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Courts, Social Change, and Political Backlash

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Hart Lecture at Georgetown Law Center, March 31, 2011

Speaker's Notes

Thrilled and honored to be invited to deliver the 2011 Hart lecture, named for the great senator from Michigan, who was a Georgetown University graduate, and for whom the Hart office building was named.

I am especially thrilled to be giving the lecture today because this marks the beginning of another major league baseball season.

I think Senator Hart would have appreciated that coincidence; his father-in-law, Walter Briggs, Jr., was at one time the owner of Detroit Tigers.

Now Briggs at one time had a coowner, whose name was Bill Yawkey. Bill Yawkey's nephew and adopted son was Tom Yawkey, who later bought the Boston Red Sox.

Which brings me back to me: As my friends know, I am a fanatical Red Sox fan, and am pleased to report to you that up in Boston, we are very excited at the prospect of the coming season, with Theo Epstein's brilliant offseason acquisitions of Carl Crawford, Adrian Gonzales, and Bobby Jenks.

And of course you all here in DC have reason to be excited as well: You bought Jason Werth, who was surely a steal at only 17 million dollars a year.

Am talking to you today about Court Decisions, Social Change, and Political Backlash

Let me start with a series of bold claims about 5 landmark Ct. Rulings:

In the short term, *Brown v. Board of Education* (1954) retarded racial progress in the South and radicalized southern racial politics, advancing the careers of extreme segregationists such as Bull Connor and George Wallace.

Miranda v. Arizona (1966), in the face of rapidly rising crime rates, facilitated Richard Nixon's victory in the 1968 presidential election on a law-and-order platform.

Furman v. Georgia (1972), by threatening to extinguish the death penalty, produced a dramatic resurgence in support for capital punishment, as thirty-five states enacted new death penalty legislation within the next four years.

Roe v. Wade (1973) generated a politically potent right-to-life movement that has had profound effects on national politics ever since. For example, abortion, more than any other single issue, determined the choice of the Republican VP nominee in 2008 and played a critical role in the health care reform debate in 2009. Extraordinary when you think about it—35 years after the Court's decision, that abortion could still play such an important role in national politics.

Goodridge v. Department of Public Health (2003) resulted in more than twenty-five states enacting constitutional bans on same-sex marriage, led to the defeat of at least a couple of Democratic Senate candidates, including the Majority Leader, in 2004, and quite possibly enabled George Bush to win Ohio's electoral votes, without which he would not have won a second term.

I am in the process of writing a book on the backlash phenomenon: Court decisions on highly charged issues that produce massive resistance to ruling, arguably set back the cause that the decision seems to advance, at least in the short term, and possibly have larger, often unpredictable effects on politics as well.

Let me talk in detail about 3 of these examples and then talk a little about how and why the backlash dynamic works the way it does.

Then will finish up by offering just a few brief thoughts on normative implications, though want to emphasize that mostly what I am doing today—and in the book—is describing and explaining backlash. My normative thoughts—what one ought to do if persuaded by my descriptive account-- are more tentative and ambivalent.

First illustration of backlash phenomenon is *Brown v. Board* and massive resistance.

Before Supreme Court decided *Brown*,

Black voter registration in deep South increased tenfold in decade following WWII

Cities even in Deep South were integrating minor league baseball teams, hiring black police officers, and putting blacks on juries, often for first time since 19th century

Politicians like Big Jim Folsom in Alabama were winning elections on populist economic platforms while downplaying race.

After *Brown*, progressive racial reform ground to a halt and politics moved far to the right as politicians competed against one another to occupy most extreme point on segregationist spectrum.

In Mississippi, black voter registration fell from 22,000 to 8,000 in years after *Brown*.

Desegregation of higher education became far more controversial with grade school desegregation lurking in the background. Race riots now erupted in Alabama, Georgia and Mississippi when blacks tried to desegregate those universities, whereas before *Brown*, most southern states had peacefully desegregated higher education pursuant to the Court's ruling in *Sweatt v. Painter* in 1950.

Progress in integration of athletic competitions also ground to a halt. In early 1954, Birmingham city council had rescinded ban on integrating sporting competitions, hopeful for spring training visit from Jackie Robinson and Brooklyn Dodgers. Within two weeks of *Brown*, Birmingham voters had restored that ban in referendum by margin of 3-1.

Brown unleashed a political backlash in the South that destroyed moderates like Big Jim Folsom, induced politicians to take the most extreme segregationist positions they could devise, and helped create or revive the political careers of racial demagogues such as George Wallace, Ross Barnett, and Bull Connor.

Second example: *Furman*.

Opinion polls in 1960s showing decreasing support for death penalty. In 1966, one and only poll showed plurality opposed, 47 to 42 percent.

Urban riots and assassinations in 1968 increased support, which stabilized at about 50 to 40 in favor, in 1969, 1970, and 1971.

Then CA Supreme Court invalidated death penalty under state const'n early in 1972 and US Supreme Court followed suit under federal const'n in June 1972.

By the fall, Gallup polls showed 10% margin in favor becoming 25%

In CA that fall, a voter referendum restored the death penalty by a margin of 66 to 34%, the largest margin in favor of death penalty since polling began on the issue in CA.

At the national level, 25% became 35% within another year or two.

In the four years after *Furman*, 35 states enacted new death penalty legislation.

The Supreme Court's ruling against the death penalty perversely but almost surely increased support for the death penalty.

Last illustration I will offer today is same-sex marriage.

In November 2003, MA Supreme Court ruled that same-sex marriage was protected under state const'n.

At that time, only 3 states had const'l bans on same-sex marriage.

Today, that number is about 30.

Same-sex marriage quickly became a significant issue in the 2004 elections and almost all political pundits appreciated that it would make life difficult for Democrats.

Two Democrats almost surely lost their Senate races over the issue—one in KY where Jim Bunning was reelected, after running an almost comically inept campaign, by a margin of less than 2% while the ban on same-sex marriage passed in a referendum by a margin of more than 40 percentage points.

Tom Daschle became first leader of party in Senate in 50 years to lose his seat and SSM almost surely proved dispositive.

Daschle's opponent, John Thune, who is an evangelical Christian, criss-crossed the state warning that "the institution of marriage is under attack from extremist groups.

They have done it in Massachusetts and they can do it here.”

Cultural conservatives James Dobson, Tony Perkins, and Gary Bauer came to Sioux Falls and told a crowd of five thousand that if the institution of marriage was not defended from homosexual attack, “it’s going to be gone.”

Daschle lost by less than 2% while a marriage initiative passed that year across the border in North Dakota by margin of roughly 50 points.

There’s even some possibility that the issue reelected President Bush, who would have lost without Ohio, a state he won by less than 2% while the marriage initiative passed there by a margin of about 24 points.

If SSM issue brought out enough cultural conservatives to the polls who otherwise might have stayed home or induced enough swing voters to switch from Democrat to Republican, then it may well have determined the outcome of the presidential election.

From the perspective of 2011, one must concede that the longer term effects of *Goodridge* are more complicated—and that’s certainly something I intend to discuss in the book.

May well be in that in short term, *Goodridge* produced extreme backlash but in long term it accelerated the day when we will have gay marriage.

That is, in fact, what I think about *Brown*: that in short term it produced extraordinary backlash, radicalizing southern politics, electing extremist politicians, and creating climate ripe for violence. But when that violence directed at peaceful civil rights demonstrators was portrayed on national television, it had dramatic effect on national opinion and led directly to enactment of transformative civil rights legislation.

Those are my 3 illustrations of phenomenon of backlash. If I had more time, would talk about abortion and criminal procedure rulings as well.

Why backlash? Briefly note a few reasons why prominent Court decisions sometimes have this effect. Emphasize: I’m not being normative here. I’m offering a description of what I think happened, not a prescription for what should have happened.

(1) Most importantly, on most issues like abortion or death penalty, there are compromise positions that might appeal to swing voters, but Supreme Court failed to reach that position in these cases.

E.g., on **gay marriage** that position is civil unions, yet *Goodridge* said those weren’t good enough

On **abortion**, Court in *Roe* had available at least two different compromises that almost surely would have reduced the backlash effect of the ruling:

- (a) Limit abortion right to first trimester—public opinion favored abortion decision to be made between woman and doctor by 60 percent in first trimester, but only by 28% in second. *Roe* pretty much protects unfettered abortion right through second trimester.
- (b) Strike down antiquated 19th century abortion restrictions, like the law in Texas, which forbade abortions except where woman's life was at risk, but sustain therapeutic abortion laws, like the one in GA, which permitted abortions where woman's life or health was at risk, where there was strong chance of fetal deformity, or where pregnancy was result of rape or incest.

Interestingly, there is evidence that on both these issues, a majority of Court was initially prepared to take the position that would have been less likely to generate backlash, but in neither case did it ultimately do so.

On **death penalty**, compromise position might be to bar it for some sorts of crimes—e.g., rape, but not murder, or permit it for certain murders (e.g., of a police officer) but not others—to impose certain procedural restrictions—e.g., bifurcated trial, mandatory appellate review, guiding jury discretion with mitigating and aggravating factors. *Furman* does none of those things—it threatens to simply abolish the death penalty across the board.

Turns out that in 1972, most Americans have trouble with death penalty but still want to be able to execute Charles Manson (Timothy McVeigh, if that helps) *Furman* threatened to take that option away, and the country revolted against it.

This observation about failure of Court in these cases to reach the compromise position that appeals to median voter naturally raises question of why. Let me say a few words about that and then go back to other factors that help explain backlash.

One possibility is that something in nature of judicial decision making—commitment to principled adjudication—makes it difficult to reach compromise position that appeals to most people.

I raise that to reject it. On most of these issues, Court can and often does reach compromises.

Casey to some extent is the compromise that *Roe* rejected. It just took the Court 20 years to get there.

On death penalty, Court ultimately did accept all the compromises I just mentioned that *Furman* rejected.

Some state courts have insisted on civil unions while rejecting same-sex marriage.

Justice Powell's affirmative action opinion in *Bakke* is compelling evidence of ability of justices to reach nuanced, murky compromise positions.

So, if it's not lack of capacity to reach compromise, it must be lack of motivation.

Because justices reflect values of cultural elite, not mass public opinion, they may genuinely fail to realize how unpopular some of their rulings will be.

I am confident justices in *Roe* had no clue how many people out there would be uncomfortable with abortion on demand. Note huge disparity in attitudes toward abortion—as much as 30 or 40 percentage points in opinion polls—depending on socioeconomic status. Justices, by definition, occupy the stratosphere on socioeconomic spectrum—affluent and very well educated

I'm sure the justices in *Furman* thought the death penalty was on ineluctable road to extinction and had no idea how much latent support there was for it in country.

Justices in *Brown* had little idea how deeply invested in white supremacy white southerners were in 1954 and how much of a fight they would put up against *Brown*. Most of them not from South, even those from South had spent much of their adult lives in Washington, DC, and, in any event, racial views highly correlated with education, so even southern justices were the ones least likely among white southerners to harbor strong commitments to white supremacy.

I'm pretty sure MA Supreme Court justices in 2003 didn't expect quite the backlash against gay marriage their ruling created. Again, enormously strong correlations between socioeconomic status and views on gay rights. Plus, justices from MA almost surely have no clue how people in Kansas might feel about gay marriage.

So, perhaps main reason justices don't reach the median compromise position is because they fail to accurately perceive it, partly because of the culturally elite bias that characterizes their position.

Other factors that play into backlash (let me run through these more quickly):

(1) Court decisions good at raising salience of an issue:

Flag burning as is a classic illustration: Nobody in the country gave a second thought to burning of the American flag until the Supreme Court in two salient rulings in 1989/90 said it was protected by the First Amendment.

Roe makes abortion salient, perhaps more than stories of legislative reform which are less likely to capture front page headlines.

Not everyone knew there was a death penalty moratorium in the country, but *Furman* was front-page news, so everyone knew that Court was threatening to abolish death penalty for good.

Re *Goodridge*, huge changes taking place on gay rights issues—e.g., adoptions, antidiscrimination laws, repeal of antisodomy laws—but often these pass under radar screen. After *Goodridge*, nobody can miss news that gay rights are coming.

(2) It's not just that a court decision produces result divergent from median opinion but also that it shifts agenda of beneficiaries, leading them to push for something that otherwise wouldn't have been their top priority.

Brown had a dramatic effect on the agenda of southern blacks, e.g., in rural SC, who before *Brown* would not have dreamed of asking for school desegregation, but rather were focused on other issues, such as equalizing resources for their schools, securing voting rights, and curtailing police brutality.

This shift in agenda mattered a great deal because southern whites were much more resistant to grade school desegregation than these other reforms. Southern whites by 1954 probably could have lived with equalization of school funding, black policemen, black voting. Indeed, evidence is they were learning to live with those things before *Brown*. But not school desegregation.

After *Goodridge* and 10 years earlier, after the Hawaii Supreme Court ruling in *Baehr*, many gays and lesbians who had not previously thought much about marriage, shifted their focus away from securing antidiscrimination laws, hate crimes legislation, and repeal of don't ask, don't tell and towards securing the right to marry.

This mattered a great deal because public opinion at that time supported antidiscrimination laws, hate crimes legislation, etc. but not SSM

(3) Related to this point about agenda shifting is that bold victories in Court encourage beneficiaries to implement the rulings, and often those efforts at implementation create more backlash than the abstract Court ruling.

Note re *Brown*/NAACP petitions and re *Goodridge*/and gay couples trying to marry in SF, Portland, etc.

There is evidence that implementation efforts generate more backlash than initial court decision. Make the threat to the status quo more concrete than the court decision in the abstract.

(4) A fourth factor that feeds into backlash is the uneven geographic/regional distribution of opinion on many of these issues, which, when combined with the political effects of federalism, has a cascading effect on the politics of backlash.

Most obvious illustration here is the disparate reaction of white southerners and northerners to *Brown*. In the South, 90 percent of whites disagreed with the Court, usually quite strongly. In the North, 75 percent of whites thought the Court was right.

Because most white southerners strongly opposed *Brown*, politicians like Gov Orval Faubus or Arkansas have strong incentives to resist it. He was under great political pressure in fall of 1957 to block court-ordered desegregation of Little Rock high schools.

But when he called out state militia to do so, that ratcheted up conflict, forcing Pres Eisenhower, a reluctant enforcer of *Brown*, to send in federal troops to prevent Little Rock 9 from being lynched.

But that action by president simply made Faubus a political martyr in Arkansas, making him unbeatable in state politics, and securing him 4 more victories in gubernatorial elections.

Other southern politicians, like George Wallace in Alabama, were watching and taking notes. A few years later, Wallace was elected governor of that state by taking an even more militant anti-integration stand, though his incendiary rhetoric encouraged violence, which when it erupted against peaceful demonstrators on the streets of Birmingham and Selma in mid-1960s, mobilized northern opinion still further in support of transformative civil rights legislation.

Can skip this if running short on time:

Similarly, with *Goodridge*, opinion on gay rights issues breaks down strongly along urban/rural lines. Mayor Newsom of San Francisco, is responsive to a local pol constituency, which strongly favors gay marriage. When he starts marrying gays early in 2004, in contravention of state law, his approval ratings quickly rise to 85%.

But the effect of these marriages, when broadcast on national television, is a strong backlash in more traditional parts of the nation, leading President Bush for the first time to explicitly call for a federal marriage amendment, leading Christian conservatives to mobilize behind the issue, and leading Republican politicians throughout the nation to use the issue to great advantage in 2004.

As local politicians play to their local constituencies, for which they are rewarded, they incite even greater resistance on other side of the debate. The politics produced by federalism feeds the backlash phenomenon.

Can skip this too if pressed for time:

(5) The final factor in backlash that I want to mention is disparate intensities of preference.

On some of these issues, opponents of Court decision care more than supporters (at least outside core group of supporters).

Note re *Brown* that 3/4 of northern whites feel that *Brown* is right but only about 5 percent see civil rights as most important issue of their lives. In South, 90 percent of whites see *Brown* as wrong, and 40 percent see issue as most important in their lives. Whites in the country who care the most see *Brown* as egregiously wrong. Of course, it produces a backlash

Same-sex marriage: country divided roughly 2-1 against in 2004. But, significantly, of the 1/3 favoring SSM, only 6 percent say it would influence their choice of candidates. Among the 2/3 who oppose, 34 percent say it would influence their votes. Among evangelicals, that number rises to 55 percent. Again, given that huge disparity in intensity of preference, no surprise that *Goodridge* produces a backlash.

True about abortion too but not as dramatically; Pro-lifers have greater intensity of preference than pro-choicers. Since they regard abortion as murder, that's not surprising.

Those are some of the main factors that contribute to phenomenon of backlash.

Finish up with a few words about **Normative implications**, which are very complicated.

Let me say something about this from perspective of judges, from perspective of lawyers, and from perspectives of citizens with an interest in politics.

E.g., judges—not clear if they are supposed to be consequentialist to begin with (compare Scalia with Posner).

Also note there are dangers to judges trying to predict consequentialism. *Brown II* is a great illustration: By predicting backlash, the justices may have helped to foment it. They tried to appear reasonable and accommodating to white southerners, thinking this would lead them to meet Court half way. Instead, their ruling was perceived as a sign of weakness-of vacillation—and white southerners began to think maybe Court could be induced to back down from *Brown* with stronger display of resistance.

Also note another complicating factor: backlashes can lead to counterbacklashes, which makes prediction very difficult indeed: *Brown* mobilized extraordinary southern white resistance, led to extremist politics, created climate ripe for violence, led to northern demands for civil rights leg.

Brown's backlash created a counterbacklash, which accelerated the achievement of progressive racial change. Doubt anyone could have predicted this pattern in 1954.

Could argue that predicting consequences is so difficult that judges are better off not even trying.

Still, having said that, I don't think one had to be a genius to predict that *Goodridge*, in short run, would set back cause of SSM.

Re lawyers: This is also complicated. Are lawyers representing clients or cause? Gays in MA are eligible to marry after *Goodridge* and thousands have done so. Maybe that's all their lawyers were supposed to worry about.

Also, I am not denying other sorts of beneficial effects of litigation. It's pretty clear, for example, that gay marriage litigation makes same-sex civil unions more acceptable. Polls showed 60 percent favored in 2004; Bush near end of election campaign in 2004 said he had no problem with civil unions—hard to imagine such a statement but for *Goodridge*.

But compare *Brown* backlash, which set back progressive change on other issues. Clearly harder for blacks to vote in the Deep South after *Brown* than before.

It's also quite possible that decisions like *Goodridge*, by enabling gays to marry in Massachusetts, has powerful effect on public opinion by enabling people to see gay couples, to experience gay marriage without all the horrible consequences that were predicted coming to fruition. Public opinion in Mass has turned so strongly in favor of gay marriage since 2003 that it is hard to believe *Goodridge* didn't have something of this effect.

Another complicating factor from perspective of lawyers: In calculating costs and benefits of winning social reform litigation "before its time," so to speak, important to keep in mind litigation is not just about winning cases but also has served historically as important method of mobilizing social protest. Thurgood Marshall and Charles Hamilton Houston certainly understood this in their roles as pioneer lawyers for racial reform; proselytizing; branch building; fund raising; consciousness raising.

So lawyers for social reform have a complicated calculus to consider, and backlash is just one factor in that mix.

Still, it seems to me that if lawyers are interested, for example, in promoting cause of SSM, think they have to consider backlash. No doubt that *Goodridge* set back that cause in short term: state amendments, defeat of Senate Majority leader Daschle, Bush's victory in Ohio (and, with that victory, the justices he got to appoint—Alito and Roberts not going to be voting for SSM any time soon.

Yet, it's also important to note, that there's a clear limit to how much lawyers' strategizing is even relevant any more.

The NAACP had an effective monopoly over most civil rights litigation in 1940s and 1950s. For the most part, if it didn't bring a certain suit, that suit didn't get brought.

World of social reform litigation has changed dramatically since then.

National gay rights groups didn't want Hawaii case brought in early 1990s and didn't want the California litigation against Prop 8 brought in 2009. David Boies and Ted Olson have different set of incentives and predictions.

Perhaps today, any lawsuit that can be brought will be brought. So maybe it doesn't matter what you as a lawyer calculate regarding potential for backlash; some other lawyer will still bring the case.

Leads to final normative point, and this one is from perspective of ordinary citizens with an interest in politics. I think these progressive court decisions—and, at least in last 50 years, it is mostly progressive court decisions that have produced conservative political backlashes, though I don't think that is somehow intrinsic to phenomenon of backlash.

People understand that politicians have to make compromises.

Note Obama and 2008 election and 2nd amendment, execution of child rapists, and SSM

Most Progressives fine with that. But if one dares to suggest that maybe court decisions should be considered same way—that compromises may be necessary, because there are only so many unpopular battles one can fight simultaneously--people are up in arms.

Most of the court decisions giving rise to backlash have made life miserable for progressive politicians.

In the short term, *Brown* killed off southern racial moderates and played into the hands of extremists.

Nixon used *Miranda* to great political effect in his 1968 campaign.

SSM made John Kerry's life miserable in 2004, and it may have helped to reelect George Bush.

Reasons for this:

- (a) Most people may oppose the court decision, e.g., *Furman*, *Goodridge*.
- (b) Yet an important constituency of Dem Party may support it—e.g., gays and *Goodridge*; women's rights advocates and *Roe*. And not only does a Democratic Party constituency support the ruling, but once someone has won a victory, it's very hard to ask them to settle for less. That's how Democratic party gets stuck supporting partial birth abortion, which is an issue where 80 percent of country disagrees with them.
- (c) At same time the issue drives a wedge through Democratic party. On abortion, conservative Catholics, who had been reliable Democrats, strongly oppose *Roe*. On same-sex marriage, several constituencies that historically trended Democratic—the elderly, African Americans, the working class—tend to oppose the court decision
- (d) And the court decision makes the issue so salient that politicians can't duck it, as they might otherwise have been inclined to do. E.g., southern racial moderates after *Brown*, who would have far preferred not to talk at all about school segregation but now had no choice.

Culture war issues have helped create Republican pol hegemony since 1968. Almost all of those issues made salient and difficult to compromise by court decisions—school prayer, pornography, the death penalty, abortion, flag burning, gay marriage.

Thank you for indulging me for 50 minutes, and now go and enjoy the start of another beautiful baseball season!