

## Pro-Abortionists Harshly Criticize *Roe*

BY Dave Andrusko

It is no surprise that pro-life commentators and legal analysts skewered *Roe v. Wade's* and *Doe v. Bolton's* tissue-thin legal analyses. But what is more intriguing is the extent to which “pro-choice” analysts have hammered Justice Harry Blackmun’s abominations.

Not that they necessarily—or ever—wanted protective laws restored. Mostly they threw daggers at *Roe/Doe* because the decisions’ patent flimsiness and indifference to the interests of the unborn helped build the Pro-Life Movement. By moving too quickly and without a quasi-plausible legal basis, Blackmun left the “right” to abortion in perpetual jeopardy.

More recently, the motivation is strictly political. Most argue that unrelenting support for *Roe* is an electoral albatross around the neck of Democrats. They are convinced that *Roe's* reversal would provide them with a club to clobber pro-life Republicans.

Below is just a sampling of some old, but mostly newer criticisms from pro-abortionists critical of *Roe/Doe*. We start with the most famous.

Prof. John Hart Ely, *Yale Law Journal* (1973)

“What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-à-vis the interest that legislatively prevailed over it. ... At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.”

Laurence Tribe, *Harvard Law Review* (1973)

“One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”

Justice Ruth Bader Ginsburg, *North Carolina Law Review* (1985)

“*Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the court. ... Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.”

Author (and former Blackmun law clerk) Edward Lazarus, Findlaw.com (October 3, 2002)

“As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible. I say this as someone utterly committed to the right to choose, as someone who believes such a right has grounding elsewhere in the Constitution instead of where *Roe* placed it, and as someone who loved

Roe's author like a grandfather. ...

"What, exactly, is the problem with *Roe*? The problem, I believe, is that it has little connection to the Constitutional right it purportedly interpreted. A constitutional right to privacy broad enough to include abortion has no meaningful foundation in constitutional text, history, or precedent—at least, it *Does* not if those sources are fairly described and reasonably faithfully followed. ...

"In any event, when Democratic senators oppose a judicial appointment because of the nominee's opposition to *Roe*, they not only endorse but make a litmus test out of one of the most intellectually suspect constitutional decisions of the modern era. They practically require that a judicial nominee sign on to logic that is, at best, questionable, and at worst, disingenuous and results-oriented. In doing so, they select not for faithful, but for unfaithful, constitutional interpreters to people the federal judiciary. ...

"This is a strategy with baleful long-term consequences."

Columnist and Prof. Jeffrey Rosen, legal affairs editor, *The New Republic* (February 24, 2003)

"In short, 30 years later, it seems increasingly clear that this pro-choice magazine was correct in 1973 when it criticized *Roe* on constitutional grounds. Its overturning would be the best thing that could happen to the federal judiciary, the pro-choice movement, and the moderate majority of the American people. ...

"Thirty years after *Roe*, the finest constitutional minds in the country still have not been able to produce a constitutional justification for striking down restrictions on early-term abortions that is substantially more convincing than Justice Harry Blackmun's famously artless opinion itself. As a result, the pro-choice majority asks nominees to swear allegiance to the decision without being able to identify an intelligible principle to support it."

Columnist Michael Kinsley, *Washington Post* (November 14, 2004)

"Although I am pro-choice, I was taught in law school, and still believe, that *Roe v. Wade* is a muddle of bad reasoning and an authentic example of judicial overreaching. I also believe it was a political disaster for liberals. *Roe* is what first politicized religious conservatives while cutting off a political process that was legalizing abortion state by state anyway."

Washington Post editorial writer Benjamin Wittes, *Atlantic Monthly* (January/February 2005)

"Still, if *Roe* ever *Does* die, I won't attend its funeral. Nor would I lift a finger to prevent a conservative president from nominating justices who might bury it once and for all.

"Are you a pro-lifer?"

"Not at all. I generally favor permissive abortion laws. And despite my lack of enthusiasm for *Roe*, I wouldn't favor overturning the decision as a jurisprudential matter. ... Still, the liberal commitment to *Roe* has been deeply unhealthy—for American democracy, for liberalism, and even for the cause of abortion rights itself. ...

"[T]he costs of defending *Roe* have grown too high, and I'm just not willing to pay them anymore.

"Do you seriously think that pro-choice liberals could ever come around to your view?"

"Self-confident liberals already would have. A liberal fear of democratic dialogue may make sense

regarding social issues on which the majority is conservative. But it is a special kind of pathology that would rather demand a loyalty oath to a weak and unstable Court decision than make a case before one's fellow citizens on a proposition that already commands majority support. The insistence on judicial protection from a political fight that liberals have every reason to expect to win advertises pointedly how little they still believe in their ability to persuade."

*Slate* columnist William Saletan, *Legal Affairs* (May/June 2005)

"Blackmun's [Supreme Court] papers vindicate every indictment of *Roe*: invention, overreach, arbitrariness, textual indifference."

Columnist Richard Cohen, *Washington Post* (October 20, 2005)

"Abortion is a different matter. It entails so much more than mere birth control—issues that have roiled the country ever since the *Roe* decision was handed down in 1973—and so much more than mere privacy. As a layman, it's hard for me to raise profound constitutional objections to the decision. But it is not hard to say it confounds our common-sense understanding of what privacy is.

"If a Supreme Court ruling is going to affect so many people then it ought to rest on perfectly clear logic and up-to-date science. *Roe*, with its reliance on trimesters and viability, has a musty feel to it, and its argument about privacy raises more questions than it answers. For instance, if the right to an abortion is a matter of privacy then why, asked Princeton professor Robert P. George in the *New York Times*, is recreational drug use not? ...

"Conservatives—and some liberals—have long argued that the right to an abortion ought to be regulated by states. They have a point. ... The prospect of some women traveling long distances to secure an abortion does not cheer me—I'm pro-choice, I repeat—but it would relieve us all from having to defend a Supreme Court decision whose reasoning has not held up. It seems more fiat than argument. ...

"Still, a bad decision is a bad decision. If the best we can say for it is that the end justifies the means, then we have not only lost the argument—but a bit of our soul as well."