

WHAT *Roe v. Wade* SHOULD HAVE SAID (Review)

BY Dwight G. Duncan

Edited by Professor Jack Balkin of Yale Law School, the book's subtitle is "*The Nation's Top Legal Experts Rewrite America's Most Controversial Decision.*" Justice Blackmun's 7-2 majority opinion for the United States Supreme Court in *Roe* certainly qualifies as "America's most controversial," in part because of the sloppy way it was written and reasoned (this is the early Justice Blackmun).

The book is a successor to a previous volume edited by Balkin on "*What Brown v. Board of Education Should Have Said.*" But there are significant differences between the two cases, as he acknowledges.

Rewriting the opinion of a unanimous 1954 decision, which a decade or so after it was written was widely accepted by the public (and is now firmly entrenched in constitutional law and political thought generally) is a markedly different project from trying to shore up the 1973 *Roe v. Wade* decision nearly 33 years after it was written when it remains more controversial than ever.

I suppose it is an interesting academic exercise, somewhat akin to rearranging the deck chairs on the Titanic. You can pretty up the deck, but the ship is still going down.

I can't help but wonder why anyone would want to write a volume which is the modern-day equivalent of "*What Dred Scott v. Sanford Should Have Said.*"

In any case, Professor Balkin has assembled eleven law professors from around the country to write opinions in *Roe* and its companion case *Doe v. Bolton*, "using only materials available as of January 22, 1973" (p. x). Balkin acted as the book's "Chief Justice" and (as he describes it), "I have issued an opinion announcing the judgment of the Court, which strikes down the Texas and Georgia abortion statutes in *Roe* and *Doe*" (p. 18). There are seven concurring opinions (one of which concurs in *Roe*, but dissents in *Doe*), and three dissenting opinions.

Over the years, there have been other attempts to reconfigure *Roe v. Wade*. Ruth Bader Ginsburg, former ACLU attorney and current Supreme Court Justice, has opined that the equal protection clause's restrictions on sex discrimination would've been a better basis for the decision. Several of the contributors to this volume develop that line of argument, most notably Balkin himself, Reva B. Siegel, and Anita Allen. (A couple even attempt to use the never-ratified Equal Rights Amendment, which was pending in 1973, as part of their argument—a rather curious move.)

Of course, the most famous attempt to reconfigure *Roe* was the Supreme Court's 1992 decision in *Planned Parenthood v. Casey*. *Casey* upheld what it called the "essential holding" in *Roe* but dumped its trimester framework and re-articulated Justice O'Connor's famous "undue burden" test.

Most of the pro-choice contributors to this volume follow *Casey* in getting rid of the trimester framework but retaining the significance of the point of viability.

Jeffrey Rosen dissents on separation of powers grounds. Finding none of the constitutional arguments "substantially more convincing than Justice Blackmun's famously artless opinion itself" (p. 243), Rosen argues that the regulation of abortion should be left to legislatures.

Editor Balkin thinks that “balancing the interests [between the state’s interest in potential human life and a woman’s right to abortion] and drawing appropriate lines is a legislative task” (p. 234), and so does not adopt the rigid trimester scheme of *Roe*. Nonetheless he would still overturn both the Texas and Georgia statutes. “[T]he purpose of the abortion right is to give pregnant women a fair and realistic opportunity to decide whether or not to become mothers” (Ibid.).

That way of phrasing the matter is to adversely decide the status of the unborn child, of course. Talk of “potential human life” and deciding “whether or not to become mothers” wrongly assumes that a woman is not a mother unless and until she decides not to have an abortion. But the peculiar horror of abortion is related to the already-existing intimate relationship between mother and child that is attacked by the procedure.

Which is why contributor Teresa Stanton Collett (a friend, I am happy to note) is right in pointing out that the first wave of feminists such as Susan B. Anthony and Elizabeth Cady Stanton were “uniformly opposed to abortion” (p. 188). She concludes her dissent, “Like the early feminists, I refuse to accept that women must deny their fertility and slay their children in order to obtain equal access to the marketplace and the public square.” (p. 194).

Michael Stokes Paulsen is most devastating in dissent. He shows how the “substantive due process” analysis the others employ originated with the notorious 1857 *Dred Scott* decision which held that no Black American was a citizen within the meaning of the Constitution (p. 203). Substantive due process is the notion that the due process clause of the Fifth and Fourteenth Amendments acts as more than a procedural guarantee. In *Dred Scott*, for example, the Court held that due process protected the slave-owner’s property but not the slave’s liberty. (Just as in *Roe*, the Court held that it protected the mother’s liberty to abort, but not the child’s life.)

Then there is the equal protection argument, which tries to make the case that restrictions on abortion are some form of discrimination on the basis of sex. In rebuttal, Paulsen argues that “[a]bortion restrictions impose legal burdens not on the basis of gender but on the basis of the asserted presence and value of a human life in utero...; it does not regulate women as a class; it regulates the conduct of men and women relevant to commission of or assistance in abortion; it affects no women who are not pregnant (p. 205).” And his clincher: “[O]nce the humanity of the fetus is recognized, the game is up.” (p. 206).

Paulsen correctly notes that none of the opinions of the other contributors in support of *Roe* grapple with that question. (Ibid.) “To embrace the result reached today is to commit an act of great evil. To accept the result—to remain silent, to acquiesce, to offer only tepid critiques—is to act in cowardly complicity with great evil” (p. 213).

Balkin supports legal abortion, so perhaps the imbalance found among the contributors was to be expected. Paulsen calls the hand-picked group of legal academics a “packed” Court: “a small group of elites not renowned either for its diversity of opinion on abortion or its commitment to interpreting the Constitution in accordance with the meaning its language would have had to ordinary, reasonably well-informed readers and speakers of the English language at the time the document’s provisions were adopted.” (p. 214).

Mark Tushnet, who actually clerked for Justice Thurgood Marshall at the time of the *Roe* decision, writes a concurring opinion. He raises an interesting question in his comment on the contributions:

“[W]e are academics, not judges....I have no idea, and I think my colleagues have no idea, what constraints we would face were we to be in a position to write real opinions in a real abortion case. And, to make an obvious point, the political coloration of the contributors to this collection is such that most of us are unlikely in the extreme to be in a position to do so. So—and this is a serious question—what’s

the point of the exercise?" (p. 254). Good question, which I'm not sure the book answers satisfactorily.

Roe is "America's Most Controversial Decision" not because of how it was written but because of what it wrought: open season on the unborn, resulting in over 45 million deaths; the disregard for and trivialization of human life in its early stages that persists in today's arguments over embryonic stem cell research; a poisoning of the judicial confirmation process; and a utilitarian "ends-justifies-the-means" mentality with respect to human life that easily infects the culture, culminating in what Pope John Paul II aptly called the "culture of death."

Rather than rewrite *Roe*, we should just bury it.

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