

# Book Review: What Roe V. Wade Should Have Said, by Jack M. Balkin (ed)

Erin Nelson

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>  
Book Review

## Citation Information

Nelson, Erin. "Book Review: What Roe V. Wade Should Have Said, by Jack M. Balkin (ed)." *Osgoode Hall Law Journal* 44.4 (2006) : 759-765.

<http://digitalcommons.osgoode.yorku.ca/ohlj/vol44/iss4/7>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

*WHAT ROE V. WADE SHOULD HAVE SAID* EDITED BY JACK M. BALKIN (NEW YORK: NYU PRESS, 2005) 302 pages.<sup>1</sup>

BY ERIN NELSON<sup>2</sup>

The decision of the U.S. Supreme Court in *Roe v. Wade*<sup>3</sup> has been both celebrated and vilified for the past thirty-three years. It is nothing if not controversial, and this is not surprising. Abortion is perhaps the most hotly debated social issue in the United States today, and *Roe*, the case that granted American women a constitutional right to terminate a pregnancy, is a key target for abortion opponents: But the approach to constitutional interpretation in *Roe* is so controversial that even those who agree that women should be legally entitled to terminate unwanted pregnancies disagree with it.<sup>4</sup>

Anyone who doubts the currency of a discussion of *Roe* need only look to South Dakota, whose governor recently signed a statute banning all abortions save those necessary to preserve the life of the pregnant woman. Even in life-saving abortion procedures, physicians are instructed to “make reasonable medical efforts ... to preserve both the life of the mother and the life of her unborn child in a manner consistent with conventional medical practice.”<sup>5</sup> Several other states have introduced similar legislation.<sup>6</sup> The governor of South Dakota has acknowledged that the statute is a direct challenge to *Roe*, and that it is

---

<sup>1</sup> [*What Roe v. Wade Should Have Said*].

<sup>2</sup> Assistant Professor, Faculty of Law and Research Associate, Health Law Institute, University of Alberta.

<sup>3</sup> 410 U.S. 113; 93 S. Ct. 705 (1973) [*Roe*], and its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973) [*Doe*].

<sup>4</sup> In particular, the majority has been criticized for reading the Fourteenth Amendment too broadly, so as to include “substantive due process,” thereby opening the door to judicial review in areas where it is inappropriate. In addition, it has been argued that the “right to privacy” has no constitutional foundation. See e.g. John Hart Ely, “The Wages of Crying Wolf: A Comment on *Roe v. Wade*” (1973) 82 *Yale L.J.* 920; and Akhil Reed Amar, “Intratextualism” (1999) 112 *Harv. L. Rev.* 747.

<sup>5</sup> *Women’s Health and Human Life Protection Act*, H.B. 1215, 2006 Leg., 81st Sess. (S.D. 2006).

<sup>6</sup> Alabama, Georgia, Indiana, Kentucky, Louisiana, Missouri, Mississippi, Ohio, Rhode Island, South Carolina, and Tennessee. Guttmacher Institute Media Center, “1,207 State Reproductive Health Bills Introduced by Mid-2006,” online: <<http://www.guttmacher.org/media>>.

intended to test whether a differently composed, more conservative Supreme Court is prepared to reverse *Roe*.<sup>7</sup>

*What Roe v. Wade Should Have Said* starts with an intriguing project: ask a number of renowned constitutional scholars to write opinions on *Roe* based only on materials available when the case was being decided. The volume includes an introduction written by editor Jack Balkin, the contributors' opinions, and post-opinion comments from the contributors explaining why they chose to follow particular lines of reasoning in their opinions. The list of "judges" is impressive, including a number of the most eminent constitutional thinkers in the United States today. As someone who is very interested in reproductive rights—and in the impact and continuing importance of *Roe*—I assumed I would find this book both engaging and enlightening. Unfortunately, in my view, the unusual configuration of the book prevents it from delivering on that promise.

Balkin offers three purposes for the book: to provide a vehicle through which to "reexamine the premises of *Roe* and fundamental rights jurisprudence at the beginning of a new century";<sup>8</sup> to offer a means to experiment with the theories of constitutional interpretation espoused by many of the contributors in the aftermath of *Roe*; and finally, to provide a forum for addressing questions about the role of the judiciary that have arisen since the *Roe* decision. Balkin notes that both opponents and supporters of the abortion right have disparaged the decision, and that several aspects of the decision have contributed to these critiques. Among other things, Justice Blackmun neglected to provide an adequate defence of the abortion right he crafted; he proposed an unwieldy trimester-based system that arose from compromises among the justices themselves; and the Court failed utterly to recognize that the abortion right is anchored in women's equality as well as in liberty.<sup>9</sup> Some were concerned about the sheer complexity of the decision from the start; apparently Justice Blackmun gave some

---

<sup>7</sup> John Holusha, "South Dakota Governor Signs Abortion Ban" *The New York Times* (6 March 2006), online: <<http://www.nytimes.com/2006/03/06/politics/06cnd-abortion.html?ei=5090&en=6bfae1ad7041dc1a&ex=1299301200&adxnml=1&partner=rssuserland&emc=rss&adxnmlx=1163019712-MXJtZV33dz8H+pct9zR8/A>>.

<sup>8</sup> Jack M. Balkin, "Preface" in Balkin, *supra* note 1, ix at xii ["Preface"].

<sup>9</sup> Jack M. Balkin, "*Roe v. Wade*: An Engine of Controversy" in Balkin, *supra* note 1, 3 at

thought to writing an addendum to explain what he meant in his judgment.<sup>10</sup>

In addition to suffering under the constraint of judicial writing, the appeal and utility of this book are further weakened by the implausible notion that these authors have written their judgments as though they were doing so in 1973. Balkin (editor and “chief justice”) instructed the contributors that while they were permitted to predict future events, they could not refer to such events as fact, nor could they cite material published after 22 January 1973 (the date the judgment in *Roe* was handed down). But as Mark Tushnet points out in his comments at the end of the volume,

[o]f course, we are academics, not judges, and we have lived through thirty years of social, cultural, political and legal (if there are differences among these) experience since then. 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.<sup>11</sup>

The eleven opinions themselves are well written and thoughtful, and are probably among the best-reasoned “opinions” in American constitutional law. But I would much prefer to read the academic writing of any of these scholars than their make-believe judgments in a thirty-year-old case. While their opinions remain true (for the most part) to their other work in relation to the abortion right and constitutional law, they are constrained by the format.<sup>12</sup> And, while judicial opinions in real cases can certainly be lengthy, this set of opinions stretches to 187 pages, well in excess of the judgments in *Roe*.<sup>13</sup>

Seven contributors found in favour of the abortion right, to varying degrees and for various reasons. One dissented in part in *Roe* and in whole in *Doe*, and three others dissented entirely from the majority’s opinion. The majority opinions tend to take the view that the

---

<sup>10</sup> *Ibid.* at 23, citing David J. Garrow, *Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: MacMillan, 1994) at 587.

<sup>11</sup> Mark Tushnet in “Comments from the Contributors” in Balkin, *supra* note 1, 230 at 254 [“Comments”].

<sup>12</sup> Indeed, in the “Preface,” *supra* note 1, ix at xiii, Balkin himself notes that

[t]he task of putting one’s views in the form of a judicial opinion requires an intellectual discipline that has its own distinctive values. It is one thing to offer academic theories of constitutional interpretation. It is quite another to have to articulate those theories in the form of a legal opinion and to demonstrate that one’s views about the Constitution really are consistent with a successful and acceptable judicial performance.

<sup>13</sup> Also in excess of *Doe*, *supra* note 3.

constitutional right to abortion is grounded both in women's liberty and equality, although each set of reasons approaches this conclusion from a slightly different viewpoint. Balkin takes this dual-ground approach to the abortion right, noting that prohibitions on abortion lead to compulsory motherhood, which violates women's equality and liberty interests. Balkin holds that the abortion right includes, where the woman's life or health is not at risk, a reasonable amount of time to determine whether or not to continue with the pregnancy; what amounts to "reasonable time" is left to the legislatures to decide. Where the woman's life or health is at risk, abortion is permissible throughout pregnancy.

Reva Siegel bases her reasons on the equality arguments made in amicus briefs in *Roe* and *Doe*, concluding that the principle of equal citizenship, enshrined in the Fourteenth and Nineteenth Amendments, prohibits state action that is premised on traditional assumptions about women. Anita Allen argues that the abortion right is based on women's "procreative autonomy,"<sup>14</sup> and rejects Balkin's "reasonable time to decide" approach. Instead, Allen holds that "the fundamental nature of the right to terminate pregnancy must mean that access to medically safe abortion cannot be cut off absolutely after a legislated 'reasonable time.'"<sup>15</sup> For Allen, this right "goes to the very core of what it means to be a free person."<sup>16</sup> Robin West also joins the chorus of those who claim that restrictions on abortion violate women's liberty and equality. In West's view, they do so by imposing supererogatory duties on women when the law does not require any one else to act as a "good samaritan" for the benefit of others. West also focuses on the fact that abortion laws that do not make exceptions for pregnancies resulting from coerced sexual activity or marital rape are particularly problematic. West concludes that the real problem is one that the Supreme Court cannot resolve: that motherhood, as the role is socially constructed, is incompatible with equal citizenship. Accordingly, she ends her reasons with a call to action directed at the U.S. Congress.

---

<sup>14</sup> According to Allen, this autonomy is rooted in the Fourteenth Amendment. Anita Allen, "Allen, J., concurring in the judgement" in Balkin, *supra* note 1, 92 at 92.

<sup>15</sup> *Ibid.* at 93.

<sup>16</sup> *Ibid.* at 101.

Jed Rubenfeld bases his reasons on the right to privacy, which he articulates as “the right to a private life—a life of one’s own ... .”<sup>17</sup> This right precludes the state from imposing “a specific, long-term, life-altering and life-occupying course of conduct [one] does not choose for [oneself].”<sup>18</sup> Prohibiting abortion, or even severely restricting its availability, forces women into just such an occupation—motherhood.

In his opinion, Cass Sunstein takes his theory of judicial minimalism<sup>19</sup> for a test drive, holding that the impugned statutes in both *Roe* and *Doe* should be struck down because they are overbroad. Sunstein leaves to future cases the “harder questions,”<sup>20</sup> including the precise contours of the abortion right and the balance that must be struck between the state’s interest in fetal life and women’s freedom to decide for themselves whether or not to carry a pregnancy to term. Akhil Reed Amar would strike down the Texas law at issue in *Roe* because that law was enacted at a time when women could not vote. It therefore failed to “reflect women’s equal input” and imposes unique burdens on women that limit their ability to participate fully in political life.<sup>21</sup> By contrast, the Georgia law before the court in *Doe* had been more recently enacted, and had not yet been considered by state courts.

Given the criticisms of *Roe* and the enthusiasm of the other contributors for re-writing the decision, Tushnet’s judgment comes as a surprise. In his view, the concurring reasons of Justice Douglas in *Doe* represent the best effort that any sitting member of the Supreme Court in 1973 had to offer, and so he presents a “lightly edited”<sup>22</sup> version of that opinion as his own.

As for the dissenting opinions, one—Jeffrey Rosen’s—is procedural in nature. Rosen claims that because there is no foundation

---

<sup>17</sup> Jed Rubenfeld, “Rubenfeld, J., concurring in the judgement except as to *Doe*” in Balkin, *supra* note 1, 109 at 119.

<sup>18</sup> *Ibid.*

<sup>19</sup> Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).

<sup>20</sup> Cass R. Sunstein, “Sunstein, J., concurring in the judgement” in Balkin, *supra* note 1, 148 at 148.

<sup>21</sup> *Ibid.* at 166.

<sup>22</sup> “Comments,” in Balkin, *supra* note 1, 230 at 250.

for a right to privacy within the constitution, the decision should not have been made by the court but by state legislatures.<sup>23</sup>

The other two dissenters object to the majority's approach on moral grounds. Teresa Stanton Collett claims that access to abortion is what threatens women's liberty and equality. Collett writes that "artificial birth control and abortion ... treat women's bodies as unnatural, something to be altered to conform to the male model,"<sup>24</sup> and argues that liberal access to abortion permits men to avoid sexual and parental responsibility, leaving women worse off. Collett concludes by stating "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."<sup>25</sup>

The final dissenter, Michael Stokes Paulsen, also draws heavily on political rhetoric. Paulsen's judgment is unabashedly anti-abortion and manages almost entirely to remove women from the debate. He appends to his opinion a series of photographs of a developing fetus, making it very clear where his focus lies. Paulsen makes a constitutional argument as well, arguing that "[t]he Constitution quite obviously does not contain a right to abortion."<sup>26</sup>

Most chilling about Paulsen's judgment is his assertion that "[r]esistance to the Court's decision is not only legally justified. It is a moral imperative."<sup>27</sup> In his view, the majority's judgment "does ... violence to the Constitution, and ... authorizes violence against innocent

---

<sup>23</sup> Jeffrey Rosen, "Rosen, J., dissenting" in Balkin, *supra* note 1, 170 at 170-86.

<sup>24</sup> Teresa Stanton Collett, "Collett, J., dissenting" in Balkin, *supra* note 1, 187 at 189.

<sup>25</sup> *Ibid.* at 194.

<sup>26</sup> Michael Stokes Paulsen, "Paulsen, J., dissenting" in Balkin, *supra* note 1, 196 at 196-97.

<sup>27</sup> *Ibid.* at 197. While Paulsen is not specific about what he means by "resistance," it is possible that some would take it as an invitation to commit violence. He has been, perhaps, more specific elsewhere. Paulsen has written that he is responsible

... indirectly, remotely, only contributorily, and perhaps excusably, but nonetheless partially responsible—for the deaths of one and a half million innocent unborn children per year. I might have been able to stop the nomination of David Souter to the United States Supreme Court, and thus possibly could have prevented the Court's disastrous reaffirmation of *Roe v. Wade* two years later in *Planned Parenthood v. Casey*, if only I had been willing to violate my duty of confidentiality as a government lawyer and leak to pro-life groups my advance knowledge of Souter's likely nomination to the Supreme Court by President Bush in 1990. I had the information. I had the opportunity. I had the time. I had the telephone in hand. But indecision, inertia, uncertainty—and probably cowardice—prevailed. I did nothing.

Michael Stokes Paulsen, "Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and its Limits" (1998) 61 *Law & Contemp. Probs.* 83 at 83.

human life.”<sup>28</sup> To Paulsen, anyone who fails to condemn the decision is complicit in the evil perpetrated by it. Paulsen goes on to render his “honest judgment” about both the decision and its authors, calling each of the members of the majority a man or woman of violence; for the partial dissenter, he reserves the designation “coward and collaborator.”<sup>29</sup> This language is startling for its departure from the reasoned and collegial tone adopted by the other contributors, and is disturbing in that it sounds much like a call to arms for abortion foes.

Ultimately, this is a book for students of American constitutional law—in particular, for those who are interested to see how well the authors’ theories of constitutional interpretation and the judicial office stand up to the test of being structured as judicial opinion. It will also hold the attention of those interested in the legal history of the abortion movement and the right to privacy in U.S. jurisprudence. It is not a book, unfortunately, that will be of great interest to those more concerned about the reproductive needs and interests of women, and how law can help or hinder the evolution of good public policy in that context. Neither is it a book that advances the reproductive rights debate or helps us to imagine how we might best approach the new state laws that have been enacted with a view to testing the Court’s ongoing commitment to its decision in *Roe*.

At the end of the day, I am left asking the same question posed by Tushnet in his post-opinion comments: “So—and this is a serious question—what’s the point of the exercise?”<sup>30</sup>

---

<sup>28</sup> Paulsen, “Paulsen J., dissenting” in Balkin, *supra* note 1, 186 at 213.

<sup>29</sup> *Ibid.*

<sup>30</sup> “Comments,” in Balkin, *supra* note 1, 230 at 254.

