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Four years ago Yale Law School's Jack Balkin published an edited volume entitled *What* Brown v. Board of Education *Should Have Said*.[1] Early in 2003 he convened a conference designed to produce a similar book on *Roe v. Wade*, with invited participants instructed to write their own opinion deciding both *Roe* and its companion case, *Doe v. Bolton*.

Balkin asked his contributors, "[h]ow would you have written the *Roe* opinion in 1973, if you knew then what you know now about the subsequent history of the country?" They could use "only materials available as of January 22, 1973," but Balkin distributed a first draft of his own *Roe* opinion "in order to give them something to work against."

The unspoken premise of both this enterprise and its predecessor is that present-day law professors can significantly improve upon the majority opinions that Justice Harry Blackmun and Chief Justice Earl Warren authored in 1973 and 1954. The contributions to Balkin's *Brown* volume certainly brought that premise into question, and the retrospective opinions contained in this present book disprove it almost without exception.

Fortunately for both the contributors and whatever readers this book attracts, the volume includes not only the faux opinions but also a concluding "Comments from the Contributors" section where the authors voice a variety of observations they could not make in the fictional context of 1973. Some of those comments are far more intriguing and stimulating than the authors' opinions, and to some degree they rescue the volume from what otherwise would be a highly embarrassing failure to perform.

Balkin ended up with eleven nouveau justices, not nine, yet their seriatim opinions fall easily into three distinct groups. A majority of six, led by Balkin himself, assertively affirms *Roe*'s fundamental correctness, notwithstanding individual doctrinal preferences and hobby-horses. Another trio expresses

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1 New York University Press, 2001.

a shared discomfort with *Roe*'s breadth and self-assurance, a theme that unites their critiques despite their disparate formal "votes" – one in concurrence, one concurring and dissenting, and one in dissent. The final duo oppose not just *Roe*'s holding but abortion itself, and may well represent the only contributions beyond Balkin's own opinion that are indisputably superior to what the real Justices rendered in 1973.

Balkin's opinion, announcing the judgment of his Court, evinces greater verisimilitude than any of the other "majority" statements. Relying most centrally on Justice William O. Douglas's 1942 opinion for the Court in *Skinner v. Oklahoma*, Balkin argues that pre-1973 precedents recognize a "right of intimate relation" that eight years earlier, in *Griswold v. Connecticut*, Douglas had called simply "privacy." "Individuals have the fundamental right to decide whether they want to become parents," Balkin states, and "the state may not force people to become parents against their will."

Outlawing abortion, Balkin writes, "forces pregnant women to assume life-altering obligations, restricting their present and future liberty in the most profound way." Balkin couples that argument with a parallel analysis based upon equal protection. "Denying women the choice to end unwanted pregnancies … pushes more women into low-status occupations and conditions of economic dependence." Thus "restrictions on abortion reinforce women's subordinate status in society and therefore deny them equal citizenship."

Balkin's constitutional rights analysis is more detailed and sophisticated than what *Roe* itself offered, but both the substance of his argument and his supporting citations are inescapably familiar. Balkin waxes loquacious in Kennedy-esque fashion (Anthony M., not John F.) when he invokes "the fundamental right of women to control their own lives," but once he moves to a consideration of the respondents' contentions, his analysis is highly reminiscent of Blackmun's own. "The state's interest in potential human life becomes increasingly important to vindicate as the pregnancy proceeds," Balkin acknowledges; five pages later, in what is perhaps an editorial oversight, he reprises that perspective in virtually identical words: "the state's interest in protecting unborn life becomes increasingly important to vindicate as the pregnancy proceeds." Perhaps if all the contributors had been allocated four law clerks, or, in Balkin's case, three, such compositional shortcomings would have been avoided.

Balkin is impressively adept, however, at illuminating the lack of rigor in much abortion law discourse. For example, "it is not clear why fetuses conceived through rape are any less valuable to the state than fetuses conceived through consensual sex," Balkin notes. "[T]he circumstances of the pregnancy do not make these fetuses less human or less valuable as human beings." In a telling aside, he also observes that "neither at the time of the ratification of the Fifth Amendment's Due Process Clause in 1791 nor at the time of the ratification of the Fourteenth Amendment in 1868 was the word 'person' understood or intended to include fetuses."

The tangible bottom-line of Balkin's opinion affirms a woman's fundamental right to a legal abortion for an indeterminate period of time during her pregnancy. "Where a woman's life or health is not in danger, the right to abortion is the right to a fair and realistic opportunity to choose whether or not to become a mother," he writes. A "realistic opportunity," Balkin explains, means "sufficient time to recognize the fact of her pregnancy," but exactly how long into pregnancy the state must extend that opportunity is a choice that "must be drawn by legislatures themselves," rather than by the Court, Balkin

declares. He adds, however, that "Some women in some circumstances may need additional time, and legislation may take these special circumstances into account."

Balkin's use of that second "may," rather than "must," is a strikingly deferential and concessionary choice, but in his subsequent comments he defends his decision to "punt" the crucial issue of duration to the political branches. "[J]udges do not have to write minimalist opinions to respect democratic processes or to avoid a political backlash. To the contrary, giving a legislature guidance about what constitutional principles are at stake may be a better way of facilitating a legislative solution."

Like others before him, however,[2] Balkin makes an embarrassingly serious error that reflects a fundamental historical ignorance about early 1970s abortion politics when he blithely asserts that "if state legislatures in the early 1970s had been required to justify their abortion laws …, most of them would have guaranteed a basic right to abortion somewhere around twenty weeks." In fact, as of January 1973, only three state legislatures had done so – Hawaii, Alaska, and New York, all in early 1970 – and New York's subsequently reversed itself, an action that prochoice Governor Nelson Rockefeller vetoed.[3] While Washington state also legalized abortion in 1970, by means of a statewide popular vote,[4] no other state legislature came anywhere close to authorizing across-the-board abortion legalization – abortion law "repeal," in the parlance of that era – at any time during 1971 and 1972.

Of the five other contributors who basically affirm *Roe*, Anita Allen and Jed Rubenfeld do so in privacy- and liberty-oriented opinions that reprise their prior writings, while Reva Siegel and Robin West each seek to apply a gender equality analysis. Mark Tushnet, in distinctive fashion, forthrightly appropriates the concurring opinion that Justice William O. Douglas filed in *Roe* and *Doe* rather than draft one of his own.

Allen, like Balkin, declares that "the right to terminate a pregnancy is fundamental," and Rubenfeld likewise explicitly endorses Balkin's "sufficient time" standard, holding that states must give a woman "a reasonable amount of time to discover her pregnancy." Siegel and West, in very different fashions, strive to emphasize sex discrimination, yet West volunteers that she agrees with Rubenfeld and Balkin "that at some time in a pregnancy, a woman's consent to the pregnancy can be assumed because of her failure to obtain an abortion in a timely manner." But West too shies away from specifying exactly what her timeliness standard would entail.

In her subsequent comments, Siegel revealingly acknowledges how the 1973 Court "could have started sex discrimination jurisprudence in an opinion striking down laws that criminalize abortion." "Started" is an appropriate and important verb, for, prior to *Roe*, only *Reed v. Reed*, decided in 1971 employing a rational basis standard of review, had so far reflected the Court's soon-to-emerge application of equal protection principles to discrimination on the basis of sex. West likewise admits that the "specific arguments" of

2 See Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 North Carolina Law Review 375 (1985), and Ginsburg, "Speaking in a Judicial Voice," 67 New York University Law Review 1185 (1992). See also David J. Garrow, "History Lesson for the Judge: What Clinton's Supreme Court Nominee Doesn't Know About *Roe*," Washington Post, 20 June 1993, at C3; Garrow, Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade* 616–17 (1998).

3 See Garrow, Liberty and Sexuality, 546–47, and Garrow, Abortion Before and After *Roe v. Wade*: An Historical Perspective, 62 Albany Law Review 833, 840–41 (1999).

4 See Garrow, Liberty and Sexuality, at 466.

her "fantastical" opinion "were not developed" and "could not have been made at the time of *Roe*."

Balkin, perhaps trying to straddle what he may view as a politically sensitive fence, says on the one hand that "treating *Roe* as a sex equality case in 1973 is not as far-fetched as it might appear." He then nonetheless quickly admits that "the Justices were not prepared to engage with" sex equality arguments in 1973 "or to take their implications seriously." Tushnet makes the same point more forcefully and without equivocation, admitting that at the time of *Roe* "[t]he Court had barely begun to recognize women's equality interests as constitutionally significant." In what may be a pointed commentary on Siegel's contribution, Tushnet adds that "'Opinions' that use materials available in 1973 to support a women's-equality theory for *Roe*'s outcome would have been regarded in 1973 as outside the bounds of professional respectability."

Tushnet's comments are the most substantive and challenging by far. Acknowledging his own central involvement in the original *Roe* decision as the OT72 clerk in Justice Thurgood Marshall's chambers assigned to the abortion cases, Tushnet looks back on the events of that time by way of justifying his decision not to draft a faux opinion of his own from scratch. Beginning with Justice Blackmun's original draft, which was circulated in May 1972, Tushnet explains that "[a]t the time, the opinion was – I think nearly universally with the Court – regarded as grossly unsatisfactory." In large part that was because Blackmun was attempting to void Texas's 19th century anti-abortion law on vagueness grounds, rather than reach the larger constitutional issues. Blackmun's vagueness analysis, however, as Justice Byron White trenchantly noted in a timely draft dissent, hopelessly contradicted the Court's opinion just one year earlier in *United States v. Vuitch*, the first abortion case that the justices had decided.

Tushnet, however, now puzzlingly asserts that "Blackmun's draft wasn't nearly as bad as people thought at the time," yet once he shifts his focus to the radically different subsequent draft opinion that Blackmun circulated in November 1972, Tushnet's comments are far more acute. Balkin, in his initial introduction to the volume, reprises the familiar castigation of "the rigid trimester system" that the final draft of Blackmun's opinion featured, but Tushnet rightly objects to that trite characterization, correctly arguing that "[o]nce the justices had moved from acknowledging one state interest to acknowledging two [maternal health in addition to potential life], dividing pregnancy into three stages rather than two made sense."

As Tushnet appropriately observes, "some of the features of *Roe* and *Doe* that seem questionable today seemed quite natural then. Given the constitutional concerns as the justices saw them, the structure of the opinions was either entirely sensible or even inevitable." However, even the Blackmun clerk who was primarily responsible for much of the November 1972 draft opinion, George Frampton, had observed pointedly in August that the draft's constitutional analysis needed "considerable" amplification,[5] but Tushnet is the only contributor who appears to have pondered seriously just how differently might the justices of OT72 have decided *Roe* and *Doe*.

"How could these men" – and men they all were – Tushnet asks, "actually have done anything different?" Granted, they should – and could – have appreciated, just as Frampton had several months earlier, that Blackmun's discussion of the abortion right's constitutional groundings was seriously inadequate.

5 See David J. Garrow, The Brains Behind Blackmun, Legal Affairs, May–June 2005, at 29.

But Tushnet has a more basic concern. "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." Robin West echoes that concern – "I can't possibly project myself imaginatively onto the Court at the time *Roe* was decided, or any other time" – but only Tushnet voices the most telling query: "So – and this is a serious question – what's the point of the exercise?"

Tushnet's obvious discomfort led him simply to present "a lightly edited version of the substantive portions of Justice Douglas's concurring opinion in the 1973 abortion cases" as his own contribution to the Balkin volume. "Douglas's opinion stands up quite well," Tushnet asserts, but he passes up the opportunity to explain why he now believes Douglas's *Roe* opinion is superior to Blackmun's, a silence made all the more puzzling by the enthusiasm with which Tushnet in November 1972 told Justice Marshall that Blackmun's draft was "one the Court can be proud of" and that Marshall should join "without reservation."[6] Tushnet also praises Douglas's "often derided" majority opinion in *Griswold v. Connecticut* as "actually quite intelligent," but at bottom he defends "appropriating Justice Douglas's [*Roe*] opinion for myself" because he rightly believes "it may be impossible … to think ourselves back into the position of the judges who decided *Roe*, acting as if we had available to us only the legal materials they had available."

Ironically enough, Tushnet is a more convincing advocate of humility – scholarly if not juridical – than any of the three contributors whose profound underlying aversion to the exercise of federal judicial power unites their otherwise disparate opinions. Cass Sunstein formally concurs in the Balkin majority's judgment, but his brief contribution – less than three full pages, in stark contrast to Balkin's and West's twenty-seven page efforts – disparages Balkin's "unnecessarily broad opinion" and volunteers that "I would leave the harder questions … for another day."

As with Tushnet, however, Sunstein's comments later in the volume are more instructive than his faux opinion. Ignoring or forgetting *Vuitch*, he wrongly states that *Roe* was the Court's "very first confrontation with the abortion question," and, even more egregiously than Balkin, he erroneously claims that "the nation was moving, quite rapidly, toward legalizing abortion." Even more astounding is Sunstein's unsupported and self-contradictory assertion that "it would have been quite plausible for the Court to uphold the Texas and Georgia statutes" under attack in *Roe* and *Doe*. But Sunstein quickly backs away from that statement, saying that "the Court should have proceeded far more slowly and incrementally than it did" and that "an overbreadth ruling was its best available option."

Akhil Amar's opinion, partially concurring and partially dissenting, echoes Sunstein's comments in declaring that the "members of the Court should proceed with extraordinary humility and caution." Amar's contribution is an odd piece of work. He attacks Balkin's commonplace use of Justice William J. Brennan's 1972 majority opinion in *Eisenstadt v. Baird*, with its well-known phrase about "whether to bear or beget a child," by misleadingly asserting that that

6 See MVT to Dear Judge, n.d. [ca. 22 November 1972], Thurgood Marshall Papers, Manuscript Division, Library of Congress, Box 99, as quoted in Garrow, Liberty and Sexuality, at 582. Tushnet's altered evaluation is not a new one, for more than two decades ago he termed Douglas's concurrence "brilliant" while opining that "[i]t seems to be generally agreed that, as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful." Tushnet, Following the Rules Laid Down, 96 Harvard Law Review 781, 820–21 (1983).

"*Eisenstadt* language did not command the support of five justices." Numerically that is true, since *Eisenstadt* was heard and decided by only a seven-justice Court, but *U.S. Reports* of course correctly declares that "Justice Brennan delivered the opinion of the Court," whether Amar likes it or not.

Amar also oddly, on multiple occasions in his faux opinion, suggests that the Court should defer any ruling in at least *Doe*, if not also *Roe*, until questions of "state constitutional law" can be adjudicated. Similar to the equal-protection sex-discrimination fallacy, Amar appears to be imagining that the robust discussion of independent state court review of constitutional claims that blossomed in the mid- and late-1970s was already in full flower in 1972–73, when it was not.[7]

By far the most rich and original of the three judicial restraint opinions is Jeffrey Rosen's. Rosen pulls no punches in his criticisms of *Roe*'s antecedents or *Roe* itself. Justice Douglas's *Griswold* opinion, he writes, "conflated several different enumerated privacy rights at such a high level of generality that the free-floating privacy penumbra that emerged had little obvious connection to the textual principles from which it supposedly emanated." Read in context, Douglas's constitutional analysis "was heavily rooted in Fourth Amendment notions of the privacy of the home," and focused centrally and particularly on "the privacy of the marital bedroom, rather than a broad right of sexual autonomy for single and married people alike."

Perhaps the most unanswerable historical question concerning the progression from *Griswold* to *Roe* involves how Douglas's insistent emphasis upon the marital context of *Griswold* disappeared totally and without comment from the abortion rights arguments first put forward in the lower federal courts in 1969 and 1970. Thus Rosen has a strong claim in arguing that purely as a doctrinal matter, *Roe* did not necessarily follow from *Griswold*. "[O]ur Constitution does not provide any obvious protections for privacy conceived as a form of autonomy," he says in (Hugo) Blackian fashion, and "the text and original understanding of the Fourteenth Amendment fail to support a right to terminate pregnancy."

Rosen's advocacy of judicial restraint is more sophisticated than Sunstein's or Amar's, although he too makes a less egregious version of the common historical error when he asserts that "most state legislatures, in time," would repeal their prohibitions on abortion. Rosen is guilty of rhetorical excess when he claims that the Court "is aggrandizing itself" by "rushing brazenly to circumvent th[e] political debate" over abortion, for at the time that *Roe* and *Doe* were under final consideration, several dozen similar constitutional challenges to state abortion statutes were pending in lower federal courts or already awaiting review on the Supreme Court's own docket. Yet Rosen's most telling argument against *Roe*, whether in the Blackmun version or the Balkin, is a political rather than constitutional one: by "converting what would have been [the supposed] eventual losers in the political arena into aggrieved and determined opponents of judicial power," the judiciary "will be enfeebled by a self-inflicted wound."

In his concluding comments, Rosen reveals himself to be an opponent of not simply the historical *Roe* but of any constitutional rights analysis that extends protection to a pregnant woman's desire for a legal abortion. "None of the attempts to justify *Roe* on alternative grounds strike me as substantially more convincing than Justice Blackmun's fa-

7 See, e.g., William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harvard Law Review 489 (1977).

mously artless opinion," Rosen declares. He self-deprecatingly claims that "liberal advocates of judicial restraint have even fewer fans today than they did when *Roe* was decided," but that contention is dubious indeed, in light of the growing raft of liberal academics – Sunstein and sometimes Tushnet among them – who have become more sharply critical of constitutional judicial review over the course of the past decade.[8]

The two final contributions stand out for their full-throated opposition to abortion itself, and not just the constitutional jurisprudence that legalized it. Teresa Stanton Collett was a last-minute addition to the volume, and she explains in her concluding comments that her opinion was subject to "tight word limits" because "the manuscript was already at the publisher." She accurately observes that *Roe*'s supporters and champions have "an unshakeable conviction that women can prosper only under a regime that allows liberal access to abortion," and she corrects a commonly-made abortion-rights error by rightly noting that in the years before *Roe* only a few hundred women per year died from illegal abortions, not the thousands upon thousands that some writers – Sunstein in this volume says "as many as 10,000" annually – wrongly claim.

Collett contends that *Eisenstadt* "gravely erred" by extending *Griswold*'s marital protection to unmarried individuals. She insists that it is the marital union, "not the sexual act per se, that is at the heart of the constitutional protection this Court has traditionally afforded the procreative act." Indeed, Collett makes clear that her opposition to *Roe*'s constitutional holding extends to sexual freedom more broadly when she tellingly speaks of "artificial birth control and abortion" as a conjoined duo.

Michael Stokes Paulsen is as outspoken an opponent of abortion as can be found in legal academia. Paulsen's opinion is brutally direct, declaring repeatedly that "abortion kills a living being," a "human living being." Wisely avoiding any discussion of the concept of "person," Paulsen instead insists that "the essential question" is "whether the fetus is a living human being." Emphasizing a formulation whose predicates no one could dispute, Paulsen asserts that "[t]he living human embryo is already alive, and it is a human life. Abortion does not destroy potential life. Abortion kills a living human being."

Given that conclusion, Paulsen understandably reasons that "If anything constitutes a 'compelling state interest,' it is the protection of human life from being killed." Instead, *Roe*'s progenitors "create out of whole cloth a super-protected constitutional right of some human beings to kill other human beings." That "is the most horrible thing this Court has ever done in its history," and "to embrace the result reached today is to commit an act of great evil."

Paulsen follows those protestations with a seriatim listing declaring that each member of Balkin's majority is "a man [or woman] of violence"; Sunstein receives the parenthetical addition "(one case at a time)" and Amar is separately labeled "a coward and a collaborator." In his subsequent comments, Paulsen writes that "I know my words will offend many," but he rightly questions "whether decorum, in the face of evil, is really a virtue." *Roe* in his view "constitutionalized private mass murder," and Paulsen accordingly concludes that "[r]esistance to the Court's decision is not only legally justified. It is a moral imperative."

8 See generally David J. Garrow, "Happy" Birthday, *Brown v. Board of Education*? *Brown*'s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity, 90 Virginia Law Review 693, 720–29 (2004).

Paulsen's comments, however, completely but unsurprisingly beg the question of why, if women's legal access to abortion is indeed "mass murder," Paulsen is simply authoring academic essays rather than picking up the gun to prevent further wholesale killings. This conundrum is not new; abortion opponents faced the exact same challenge in the mid-1990s when a succession of right-to-life gunmen took quite literally to heart the political teaching that "abortion is murder" and killed three abortion providers plus a trio of clinic volunteers and receptionists. Those gunmen unintentionally demonstrated that the overwhelming majority of hard-core abortion opponents, like Paulsen, actually do not believe the literal truth of their sloganeering. Once Michael Griffin, Paul Hill, and James Kopp acted directly to prevent what they indeed believed to be "mass murder," all but a tiny fringe of right-to-lifers immediately denounced them as anarchic domestic terrorists.[9] Claus von Stauffenberg and the other men and women of July 20, like the earlier students of the White Rose, are all now widely celebrated and memorialized on account of their courageous and self-sacrificial opposition to true mass murder,[10] but even a decade after Griffin, Hill, and Kopp's actions, it is almost impossible to find anyone who celebrates them. Legal abortion is not "mass murder," and Paulsen's opposition to abortion would be better served by an avoidance of exaggerated rhetoric.

Paulsen also criticizes the "majority" justices for failing to apply the Constitution's language or employing what he calls "transparently dishonest, result-oriented reasoning." Denouncing their "poor sophistries," he declares that "the majority's divergent opinions represent the very worst of American constitutional legal thinking." Looking back at the actual 1973 dissents in *Roe* by Justices White and Rehnquist, Paulsen observes that "I was struck by how rather weakly critical of the majority they were," especially given his belief that "*Griswold* and *Eisenstadt*, even on their own terms, come nowhere near justifying a constitutional right to abortion." Paulsen's contribution concludes with an eleven-page photographic appendix that reproduces fetal pictures that were submitted to the actual *Roe* Court in 1971–72.

Perhaps the single most striking feature of the Balkin volume, leaving aside only Tushnet's comments, is the stunning ignorance of history that repeatedly is demonstrated. One might well imagine that upon receiving and accepting an invitation such as Balkin's, participants would immerse themselves in, or at least cursorily review, the opinions that were rendered in other pre-*Roe* constitutional challenges to anti-abortion statutes. The obvious starting point of course would be the Supreme Court's own 1971 ruling in *United States v. Vuitch*, but, amazingly, only Tushnet's – or Douglas-Tushnet's – opinion makes any reference whatsoever to *Vuitch*.[11]

Almost equally surprising is the complete failure of all the contributors to evince any awareness at all of the one particular lower-court abortion opinion that indisputably had a major influence upon the Supreme Court's own private deliberations about how to decide *Roe* and *Doe*. That opinion, by Judge Jon O. Newman on behalf of a special three-judge federal court in the Connecticut

9 See Garrow, Liberty and Sexuality, at 712.

10 See Peter Hoffman, Stauffenberg: A Family History, 1905–1944 (1995), and Inge Scholl, et al., The White Rose: Munich 1942–1943 (1983).

11 Siegel cites two amicus briefs submitted in *Vuitch* in her concluding comments, though not in her opinion.

case of *Abele v. Markle*,[12] had a decisive effect on the thinking of Justice Lewis F. Powell[13] and had a similarly significant impact upon Justice Potter Stewart.[14] In particular, Judge Newman's analysis of how abortion-law analysis should focus upon the concept of fetal viability was the subject of an especially influential private letter that Powell sent to Harry Blackmun.[15] In the wake of that letter, Blackmun included reference to Newman's analysis in a memorandum to all of his colleagues about his draft opinions in *Roe* and *Doe*,[16] and Blackmun's final *Roe* opinion included two citations to Newman in its text.[17]

Balkin notes in his preface to the book that none of the contributors' opinions "adopted Justice Blackmun's original trimester framework." That omission ought to occasion more comment and some surprise, for the weakness in Blackmun's opinion was not, as Tushnet acknowledges, its wholly appropriate and defensible adoption of an analysis correctly premised on the Court's recognition of two separate and distinct compelling state interests, but its abject failure to devote any extensive discussion to the grounding and explication of the constitutional right it rightly identified and applied.

Balkin also correctly but only passingly observes that *Roe*'s outcome "was hardly unexpected," particularly in light of how many prior lower federal court rulings already had rendered decisions generally in line with Blackmun's analysis and holding. Balkin also briefly relates how Blackmun's initial draft of his heavily-revised fall 1972 opinion would have extended full constitutional protection only "until the end of the first trimester," with abortions after that stage limited to "reasonable therapeutic categories." The single most intriguing historical hypothetical about *Roe* proceeds from that draft: how different would American abortion politics and law have been in the years after 1973 had Blackmun retained that initial formulation? But it was the impact first and foremost of Jon O. Newman's analysis of the importance of fetal viability on both the justices and their law clerks that pushed that more limited holding aside and replaced it with the more comprehensive protections contained in Blackmun's final opinions.

Both Balkin and Sunstein purport to rue, as Balkin puts it, that "*Roe* has not become a hallowed icon like *Brown*." Sunstein asserts that *Roe* could "have become our generation's *Brown*, that is, a correct, stirring, even heroic reading of the Constitution to invalidate a practice that was a source of unacceptable injustice." Sunstein unsurprisingly does not address how a *Roe* opinion which, as he would have had it, left "the harder questions

12 Abele v. Markle, 351 F. Supp. 224 (D. Conn.) (1972). See also an earlier ruling by the same panel, Abele v. Markle, 342 F. Supp. 800 (D. Conn.) (1972), and see as well Garrow, Liberty and Sexuality, at 544, 566.

13 See David J. Garrow, Revelations on the Road to *Roe*, American Lawyer, May 2000, 80, 82–83. See also Andrew D. Hurwitz, Jon O. Newman and the Abortion Decisions: A Remarkable First Year, 46 New York Law School Law Review 231 (2002–03).

14 See Garrow, Liberty and Sexuality, at 568, 574 (detailing Stewart's references by name to Judge Newman's opinion at the October 1972 oral re-argument of *Roe* and *Doe* and again subsequently at the Justices' private conference discussion of the cases).

15 See Garrow, note 13 supra, at 83.

16 Harry A. Blackmun, Memorandum to the Conference, Re: Abortion Cases, 11 December 1972, William J. Brennan Papers, Manuscript Division, Library of Congress, Box 282, William O. Douglas Papers, Manuscript Division, Library of Congress, Box 1589, and Thurgood Marshall Papers, Manuscript Division, Library of Congress, Box 99. See also Garrow, Liberty and Sexuality, 583.

17 Roe v. Wade, 410 U. S. 113, 154, 158 (1973). Justice Stewart's concurring opinion also included a citation to Newman; see 410 U.S. at 170. See also Garrow, Liberty and Sexuality, at 588, 597, 909 n129.

for another day" and instead rendered only an overbreadth ruling could have been "stirring" and "heroic." Yet Sunstein nonetheless insists that it is "unquestionable that *Roe* has become our generation's *Lochner*, that is, the preeminent symbol of judicial overreaching."

Balkin criticizes the justices of the *Roe* Court because "they failed to recognize sufficiently … that whatever they did would cause a significant upheaval in American politics." But the *Roe* justices, to a man, did not believe that the pair of cases before them entailed social and political implications at all comparable to *Brown*'s, nor did they give any consideration whatsoever to how their ruling would "play" while formulating the majority decision. Indeed, had they been at all so inclined, they should have expressed some trepidation or hesitation with regard to expanding Blackmun's draft opinion in so meaningful a fashion as the Newman influence led them to do. In addition, one of the most well-known facts about *Roe*'s public announcement on January 22, 1973, is that the ruling was not the top news story in the next morning's newspapers – former President Lyndon B. Johnson's unexpected death took precedence.[18] Even more important, the initial public reactions to the *Roe* and *Doe* decisions were overwhelmingly positive, with little if any suggestion that the decisions would generate long-term controversy or upheaval.[19]

Repeating an all-too-familiar claim, Balkin states that *Roe* "demobilized social movement support for abortion rights" and placed prochoice advocates in a defensive posture from which in subsequent years they consistently would turn "to the courts for protection." Balkin's formulation implicitly acknowledges one of the most crucial things about *Roe*, or, more precisely, about the difference between Blackmun's final formulation of *Roe* and his earlier, "pre-Newman" draft: *Roe* and *Doe* as decided, by extending constitutional protection for abortion all the way to the point of fetal viability, handed abortion rights advocates a vastly more far-reaching victory than they ever could have attained through the legislative and political process.

That important fact goes a long way toward illuminating why facile pairings of *Roe* and *Brown* can obscure more than they reveal. Neither *Brown I*, in 1954, nor *Brown II*, the supposed "implementation" ruling in 1955, actually mandated any immediate school integration, and that absence of any tangible, real-world effect contributed mightily to the largely quiescent segregationist reactions they generated. *Roe* on the other hand immediately, and correctly, voided and swept aside the oppressive laws of 46 states. *Brown* offered tremendous moral and spiritual encouragement to Black America, but it represented only the wholly unspecific beginning of a process that the Court would not frontally engage until a full fourteen years later[20] and did not meaningfully address until 1971.[21] *Brown* thereby, even if did not of course truly start the movement for the desegregation of the American South, nonetheless represented the opening judicial salvo in what for better or worse developed into a quintessential law reform struggle rather than some more profoundly transformative change in American life.

Brown's largely totemic status during its first fifteen years of life meant that few opponents had any tangible opportunity to contest the ruling's potential impact. In the very few

18 See Garrow, Liberty and Sexuality, at 600.

19 See id. at 605–07.

20 See Green v. County School Board of New Kent County, 391 U. S. 430 (1968).

21 See Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971).

instances where *Brown*'s promise was made real during those years, as in Little Rock, the resulting controversy far exceeded anything that *Roe v. Wade* has ever produced.[22] By the time that *Brown*, and its progeny, actually began to have real-life impact across the South, even in the very school districts that themselves had been parties to the original litigation,[23] subsequent developments such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965 had far eclipsed *Brown* in altering the legal underpinnings of daily life. Nonetheless, when efforts to make *Brown*'s implicit promise of true integration real finally climaxed in the South in the very late 1960s and early 1970s, so did massive white flight from the public schools and other more forceful attempts at resistance.

In some respects *Roe* might better be paired with the Voting Rights Act (VRA) than with *Brown*. That law significantly altered Deep South political life in very short order, but it too, like many of the Warren Court's most momentous constitutional rulings, primarily affected only one geographically distinct region of the country.[24] In that regard, *Roe* was far more revolutionary than either the VRA or *Brown*, and from that perspective the more enduring controversy generated by *Roe* as opposed to *Brown* and the VRA should not be seen as at all surprising.

From a vantage point of more than three decades later, the fundamental question about "What *Roe v. Wade* Should Have Said" is one that neither Balkin's contributors specifically address nor that the justices of OT72 considered or appreciated: if, absent the impact of Jon O. Newman's persuasive analysis of the legal import of fetal viability, the *Roe* justices had handed down the ruling outlined in Harry Blackmun's initial fall draft, extending constitutional protection for a woman's right to choose abortion only until the end of the first trimester of pregnancy, would the political and constitutional debates of the past thirty-plus years over abortion have been measurably or perhaps even greatly different? One could argue either "yes" or "no" in response to that question, but given the likelihood that the Roberts Court will soon begin to move the constitutional law of abortion back toward exactly such a real-world bottom-line, that question is now very much the one which should spring to the forefront in all worthwhile debates about the future meaning of *Roe v. Wade*.

22 See Cooper v. Aaron, 358 U. S. 1 (1958).

23 See David J. Garrow, Clarendon County in Black and White, 7 Green Bag 2d 237 (2004).

24 See Lucas A. Powe, Jr., The Warren Court and American Politics (2000) for a persuasive articulation of this theme.