ways throughout United States history. While this interaction in some respects can be described via a linear, historical approach, it is not fully explicated by a single dichotomous before/after analysis centered on Roe. Instead, race, class, and abortion are constantly interacting, sometimes co-constructed, constituent parts of a much greater social, cultural, and political conversation in the United States. I suggest that if national party politics and the Catholic Church are important aspects of the development of the United States narrative on abortion, then race and class are telling and even compelling subtexts in that narrative. Giving attention to these subtextual strands may offer valuable additional insights.

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I. INTRODUCTION

I agree with Linda Greenhouse and Reva B. Siegel's assertion that identifying *Roe v. Wade*¹ as the inchoative point of the abortion debate trajectory misapprehends the full scope and nature of the debate and unduly focuses on judicial actors.² However, the before and after model that they embrace is perhaps not the most efficacious way of diagramming what has occurred in relation to abortion politics in the United States. The question is not only, I suggest, what happened before or after *Roe*. A more encompassing inquiry focuses on what factors are imbricated in the politics of abortion and how these factors relate to larger social, political, and cultural conflicts both before and after *Roe*. Two significant factors in the bigger picture are race and class.

It is true that *Roe* has become generally synonymous with political conflict.³ It is also true that *Roe* is frequently cited as the source of political polarization over abortion and therefore functions as the "great divide" in addressing the social and political tenor of women's reproductive rights in the United States.⁴ Thus, one of the most frequently occurring themes in discussing legal access to abortion is the dichotomy between conditions before abortion was made available throughout the United States via *Roe* and conditions after the ruling.⁵ Because before and after themes often signal the ameliorative or pejorative dimensions of a process or cause and effect, this type of thematic address primes the reader for a linear, temporal account of change. Greenhouse and Siegel adopt such a theme in their recent Article. In doing so, however, they seek to decenter *Roe*, contending that partisan politics before *Roe*, and not disagreement with the Supreme Court's decision after *Roe*, is significantly responsible for the contemporary backlash against abortion.⁶ They offer a political and historical account of what is frequently expressed in legal terms, explaining that the legal ruling in *Roe* was not the catalyst of the social and political storm surrounding abortion. Instead, Greenhouse and

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

2. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

3. *Id.* at 2030.

4. *Id.*

5. As one writer observes, seventeen states had legalized or decriminalized abortion before *Roe v. Wade*; the Court's decision in *Roe* barred state statutes that universally banned abortion. LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 300 (2002).

6. Greenhouse & Siegel, *supra* note 2, at 2031.

Siegel aver, the decision in *Roe* is part of the broader conflict over abortion that existed before *Roe* was decided.⁷

At the heart of Greenhouse and Siegel's argument is the claim that in the years immediately before *Roe*, strategists for the Republican Party encouraged President Nixon to attack abortion and to articulate anti-abortion positions.⁸ The purpose of the attack was in order to draw Catholic voters away from their traditional Democratic alliances. Republican embrace of anti-abortion stances was a method of attracting social conservatives, especially Catholics, who eschewed "radical" groups and policies supported by Democratic candidates.⁹ Greenhouse and Siegel, as they make clear in their Article, do not urge that the Supreme Court's decision in *Roe* played no role in the abortion conflict.¹⁰ Rather, they assert that pre-*Roe* abortion conflicts, and the resulting shifting alignments of political actors, are important keys to understanding the United States abortion debate.¹¹ Hence, write Greenhouse and Siegel, these matters and related issues in the period before *Roe* are worthy of further scholarly examination.¹²

By naming party politics and the Catholic Church, the authors posit two crucial elements that shaped the abortion debate. However, what is not discussed in their Article is the way that numerous other factors have figured into the debate, race and class being two of the most salient. Race, class, and abortion have interacted in complex and numerous ways throughout United States history. While this interaction in some respects can be described via a linear, historical approach, it is not fully explicated by a single dichotomous before/after analysis centered on *Roe*. Instead, race, class, and abortion are constantly interacting, sometimes co-constructed, constituent parts of a much greater social, cultural, and political conversation in the United States.

In the Article, the authors propound their arguments in three parts. In Part I of their Article, they consider four claims and frames that shape the way in which abortion was discussed before *Roe*: public health, concerns for the environment and population, sexual freedom, and finally feminist voices.¹³ In Part II, the authors describe how abortion politics became a part of a political strategy as Republicans, who had often been among the

7. *Id.* at 2030–31.

8. *Id.* at 2031, 2052–59.

9. *Id.* at 2052.

10. *Id.* at 2086.

11. *Id.*

12. *Id.*

13. *Id.* at 2034–45.

supporters of abortion liberalization before *Roe*, began to articulate anti-abortion points of view.¹⁴ This shift, they explain, was largely in order to attract socially conservative and/or religious voters away from the Democratic Party.¹⁵ Finally, in Part III of the Article, the authors survey popular and academic commentary that position the *Roe* case as the legal and political polestar of the debate on abortion.¹⁶ I suggest that if national party politics and the Catholic Church are important aspects of the development of the United States narrative on abortion, then race and class are telling and even compelling subtexts in that narrative. Giving attention to these subtextual strands may offer valuable additional insights.

II. THE DISCOURSE OF ABORTION

In Part I of their Article, the authors point out that although most contemporary meanings of abortion center on *Roe*, the discursive import of abortion changed in structure, meaning, and intensity well prior to *Roe*. While this is in some senses a discussion of a sociohistoric rhetorical phenomenon, it is well more than a rhetorical concern. These multiple discursive frames—public health, environmental and population concerns, sexual freedom, and feminist voices—each entertaining a particular construction of abortion, are all part of a larger social and cultural program underwritten by issues of race and class.

For instance, in discussing the history of abortion Greenhouse and Siegel indicate that abortion was widely permitted in the United States prior to 1821 if performed before quickening.¹⁷ They identify an 1821 Connecticut law as the first state statute criminalizing abortion.¹⁸ The 1821 Connecticut statute is often said to mark the beginning of legal bars on abortion. Abortion was in fact permitted even under the 1821 Connecticut statute if performed before quickening and done by mechanical means; the statute was in many respects a codification of existing United States legal norms and criminalized only post-quickening abortion via “deadly poison, or any noxious or destructive substance” that was administered “to cause

14. *Id.* at 2046–70.

15. *Id.* at 2056.

16. *Id.* at 2071–85.

17. *Id.* at 2034.

18. *Id.* Though the 1821 Connecticut statute represents the first explicit state criminalization of post-quickening abortion, between 1821 and 1841 ten states passed laws that criminalized abortions, chiefly by making providers of abortifacients and mechanical abortion procedures subject to prosecution and criminal penalties. ANDREA TONE, CONTROLLING REPRODUCTION, AN AMERICAN HISTORY 138 (1996).

or procure a miscarriage.”¹⁹ Gradually, Greenhouse and Siegel indicate, other states enacted bans on abortion, leading to nation-wide prohibitions by the turn of the nineteenth-century.²⁰

There is, however, a back-story to this commonly offered legal history of abortion in the United States, and this back-story that raises issues of race and class. It has been suggested that the move by many states to legislatively bar abortion was associated with the beginning of the “penny press” era in which the availability of abortion was promulgated via advertisements in mass media publications popular among the poor.²¹ Prior to this period, states had not necessarily perceived abortion as a significant problem, and thus states often practiced a policy of abortion “containment” in lieu of active enforcement efforts.²² Moreover, in looking at the historic overview that Greenhouse and Siegel offer, it is noteworthy that the move towards criminalizing abortion, beginning in the 1820s, heightening after the Civil War, and culminating at the end of the nineteenth-century with widespread bans on abortion, also coincided with significant conflicts over slavery, leading up to the Civil War and black freedom. This time period also heralded a large-scale growth in the number of poor people in the United States, with much of this expansion attributable to immigration and the general emancipation of blacks. The coincidence of heightened abortion bars and the increase in numbers of free blacks and poor people is not to suggest that concerns about blacks or poor people were necessarily at the center of, either ideologically or materially, the nineteenth-century abortion debate. Nonetheless, it is interesting to note that the antebellum conflict over black slavery and the impact of *Dred Scott v. Sandford*, differently contextualized, is becoming

19. See JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900* 21 (1978). It may be useful to examine more closely the history of the Connecticut statute and other state statutes in much the same way that Greenhouse and Siegel consider the pre-history of *Roe*. According to one writer, the Connecticut statute was adopted in almost direct response to a scandalous case that took place in Connecticut in 1818 involving a minister who was convicted of impregnating a young woman to whom he was not married and then giving her an abortion-inducing substance. MARVIN N. OLASKY, *ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA* 92–93 (1992); see also KAREN ERDEVIG GEDGE, *WITHOUT BENEFIT OF CLERGY: WOMEN AND THE PASTORAL RELATIONSHIP IN NINETEENTH-CENTURY AMERICAN CULTURE* 57 (2003). For an account of the case by the convicted minister, see AMMI ROGERS, *MEMOIRS OF THE REV. AMMI ROGERS, A.M.* (1834). Rogers asserts in his memoirs that the accuser later recanted. Rogers also argued that the case was part of a political and religious plot to discredit him. *Id.* at 5–6. For a brief mention of Ammi Rogers and his memoirs, see William Renwick Riddell, *Common Law and Common Sense*, 27 *YALE L.J.* 993, 998 (1918).

20. Greenhouse & Siegel, *supra* note 2, at 2034.

21. OLASKY, *supra* note 19, at 94.

22. *Id.*

a metaphor of choice for some contemporary anti-abortion activists.²³ However, the occurrence of large-scale racial and class upheaval and associated concerns about the “moral decay” of society, contemporaneous with a sharp rise in anti-abortion sentiment, bears some investigation.

Race and class are infused throughout other discursive frames that the authors identify as well. For instance, the authors assert that the professional medical establishment, embodied by the American Medical Association, was in significant part responsible for the criminalization of abortion.²⁴ Preventing abortion was framed as a public health concern during the move to professionalize medicine, as formally trained physicians sought to establish standards for membership in and conduct of the medical profession.²⁵ Here race and class are more clearly implicated, because in much of the early history of the United States women’s reproductive health care was a domestic art performed by midwives, and among the masses such care was frequently performed by poor, often immigrant women, slaves, and later free black women. These women practiced “healing arts” and folk cures.²⁶ Black “grannies” or midwives came under particular scrutiny by professional physicians.²⁷ Black midwives were often suspected of either performing abortions or imparting to pregnant women information on how to perform them.²⁸ Throughout the Americas, black women were sometimes accused of providing “specifics,” “herbs,” or “powders” to women seeking to end a pregnancy.²⁹ Poor immigrant women were among the largest group of

23. *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (an infamous and ultimately discredited case supporting black slavery and articulating the non-citizenship of blacks whether slave or free) and *Roe* are increasingly used by some contemporary anti-abortion politicians as part of a strategy to delegitimize *Roe* by offering a new tool with which to attack its moral underpinnings. Thus implemented, the two cases are sometimes shaped so as to appear “as a single line of villainy to be overcome by Americans.” CELESTE MICHELLE CONDIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* 50 (1994). These politicians seek to establish a history in which *Dred Scott* and *Roe* are “thematically linked and historically plotted.” *Id.*

24. Greenhouse & Siegel, *supra* note 2, at 2035.

25. *Id.*

26. KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 16 (1985).

27. See, e.g., Stacey A. Tovino, *American Midwifery Litigation and State Legislative Preferences For Physician-Controlled Childbirth*, 11 *CARDOZO WOMEN’S L.J.* 61, 75 (2004).

28. GERTRUDE JACINTA FRASER, *AFRICAN AMERICAN MIDWIFERY IN THE SOUTH: DIALOGUES OF BIRTH, RACE, AND MEMORY* 90 (1998).

29. DAVID BARRY GASPAR, *MORE THAN CHATTEL: BLACK WOMEN AND SLAVERY IN THE AMERICAS* 205 (1996).

abortion providers in some places.³⁰ Immigrant women were most likely to patronize immigrant midwives when seeking abortions.³¹

Greenhouse and Siegel further point out in Part I of their Article that twentieth-century advocates for liberalizing access to abortion also cited health concerns, and that by the 1960s, Americans were debating abortion as a problem concerning “poverty, population control, sexual freedom, and women’s equal citizenship.”³² The authors term these “new ways” of talking about abortion, apparently in contrast to medical discourses that had previously dominated conversations on the issue.³³ I would suggest that such ways of talking about abortion in the 1960s were not new at all, especially the first two. Poverty and population control had been at the heart of programs created decades earlier by women’s rights activists and reformers such as Margaret Sanger. Sanger was a pivotal figure who sought to increase women’s control over reproduction both as a means of enhancing their freedom and as a method of population control.³⁴ Much of her work was controversial, not only because Sanger promoted women’s access to birth control, but because of racial and class concerns raised by her work.³⁵ Both in Sanger’s time and in more contemporary accounts of her work, some accused Sanger of advocating a program of eugenics to reduce the number of poor people, immigrants, and blacks.³⁶

30. See, e.g., LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867–1973*, at 71–73 (1998). Investigators of midwives in Chicago, New York, Boston and Baltimore suspected that five percent to over fifty percent of midwives performed illegal abortions. *Id.* at 71.

31. *Id.* at 73

32. Greenhouse & Siegel, *supra* note 2, at 2034–35.

33. *Id.*

34. See Loretta J. Ross, *African-American Women and Abortion*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000*, at 161–62 (Rickie Solinger ed., 1998).

35. Sanger was not directly associated with abortion advocacy and is said to have publicly opposed it, though her private views were less clear. See TIANA NORGREN & CHRISTIANA A. E. NORGREN, *ABORTION BEFORE BIRTH CONTROL: THE POLITICS OF REPRODUCTION IN POSTWAR JAPAN* 54 (2001). It is worth noting here that birth control and abortion were often considered parts of the same conversation. Sanger herself acknowledged the relation between abortion and contraception in suggesting that abortion, while undesirable in most circumstances, was an extreme form of birth control, and should not be considered a “crime”. MARGARET SANGER, *WOMEN AND THE NEW RACE* 63 (1923). Abortion, Sanger wrote, presented serious risks to women’s health, especially to the health of poorer women without access to skilled medical care or time for recovery after an abortion. *Id.* at 65. These risks could be avoided if women had access to contraception. *Id.* at 66–67.

36. Ross, *supra* note 34, at 171. According to Ross, Sanger came under the influence of nativist whites who were at the center of the eugenics movement. As a result, Sanger changed her approach from one that promoted the interests of all women to one that framed birth control as the privilege of well-to-do women but the moral obligation of black and immigrant women. *Id.* While Sanger’s references to the “new race” in her work has sometimes been understood as evidence of her support for the eugenics movement, others have argued that Sanger was referring to the improvement of the

III. THE ROLE OF THE CATHOLIC CHURCH AND REPUBLICAN PARTY POLITICS

In Part II of their Article, the authors detail how, in order to woo Catholic voters who were opposed to abortion, Republicans began to oppose abortion despite the fact that they had been among the earliest adherents of decriminalizing abortion. In doing so, the authors enter into and help to enlarge an already established scholarly conversation on this point. They note that the overarching goal of the Catholic Church was to reverse the trend of liberalizing abortion laws. While part of the Catholic strategy for opposing abortion was to frame opposition in more secular terms, ultimately, anti-abortion activism remained closely tied to and even became a central part of Catholic identity. Seizing on the Catholic opposition to abortion, the Republican Party began to adopt anti-abortion positions in order to attract Catholic voters. Greenhouse and Siegel cite the work of Kevin Phillips, a Republican strategist who predicted the fall of New Deal politics and who helped to widen the Republican coalition to include Catholics who opposed abortion and Southerners who opposed civil rights.³⁷ This latter point, I think, deserves additional discussion, as here again the politics of race and class and the politics of abortion converge and merge.

Kevin Phillips's work on the Republican "Southern strategy" is well known.³⁸ Much of this strategy focused on drawing mostly poor and working class white Southerners who resented black civil rights gains.³⁹ The Southern strategy and its race-based focus were not limited to the South, however.⁴⁰ Much like Southerners, working-class Catholics in the

human species in general and not to a plan of racial debasement or extirpation. MARGARET SANGER, *WOMEN AND THE NEW RACE* vii (1923).

37. Greenhouse & Siegel, *supra* note 2, at 2052.

38. KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1969). Here Phillips offers a historical overview of United States electoral history and urges Republicans to forego Northern voters in favor of Southerners. See George Packer, *The New Liberalism*, 51 *ARIZ. L. REV.* 543, 546–47 (2009). Packer describes the "Southern strategy" as a means of dividing white Democrats in the South from the rest of the party. *Id.* at 546. This included strategies such as nominating white Southerners for the United States Supreme Court, thereby polarizing Democrats. *Id.* See also Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 *CRIME AND JUST.* 273, 278–79 (2010). Tonry wrote "[t]he Republican Southern Strategy was premised on an extraordinary non sequitur—that black/white differences in the South in the 1960s were indistinguishable from ethnic differences at other times and places in American history." *Id.* at 278. Relying upon these differences, asserted Tonry, Kevin Phillips concluded that "manipulation of racial passions would enable Republicans to achieve political dominance in the South and strengthen their appeal to working-class whites elsewhere." *Id.* at 279.

39. PHILLIPS, *supra* note 38, at 23–26.

40. Packer suggests that calling such methods the Southern strategy was too narrow, as these

North also resented what they perceived as black intrusion into their neighborhoods, their schools, and their workplaces.⁴¹ The Catholic position on abortion was an issue that, while abundantly fueling the social and political storm of the 1960s and 70s, must be read with the larger concerns of race and class among Catholics in the South and in the urban North.⁴²

IV. CONCLUSION

In Part III of their Article, Greenhouse and Siegel illustrate the points that they make earlier in their Article about the neglect of pre-*Roe*, non-juridistic explanations of the abortion conflict. They detail the varying accounts frequently offered as to why the Court's decision in *Roe* had such powerful effects on the nation's politics: *Roe*'s nationalization of the abortion conflict, *Roe*'s divergence from popular opinion, and *Roe*'s prevention of compromise.⁴³ At the foundation of all these accounts, the authors assert, is the notion that bad judicial decision-making caused bad politics.⁴⁴ The authors cite a number of legal, scholarly, and media accounts that seem to adopt this premise. They go on to suggest that the Court-centric narrative concerning judicial decision-making is not sufficiently fact-based and thus does not adequately explain the politics of abortion. The authors opine that the history of the abortion conflict before *Roe* points up the need for a "deep history" assessment of abortion post-*Roe*.⁴⁵ This assessment would ostensibly entail a reading of the abortion

techniques were used "countrywide" and involved "Catholics in the North and ethnics in the city" as well. George Packer, *The New Liberalism*, 51 ARIZ. L. REV. 543, 547 (2009).

41. HARRY S. ASHMORE, CIVIL RIGHTS AND WRONGS: A MEMOIR OF RACE AND POLITICS, 1944-1996, at 245 (1997).

42. See, e.g., JOHN T. MCGREEVY, PARISH BOUNDARIES: THE CATHOLIC ENCOUNTER WITH RACE IN THE TWENTIETH-CENTURY URBAN NORTH 194-95 (1998).

43. Greenhouse & Siegel, *supra* note 2, at 2073-74.

44. *Id.* at 2074.

45. *Id.* at 2076. "Deep history" generally refers to a domain of inquiry that extends into human prehistory, thousands or even millions of years into the past. Deep history is in contrast to standard scholarly methodological approaches to history that address human history from relatively recent times beginning in the 1700s. Andrew Shyroock & Daniel Lord Small, *Introduction*, in DEEP HISTORY: THE ARCHITECTURE OF PAST AND PRESENT, at 11-12 (Andrew Shyroock and Daniel Lord Small eds., 2011). The term deep history has, however, been adopted across disciplines by scholars in various fields who "fret about chronological constraints and issue calls for 'evolutionary politics,' 'evolutionary economics,' or evolutionary studies of the law." *Id.* at 12. See, e.g., James Q. Whitman, *Western Legal Imperialism: Thinking about the Deep Historical Roots*, 10 THEORETICAL INQUIRIES IN LAW 305, 309-20 (2009) (arguing that the rise of Western law and its institutional tendency to spread is not a contemporary phenomenon but instead began in antiquity). In calling for a deep history Greenhouse and Siegel employ the phrase only in its most general sense of seeking answers beyond the immediate reach of the legal history of abortion.

controversy that recognizes that the Court is not necessarily or at all the source of the controversy.

I am well in accord with the authors on the need to engage in a more archaeological assessment of *Roe*. To date much scholarly attention has been focused on the legal configuration of *Roe* and on assumptions about its normative role in creating and shaping the politics of abortion. Greenhouse and Siegel sound a clarion call to scholars for a more integral analysis of the social, cultural, and political history of the abortion debate. I would add, however, that it is crucial to recognize the United States abortion debate as a consequential discursive skein in the “politics of emotion,” a politics that, in some instances, has replaced overt racist or classist appeals with moral and religious judgmentalism via abortion.⁴⁶ Hence, a fuller history of the abortion debate must encompass by necessity other factors, especially race and class, in order to offer a complete picture.

46. GLENN FELDMAN, *POLITICS AND RELIGION IN THE WHITE SOUTH* 5 (2005). Feldman discusses the way in which anti-black racism was in some instances replaced by anti-abortion rhetoric as a shibboleth of social and political conservatism. Feldman writes, for instance, that in one religious denomination, the “sin” of endorsing abortion rights replaced endorsing integration, but that factions within the group who contended over these issues were comprised essentially of the same people. *Id.* at 101.