# Roe v. Wade ruling casts shadow over gay marriage

**By Adam Liptak, New York Times**

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

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

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

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

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

"They thought they were resolving a contentious issue by taking it out of the political process but ended up perpetuating it," John C. Eastman, the chairman of the National Organization for Marriage and a law professor at Chapman University, said of the justices who decided the abortion case. "The lesson they should draw is that when you are moving beyond the clear command of the Constitution, you should be very hesitant about shutting down a political debate."

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

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

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

The author of the majority opinions in those two cases, Justice Anthony M. Kennedy, seemed to address the new ones in wary terms in remarks this month in Sacramento.

"A democracy should not be dependent for its major decisions on what nine unelected people from a narrow legal background have to say," he said.

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

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

was in a state of flux.”

“The Supreme Court’s decision was a perfect rallying point for people who disagreed with the notion that it should be a woman’s choice,” she added. “They could, instead of fighting in the trenches legislature by legislature, go after this decision by unelected judges.”

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

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

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

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

After the decision, they added, “political realignment better explains the timing and shape of political polarization around abortion than does a court-centered story of backlash.”

In an interview, Siegel said court decisions concerning same-sex marriage had played a valuable role.

“It is nearly two decades since courts in Hawaii, Massachusetts and other states began a national conversation about marriage,” she said. “There has been over the course of this long period a dramatic, revolutionary change in popular understanding of marriage equality. Courts can inspire resistance but also can teach.”

Klarman said it was not clear that a decision requiring same-sex marriage throughout the nation would give rise to the kind of sharp opposition that followed the abortion ruling.

“For abortion opponents, abortion is murder, which means the intensity of their commitment to resisting Roe was considerable,” he said in an interview. “For the gay marriage opponent in, say, Mississippi, how will their lives change if the openly gay couple living down the street can now obtain a marriage license?”

There is a range of possible outcomes in the case on California’s ban on same sex marriage, Hollingsworth v. Perry, No. 12-144. The court could uphold the ban; reject it on grounds that apply only to California or only to eight states; or establish a nationwide right to marriage equality. Or the court could say it is powerless to render a decision on the merits.

That last option would follow from the odd path the case took through the courts. After a trial judge struck down the California ban, from the voter initiative Proposition 8, and entered judgment against state officials, the officials declined to appeal. Supporters of Proposition 8 did appeal, but it is not clear that they have suffered an injury direct

enough to give them standing to appeal.

The trial court’s judgment came in 2010 from Judge Vaughn R. Walker of the Federal District Court in San Francisco. During closing arguments in the case, Judge Walker made it clear that he, too, was working in the shadow of the abortion ruling. He said the Roe case “has plagued our politics for 30 years” because “the Supreme Court has ultimately constitutionalized something that touches upon highly sensitive social issues.”

“Isn’t the danger,” Walker asked Theodore B. Olson, a lawyer for the two couples challenging the ban, “not that you are going to lose this case, either here or at the court of appeals or at the Supreme Court, but that you might win it?”