

WRONG IN EVERY WAY

BY Dave Andrusko

“The [abortion] issue was pure poison for the federal judicial system, and especially the Supreme Court. Liberal judges found themselves in the ideologically comfortable but intellectually awkward position of zealously defending *Roe*, despite what even many liberals believed to be its weak constitutional foundation. (As I explained in an earlier column, there is much to be said for this critique.)” – Edward Lazarus, who clerked for Justice Harry Blackmun, Findlaw.com, September 16, 2004

“It was Blackmun’s defensiveness about *Roe* that led to his metamorphosis as a liberal. Faced with a barrage of criticism, Blackmun tried to validate *Roe* by vehement reiteration. If the constitutionalization of abortion could be repeated, confirmed, and indeed expanded, it might be made invulnerable. Far from qualifying the right announced in *Roe*, Blackmun wanted to extend that ruling to ever more doubtful territory.” – From *Justice Lewis F. Powell, Jr.*, by John C. Jeffries, Jr.

“If this Term is any guide, the romantic inside of [Justice Anthony] Kennedy is coming increasingly to the fore. ... The romantic view of the Court holds that it is an institution largely above politics, throwing down moral thunderbolts that reshape American life. Its decisions do not merely resolve disputes. Far more than this, they uphold shining ideals like justice, fairness, and the rule of law.” – Edward Lazarus, Findlaw.com, August 7, 2003

“[Justice Sandra Day] O’Connor’s narrow opinions have the effect of preserving her ability to change her mind in future cases. It is not that O’Connor is easily swayed by the lobbying of her fellow justices: there is little lobbying or horse-trading on the Rehnquist court. (Indeed, the justices rarely have substantive discussions.) It is that she approaches her job less like a typical justice than like the state legislator she once was. O’Connor, who prefers vague standards to clear rules, does not derive her opinions from consistent principles that guide her from case to case. Her pragmatic approach allows her to remain not only at the center of the court but also at the center of American politics.” – Jeffrey Rosen, *New York Times*, June 3, 2001

As I began composing this editorial, we were only four days away from Senate confirmation hearings for Judge Samuel Alito, Jr. By the time you sit down at the kitchen table to read this edition, Judge Alito will have walked the Senate Judiciary Committee gauntlet. With Patrick Leahy, Ted Kennedy, and Dianne Feinstein on one side, and Chuck Schumer, Richard Durbin, and Joe Biden on the other, it gives a whole new meaning to the old baseball term “Murderers’ Row.”

At first, I approached this commemorative issue with some trepidation. Could we add anything new and insightful to a debate that has raged like an out-of-control forest fire for nearly 33 years?

Then I began reading *Team of Rivals*, the very fine new Lincoln biography, written by historian Doris Kearns Goodwin. Her introduction begins with this:

In 1876, the celebrated orator Frederick Douglass dedicated a monument in Washington, D.C., erected by black Americans to honor Abraham Lincoln. The former slave told his audience that “there is little necessity on this occasion to speak to length and critically of this great and good man, and of his high mission in the world. That ground has been fully occupied The whole field of fact and fancy has been gleaned and garnered. Any man can say things that are true of Abraham Lincoln, but no man can

say anything that is new of Abraham Lincoln.”

Needless to say, having just written a 757-page tome, Goodwin politely begs to differ. Her approach is ingenious. She has “coupled” her account of Lincoln’s life “with the stories of the remarkable men who were his rivals for the 1860 Republican presidential nomination.”

Not being nearly as gifted as Kearns Goodwin, I still had to answer the question: After nearly 33 years of trench warfare, has the “ground been fully occupied,” or can something new be “gleaned and garnered” about *Roe v. Wade*?

This edition conclusively demonstrates that we were able to plow new ground in a manner that is both user-friendly and able to be an invaluable resource for years to come. If you agree, call us at 202-626-8828 and order additional copies.

The many searching stories in this issue hold *Roe* up to the light of critical examination. There are a number of facets to our thorough examination.

On page 20, we explain what *Roe* and its sinister sister decision *Doe v. Bolton* actually held. This requires unearthing its slipshod historical account and exposing its ludicrously inapt extrapolations from earlier Court decisions.

As Susan Wills’ review of Prof. Joseph Dellapenna’s new book explains, Blackmun was ultra-selective in his investigation of the historical record. Hold Blackmun’s opinion and Dellapenna’s book side by side and Blackmun’s analysis comes across as a painfully embarrassing, shoddy enterprise.

“Truth matters,” Wills writes on page 10. “The entire edifice of U.S. abortion law is constructed on lies and deceptions—lies about when life begins, the scope of ‘privacy’ in the Constitution, the meaning of the Ninth and Fourteenth Amendments, about applicable (but ignored) precedents, and, significantly, about the history of abortion law and practice.”

There are two other reviews of new books which contribute mightily. On page z, Laura Echevarria traces the arc of Justice Sandra Day O’Connor’s abortion jurisprudence. The initial *Akron* decision was promising. Afterwards the line began to flatten out and by the time of the 2000 *Carhart* decision, O’Connor had reversed course and was plugging downward.

A little later Prof. Duncan does an exquisite job of reviewing *What Roe v. Wade Should Have Said*. All the contributors to the volume agree that *Roe* left an awful lot to be deserved, although most “voted” to retain Blackmun’s abomination. Prof. Duncan systematically demolishes the alternative rationales pro-abortionists offer, reinforcing a conclusion we drew years ago: it is difficult indeed to defend the indefensible.

In that same vein, on page 13, I’ve assembled just a few of the many pro-abortion criticisms of *Roe*. No more than most of the contributors to *What Roe v. Wade Should Have Said* are these critics demanding that the decision be demolished. Like one of those houses on *Extreme Makeover: Home Edition*, they want the abortion “right” entirely refurbished, beginning with a new foundation made out of stone, not clay.

Elsewhere, there is an extremely useful categorization of the High Court’s abortion decisions. Rather than just list them chronologically, the cases are divided out by subject matter on pages 11, 14 and 15.

But this edition would have deeply flawed if we hadn’t talked about abortion’s “second victim”: these children’s mothers. There are three stories on consecutive pages which all drive home the same point: abortion kills unborn babies and often maims their mothers.

However, in many ways the most intriguing contribution is made by Prof. Keith Cassidy of the University of Guelph in Canada. Prof. Cassidy offers a profoundly interesting commentary on the roots of both the "pro-choice" and pro-life movements.

I will not steal his thunder. Let me offer just one quotation. "Abortion advocates cannot recognize that the pro-life movement is much closer to the long-standing tradition of Western society than they are," Prof. Cassidy observes. "Thus, they must instead force the movement into what is clearly an utterly inadequate explanatory framework: an anti-feminist backlash by those opposed to gender equality."

The irony is impossible to miss. The heirs of the noblest and noblest [?] traditions are not the self-anointed pro-abortion "progressives," but you and me. Take that, *New York Times* editorial page.

By now you are no doubt eager to start choosing from this smorgasbord of excellent fare. One final thought.

In the past decade, Justice Blackmun's reputation has ebbed and flowed. The most recent contribution is Linda Greenhouse's *Becoming Justice Blackmun*. If you believe this *New York Times* reporter, practically the only thing Blackmun could not do was walk on water.

Others, such as Prof. David Garrow, recently lowered the hammer. In a story that appeared in *Legal Affairs*, Garrow mercilessly ridicules Blackmun, reducing him (in his later years on the court) to little more than a puppet whose strings were pulled by an army of ambitious clerks.

"Blackmun's authorship of *Roe v. Wade* and *Doe v. Bolton* became the signature event of his 24 years on the court," Garrow wrote. "The pair of cases challenging anti-abortion statutes in Texas and Georgia was decided during Blackmun's third term as a justice. Yet even then, Blackmun allowed his clerks to play influential roles not only in drafting the two opinions but also in honing the constitutional standards that made the two cases famous."

But, in the final analysis, so what? Whether the exact words or the precise legal analysis were Blackmun's; whether his initial draft was radicalized by other justices with their own more highly developed pro-abortion agendas; whether he started out primarily defending his buddies in the medical profession, all that ultimately matters is the outcome.

That outcome was/is the deaths of over 45 million unborn babies, the emotional and psychological maiming of their mothers, and a huge rip in the fabric of equal protection for all Americans, including the tiniest. THAT is Harry Blackmun's legacy.

But your legacy is of a different sort. Yours is a work of restoration, of healing, of kindness, of building bridges to those many Americans who know in their hearts abortion is wrong. When the final tally is taken. we need not guess whose contributions will be richly rewarded.