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FUELING CONTROVERSY

RANDY BECK*

In a recent *Yale Law Journal* article, Linda Greenhouse and Reva Siegel question the received wisdom that the Supreme Court's decision in *Roe v. Wade* generated a political backlash, inflaming conflict over abortion and damaging the political process.[1] The authors do not deny that *Roe* has served as a lightning rod in the culture wars.[2] The evidence they highlight, though, shows that political conflict over abortion predated the *Roe* opinion, spurred by the Catholic Church and by Republican Party strategists seeking to foster party realignment.[3] This enriched picture of the political and social landscape at the time of the decision undermines any simplistic suggestion that *Roe* served as "the sole cause of backlash"[4] or "single-handedly caused societal polarization and party realignment around the question of abortion."[5]

At the same time, not all critiques of *Roe* based on its consequences for our shared political life are grounded in a simple belief that *Roe* "began conflict over abortion."[6] Greenhouse and Siegel make no mention of perhaps the most famous articulation of the backlash thesis, offered by Supreme Court Justice Ruth Bader Ginsburg, who argued that "[a] less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day . . . might have served to reduce rather than to fuel controversy."[7] Justice Ginsburg recognized that conflict over abortion predated *Roe*, but saw the Court's

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1. Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2030–31 (2011).

2. Greenhouse and Siegel acknowledge that "*Roe* has become nearly synonymous with political conflict," and that "'*Roe*' is now a shorthand reference for positions staked out in long-running debates over gender, religion, and politics." *Id.* at 2030, 2033.

3. *Id.* at 2046–47.

4. *Id.* at 2081.

5. *Id.* at 2073.

6. *Id.* at 2072.

7. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992).

opinion as pouring fuel on the fire.[8] Her position seems immune to the authors' criticism that the backlash narrative discourages vindication of rights through the courts or counsels avoidance of adjudication.[9] Justice Ginsburg embraced the *Roe* litigation and the invalidation of the Texas statute by the Court, criticizing only the breadth of the opinion, which constitutionalized abortion rights far broader than necessary to invalidate either the Texas statute in *Roe*[10] or the Georgia statute at issue in the companion case of *Doe v. Bolton*.[11]

As Greenhouse and Siegel emphasize, "facts matter in any conversation about *Roe* as an exemplar of the possibilities and limits of judicial review."[12] Careful evaluation of the Court's handiwork in *Roe* requires a sophisticated understanding of forces contributing to the abortion conflict, an understanding the authors advance through their research.[13] But such an evaluation also demands a sophisticated understanding of the *Roe* decision itself. The authors tell us much about events prior to the Court's decision in *Roe*, but they say very little about the choices the Justices made in writing the opinion, choices that hampered any stable political resolution of the abortion issue.

Supreme Court files from *Roe* and *Doe* show that Justice Blackmun circulated successive draft opinions staking out three distinct and increasingly expansive positions on the constitutional right to abortion.[14] The Court ultimately gravitated to the most far-reaching of these formulations, recognizing a right to abortion for any reason until the fetus becomes viable (i.e., able to live outside the womb).[15] This viability rule extended constitutional abortion rights through the second trimester of pregnancy, give or take a few weeks.[16] The Court staked

8. *Id.* at 1208.

9. Greenhouse & Siegel, *supra* note 1, at 2086.

10. Randy Beck, *Self-Conscious* Dicta*: The Origins of* Roe v. Wade*'s Trimester Framework*, 51 AM. J. LEGAL HIST. 505, 507–08 (2011) (citing and quoting Ginsburg, *supra* note 7, at 1199).

11. *See* 410 U.S. 179, 201–02 (1973).

12. Greenhouse & Siegel, *supra* note 1, at 2033.

13. *See id.* at 2086.

14. DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 550–51, 580–81, 585–86 (1994); Beck, *supra* note 10, at 515–26 (detailing the development of Justice Blackmun's successive draft opinions).

15. *See* Roe v. Wade, 410 U.S. 113, 163–65 (1973).

16. *See id.*; Greenhouse & Siegel, *supra* note 1, at 2031–32. At Justice Powell's suggestion, the *Roe* majority "extended constitutional protection from the first to the second

out this sweeping constitutional entitlement even though Justices in the majority recognized that resolution of *Roe* and *Doe* did not require an opinion on the duration of abortion rights, an issue neither briefed nor argued by the parties.[17] The Court's unnecessary, unexplained, and almost casual adoption of the viability rule created a regime of abortion rights offering far less potential protection for fetal life than most other countries of the world.[18]

The Court's adoption of the viability rule in *Roe* did not initiate political conflict over abortion, but it did channel and exacerbate the nascent conflict in ways that make a stable resolution difficult to attain. By greatly restricting the range of permissible legislative action, the viability rule disabled legislative bodies from negotiating political compromises like those worked out in other countries. At the same time, the decision facilitated pro-life mobilization, putting abortion rights advocates in the position of defending methods of abortion "susceptible to gruesome description," as Justice Ginsburg once rather delicately framed the matter.[19] While the political system might have adjusted to a more limited constitutional right, *Roe*'s extension of abortion rights through the second trimester of pregnancy created a structural misalignment between constitutional law and popular sentiment, evidenced by significant majorities affirming that second trimester abortions should be presumptively illegal.[20] Absent a fairly seismic shift in public opinion about late-term abortions—something that has not occurred in the nearly four decades since *Roe*—the viability rule made it impossible to enact abortion laws even roughly

trimester of pregnancy, until the point of fetal viability." Greenhouse & Siegel, *supra*, at 2031–32.

17. Beck, *supra* note 10, at 511–12, 516.

18. Randy Beck, Essay, Gonzales*,* Casey*, and the Viability Rule*, 103 NW. U. L. REV. 249, 261–65 (2009) (comparing the United States' abortion rights regime to that of other countries and explaining that "by allowing abortion for any reason until viability, the Court has pushed U.S. abortion law far outside the international mainstream").

19. Stenberg v. Carhart, 530 U.S. 914, 951 (2000) (Ginsburg, J., concurring) (arguing that "the most common method of performing previability second trimester abortions [(the D&E)] is no less distressing or susceptible to gruesome description" than the D&X method at issue in the case). Justice Stevens provided a similar abortion-method comparison in his concurrence, finding no reason to think D&X abortion "is more brutal, more gruesome, or less respectful of 'potential life' than the equally gruesome [D&E] procedure Nebraska claims it still allows." *See id.* at 946 (Stevens, J., concurring).

20. *See infra* notes 61–64 and accompanying text.

approximating the views of a majority of Americans. The result has been an intractable battle over abortion, centered on the future of the Court.

I.

Counsel in *Roe* and *Doe* initially argued their cases to a seven-member Supreme Court, with two seats unfilled.[21] The task of writing opinions was assigned to Justice Blackmun, the Court's newest member.[22] Justice Blackmun's first draft of an opinion in *Roe* would have invalidated the Texas statute on vagueness grounds, rather than on the basis of a constitutional right to abortion.[23] The first draft of *Doe* recognized a constitutional right to abortion, but expressed no opinion as to when in pregnancy a state would have a compelling interest in regulating to protect fetal life.[24] Five Justices (Blackmun, Douglas, Brennan, Marshall, and Stewart) signed onto these opinions, striking down the Texas statute as vague and the Georgia statute as violating an abortion right of unspecified duration.[25] Notwithstanding an insurmountable majority in favor of a constitutional right to abortion, however, the Court accepted Justice Blackmun's suggestion to rehear *Roe* and *Doe* after Justices Powell and Rehnquist joined the bench.[26]

Following reargument, the second draft of *Roe* emerged as the lead opinion recognizing a right to abortion, implementing a suggestion made by Justice Powell.[27] This time, Justice Blackmun specified the temporal

21. GARROW, *supra* note 14, at 524.

22. *Id.* at 473–74, 532–33 (providing background on the appointment of Justice Blackmun to replace Justice Abe Fortas and explaining how Justice Blackmun was assigned the *Roe* and *Doe* opinions).

23. Justice Harry A. Blackmun, First Draft Opinion in Roe v. Wade 15 (May 18, 1972) [hereinafter *Roe* First Draft] (on file with the Harry A. Blackmun Papers, Library of Congress, Box 151, Folder 4); Beck, *supra* note 10, at 517.

24. Justice Harry A. Blackmun, First Draft Opinion in Doe v. Bolton 9–11 (May 25, 1972) [hereinafter *Doe* First Draft] (on file with the Harry A. Blackmun Papers, Library of Congress, Box 152, Folder 7); Beck, *supra* note 10, at 517–18.

25. Beck, *supra* note 10, at 518.

26. Memorandum from Justice Harry A. Blackmun to the Conference, Re: No. 70-18—Roe v. Wade, No. 70-40—Doe v. Bolton 1 (May 31, 1972) [hereinafter Blackmun Memorandum to the Conference, May 31, 1972] (on file with the Harry A. Blackmun Papers, Library of Congress, Box 151, Folder 3); Beck, *supra* note 10, at 518.

27. Justice Harry A. Blackmun, Second Draft Opinion in Roe v. Wade 37–49 (Nov. 22, 1972) [hereinafter *Roe* Second Draft] (on file with the Harry A. Blackmun Papers, Box 151, Folder 6); Beck, *supra* note 10, at 520 (noting the second draft's consistency with Justice

scope of the right, indicating that the state interest in protecting fetal life becomes compelling at the end of the first trimester of pregnancy.[28] He explained this alteration in a cover memorandum accompanying the draft:

> In its present form [the opinion] contains dictum, but I suspect that in this area some dictum is indicated and not to be avoided.
>
> You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.[29]

Less than three weeks later, again due to a suggestion from Justice Powell, Justice Blackmun sought input from his colleagues as to whether the Court should select the first trimester or viability as the controlling line, a decision affecting "the interval from approximately 12 weeks to about 28 weeks."[30] With only Justice Douglas expressing a preference to retain the first-trimester cutoff, and some other Justices favoring a later point in pregnancy, Justice Blackmun's third draft of *Roe* shifted to the viability rule found in the published opinion.[31]

Nothing in *Roe* or *Doe* required the Court to address the duration of

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Powell's suggestion).

28. *Roe* Second Draft, *supra* note 27, at 47. Justice Blackmun wrote as follows:

> We repeat that the State does have an important and legitimate interest in the potentiality of human life and that this interest grows in strength as the woman approaches term. At some point this interest becomes 'compelling.' We fix that point at, or any time after, the end of the first trimester, as the State may determine.

Id.

29. Memorandum from Justice Harry A. Blackmun to the Conference, Re: No. 70-18—Roe v. Wade 1 (Nov. 21, 1972) [hereinafter Blackmun Memorandum to the Conference, Nov. 21, 1972] (on file with the Harry A. Blackmun Papers, Library of Congress, Box 151, Folder 6).

30. Memorandum from Justice Harry A. Blackmun to the Conference, Re: Abortion Cases 1 (Dec. 11, 1972) [hereinafter Blackmun Memorandum to the Conference, Dec. 11, 1972] (on file with the Harry A. Blackmun Papers, Library of Congress, Box 151, Folder 4); Beck, *supra* note 10, at 523.

31. Justice Harry A. Blackmun, Third Draft Opinion in Roe v. Wade 48–49 (Dec. 21, 1972) (on file with the Harry A. Blackmun Papers, Library of Congress, Box 151, Folder 6); Beck, *supra* note 10, at 524–25.

abortion rights in order to strike down either the Texas or Georgia statutes, a point made by a variety of individuals in internal Supreme Court correspondence. Prior to circulation of the initial draft opinions, for instance, Justice Brennan wrote privately to Justice Douglas:

> I would deny any such [compelling State] interest in the life of the fetus in the early stages of pregnancy. On the other hand, I would leave open the question of when life 'is actually present'—whether there is some point in the term before birth at which the interest in the life of the fetus does become subordinating.[32]

The first draft of the *Doe* opinion pursued an approach similar to that privately endorsed by Justice Brennan, stating, "Except to note that the State's interest grows stronger as the woman approaches term, we need not delineate that interest with greater detail in order to recognize that it is a 'compelling' state interest."[33] After Justice Blackmun incorporated a first-trimester cutoff in the second draft of *Roe*, one of Justice Powell's law clerks noted that "[s]ince the statutory prohibition [in Texas] was total," it was "unnecessary to the result that we draw the line."[34] Justice Powell then made the same point to Justice Blackmun: inquiring whether viability might serve as a better line than the first trimester "if we conclude to designate a particular point of time," he acknowledged that "[o]f course, it is not essential that we express an opinion as to such a date."[35]

Since it was unnecessary for the Court to address the duration of abortion rights in *Roe* and *Doe*, Justices in the majority understood that language on this issue appearing in the opinions would constitute dictum. In his memorandum suggesting that the abortion cases be reargued, Justice Blackmun asked whether the Court should go further

32. Memorandum from Justice William J. Brennan, Re: Abortion Cases 9 (Dec. 30, 1971) (on file with the William J. Brennan Papers, Library of Congress, Box I:285, Folder 9); Beck, *supra* note 10, at 516–17.

33. *Doe* First Draft, *supra* note 24, at 11. The referenced copy of this opinion from Justice Blackmun's files includes the word "perhaps" written by hand before the phrase "grows stronger as the woman approaches term." *See id.*

34. *See* David J. Garrow, *Revelations on the Road to* Roe, AM. LAW., May 2000, at 80, 82; Beck, *supra* note 10, at 521.

35. Letter from Justice Lewis F. Powell, Jr., to Justice Harry Blackmun, Re: Abortion Cases 1–2 (Nov. 29, 1972); Beck, *supra* note 10, at 522.

than it had in the initial drafts: "Should we spell out—although it would then necessarily be largely dictum—just what aspects are controllable by the State and to what extent?"[36] As already noted, the cover memorandum accompanying the second draft of *Roe* acknowledged the inclusion of dictum in the opinion and then immediately called attention to the adoption of a first-trimester cutoff point.[37] A few weeks later, Justice Stewart commented on this second draft:

> One of my concerns with your opinion as presently written is the specificity of its dictum—particularly in its fixing of the end of the first trimester as the critical point for valid state action. I appreciate the inevitability and indeed wisdom of dicta in the Court's opinion, but I wonder about the desirability of the dicta being quite so inflexibly "legislative."[38]

Justice Stewart made explicit what had been implied in Justice Blackmun's cover memorandum, that the dicta incorporated in the second draft of *Roe* included the language specifying the duration of abortion rights.

A number of scholars have noted that the opinion in *Roe* literally offered *no* justification for adopting the viability rule[39]—an omission the Court has yet to persuasively rectify.[40] The *Roe* Court did venture a conclusory reference to "logical and biological justifications" for state regulation after viability, but made no effort to spell out those justifications or show their significance for constitutional purposes.[41]

36. Blackmun Memorandum to the Conference, May 31, 1972, *supra* note 26, at 2; Beck, *supra* note 10, at 518.

37. *See supra* text accompanying note 29.

38. Memorandum from Justice Potter Stewart, Re: Abortion Cases (Dec. 14, 1972) (on file with the Harry A. Blackmun Papers, Library of Congress, Box 151, Folder 8); Beck, *supra* note 10, at 525.

39. *See, e.g.*, Beck, *supra* note 18, at 267–70; Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 96 & n.171 (1995); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973); Nancy K. Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 YALE L.J. 639, 644, 664 (1986); Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 4–5 (1973).

40. Beck, *supra* note 18, at 267, 271–79 (demonstrating the lack of "principled justification for the viability rule").

41. Roe v. Wade, 410 U.S. 113, 163 (1973). John Hart Ely pinpointed the problem in his classic response to the *Roe* opinion: "Exactly why [viability] is the magic moment is not made

The Court's internal deliberations on the duration of abortion rights likewise seem sparse given the importance of the interests at stake. After explaining his initial selection of the first-trimester cutoff, Justice Blackmun offered some thoughts about viability as a possible line:

> Viability, however, has its own strong points. It has logical and biological justifications. There is a practical aspect, too, for I am sure that there are many pregnant women, particularly younger girls, who may refuse to face the fact of pregnancy and who, for one reason or another, do not get around to medical consultation until the end of the first trimester is upon them or, indeed, has passed.[42]

Justice Marshall echoed the latter point, expressing concern about "the difficulties which many women may have in believing that they are pregnant and in deciding to seek an abortion."[43] From the available records, this argument that some women have difficulty facing the fact of pregnancy appears to be the most explicit ground provided to the Court for favoring the viability rule over the first trimester.[44] The

clear . . . . [T]he Court's defense seems to mistake a definition for a syllogism." Ely, *supra* note 39, at 924.

42. Blackmun Memorandum to the Conference, Dec. 11, 1972, *supra* note 30, at 1; Beck, *supra* note 10, at 523.

43. Memorandum from Justice Thurgood Marshall, Re: Abortion Cases (Dec. 12, 1972) (on file with the Harry A. Blackmun Papers, Library of Congress, Box 151, Folder 4) ("Given the difficulties which many women may have in believing that they are pregnant and in deciding to seek an abortion, I fear that the earlier date may not in practice serve the interests of those women, which your opinion does seek to serve."). Justice Powell made a similar point in a private memorandum to Justice Blackmun that apparently was never sent. *See* Garrow, *supra* note 34, at 83 ("[T]he women who most need the benefit of liberalized abortion laws are likely to be young, inexperienced, unsure, frightened and perhaps unmarried." (quoting Justice Powell)).

44. Justice Blackmun's memorandum also contended that "few could argue, or would argue, that a state's interest by the time of viability, when independent life is presumably possible, is not sufficiently developed to justify appropriate regulation." *See* Blackmun Memorandum to the Conference, Dec. 11, 1972, *supra* note 30, at 1. I have argued elsewhere that the assertion the fetus is "independent" of the mother at viability fails to provide a principled constitutional justification for the viability rule. *See* Beck, *supra* note 18, at 273–76. Justice Powell's private memorandum to Justice Blackmun inquiring about the possibility of changing the controlling line from the first trimester to viability also quoted dicta from Judge Newman's opinion for the Second Circuit in *Abele v. Markle* to the effect that "the state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than

argument did not make its way into the published opinion in *Roe*.

That some women remain unaware of pregnancy for a period of time does not provide a principled constitutional justification for the viability rule. Justices Blackmun and Marshall presumably feared that some women would not learn of pregnancy until the end of the first trimester or beyond, potentially depriving them of the opportunity to obtain an abortion under a first-trimester cutoff.[45] However, viability—the ability of the fetus to survive outside the womb—has no logical connection to a woman's consciousness of pregnancy; many women are aware of pregnancy long before fetal viability, and there may be unusual cases where a woman with a viable fetus does not yet know she is pregnant. Just as *Roe*'s public defense of the viability rule "seem[ed] to mistake a definition for a syllogism,"[46] the Court's internal deliberations expose the viability rule as an enormous non sequitur. Even if one believes the right to abortion should extend beyond the first trimester in a case where a woman remains unaware of pregnancy, this seems a remarkably weak rationale for the Court's decision to expand constitutional abortion rights *in all cases* from "approximately 12 weeks" (the first trimester) "to about 28 weeks" (viability).[47] The fact that some women have difficulty acknowledging a pregnancy provides no reason to deny state regulatory power throughout the second trimester with respect to those conscious of pregnancy from an early stage.

The Court's failure to identify an adequate ground for the viability rule, either in the opinion itself or in its internal deliberations, may be attributable to the posture of the litigation. Since the duration of abortion rights was not at issue in *Roe* or *Doe*, the parties did not brief or argue the question, nor did they prepare a record designed to assist

the interest in preventing the abortion of a fetus that is not viable." *See* Letter from Justice Lewis F. Powell, Jr., Re: Abortion Cases, *supra* note 35, at 1 (quoting Abele v. Markle, 351 F. Supp. 224, 232 (D. Conn. 1972)). Justice Blackmun's memorandum to the entire Court seeking input on the durational issue did not include this argument, but it did reference Judge Newman's opinion. *See* Blackmun Memorandum to the Conference, Dec. 11, 1972, *supra* note 30, at 2. On the idea of "general acceptance" as a justification for the viability rule, see Randy Beck, *The Essential Holding of* Casey*: Rethinking Viability*, 75 UMKC L. REV. 713, 732–34 (2007); *see also infra* notes 61–64 and accompanying text (discussing polling data showing that a supermajority of Americans believe second trimester abortions should be presumptively illegal).

45. *See* Memorandum from Thurgood Marshall, *supra* note 43.

46. *See* Ely, *supra* note 39, at 924.

47. *See supra* note 30 and accompanying text.

the Court in addressing the durational problem.[48] If the Court had waited for a case in which the duration of abortion rights actually affected the validity of a statute, the parties might have prepared a record specifically addressing matters such as when most women learn about pregnancy and what percentage remain unaware of their condition after the first trimester.[49] The briefs could have debated the significance of such data for the validity of a particular statute, as well as other relevant questions the Justices failed to consider. Instead, Justices Blackmun and Marshall were reduced to speculation about essentially empirical questions.

Justice Blackmun confessed in connection with *Roe*'s second draft that he considered drawing the line at the first trimester "arbitrary," but that drawing it at quickening or viability would perhaps be "equally arbitrary."[50] The Court's unjustified decision to extend abortion rights to the point of viability seems difficult to square with the description of the Court's role offered by the three-Justice plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*: "Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw."[51] This account of proper adjudication appears, ironically enough, as part of the *Casey* plurality's explanation for retaining *Roe*'s viability rule.[52]

II.

We typically resolve political disagreements in this country through democratic participation in electoral and legislative processes. Citizens campaign and vote for candidates who represent their views and elected representatives then negotiate political compromises. People dissatisfied with those compromises may seek redress in later electoral cycles or legislative sessions, but the process often reaches a point of equilibrium when many of those pursuing a disputed question acquiesce in the prevailing resolution, either because a better resolution seems unattainable or because more pressing issues take precedence. When

48. Beck, *supra* note 10, at 511–12, 528.
49. *Id.* at 528.
50. *See* Blackmun Memorandum to the Conference, Nov. 21, 1972, *supra* note 29.
51. 505 U.S. 833, 870 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).
52. *See id.* at 869–70; Beck, *supra* note 18, at 271–72.

courts read the Constitution to conclusively resolve a contested issue, however, legislators lose the ability to negotiate a different resolution in the lawmaking process.[53] Thus, when *Roe* extended constitutional abortion rights through the second trimester of pregnancy, the Court deprived legislators of the power to craft political compromises on the central issues in the abortion controversy. Lawmakers could still act on peripheral and less consequential matters,[54] but the viability rule withdrew the most important questions in the abortion conflict from the legislative domain.[55]

In adopting the viability rule, the Court made an enduring resolution of the abortion conflict difficult to attain. The rule foreclosed the sorts of political compromises that have found favor in the majority of the world's political systems. In at least two significant respects, *Roe*'s viability rule offers less potential protection for fetal life than most of the nations of the world.[56] First, the majority of nations limit the grounds upon which an abortion can be obtained.[57] Reasons vary from country to country, with some very restrictive and others more permissive, but a significant majority of nations regulate the permissible grounds for an abortion.[58] *Roe*, by contrast, has been understood to

53. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."); City of Boerne v. Flores, 521 U.S. 507, 516 (1997). As Jeremy Waldron has argued, "[w]hen a principle is entrenched in a constitutional document, the claim-right (to liberty or provision) that it lays down is compounded with an immunity against legislative change." Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 27 (1993). The result of according the right constitutional status, therefore, is "a disabling of the legislature from its normal functions of revision, reform and innovation in the law." *Id.*

54. *See, e.g.*, Lambert v. Wicklund, 520 U.S. 292, 293 (1997) (per curiam) (upholding parental notification requirement prior to minor's abortion, subject to judicial bypass); Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding denial of funding for abortions); Roe v. Wade, 410 U.S. 113, 164–65 (1973) (permitting proscription of abortion "subsequent to viability" with exceptions for the mother's life and health).

55. The Court indicated a few years ago that approximately 1.3 million abortions are performed annually in this country, with 85%–90% taking place in the first trimester and most of the remainder performed in the second trimester. Gonzales v. Carhart, 550 U.S. 124, 134–35 (2007).

56. *See* Beck, *supra* note 18, at 261–65.

57. CTR. FOR REPRODUCTIVE RIGHTS, THE WORLD'S ABORTION LAWS 1–2 (2009), *available at* http://fidakenya.org/wp-content/uploads/2011/03/Worlds-Abortion-Laws-2009.pdf; Beck, *supra* note 18, at 263–64.

58. CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 57, at 1–2; Beck, *supra* note 18, at 264.

forbid such regulations prior to viability. Second, nations that permit abortion without restriction as to the reason generally limit the exercise of abortion rights to a much shorter time period than *Roe*, usually twelve weeks or less.[59] Only a small handful of countries recognize an unrestricted right to abortion to the point of viability or beyond.[60]

Not only has the viability rule barred political compromises accepted in most other countries, but, more importantly, it has guaranteed a regime of abortion rights substantially out of alignment with public sentiment in this country. In recent polling by the Gallup organization, respondents were asked whether "abortion should generally be legal or generally illegal during each of the following stages of pregnancy."[61] When asked about the "[f]irst three months" of pregnancy, a sizable 62% to 35% majority expressed the opinion that abortion should be legal.[62] The numbers reversed, however, when asked about the second trimester. Respondents answered by an even larger 71% to 24% majority that abortion should generally be illegal during the "[s]econd three months" of pregnancy.[63] These numbers, consistent with prior polling on the issue, indicate that approximately seven out of ten Americans believe the second-trimester abortions shielded by *Roe*'s viability rule should be presumptively illegal.[64] It is not just committed

59. CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 57, at 1–2; Beck, *supra* note 18, at 264.

60. CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 57, at 1–2; Beck, *supra* note 18, at 264.

61. Lydia Saad, *Common State Abortion Restrictions Spark Mixed Reviews*, GALLUP (July 25, 2011), http://www.gallup.com/poll/148631/common-state-abortion-restrictions-spark-mixed-reviews.aspx.

62. *Id.* Three percent of respondents selected "it depends" and one percent offered "no opinion." *Id.*

63. *Id.* (3% selected "it depends" and 2% offered "no opinion"). During the "[l]ast three months" of pregnancy, 10% of respondents thought abortion should generally be legal and 86% thought it generally should be illegal. *Id.*

64. The chart below shows representative (percentage) results from various Gallup polls on the issue of whether second trimester abortions should be legal or illegal:

	Legal	Illegal	Depends	No opinion
Apr. 2000	24	69	4	3
Jan. 2003	25	68	4	3
Jan. 2006	25	68	-	7
July 2011	24	71	3	2

pro-lifers who take that position. The data suggests that a third or more of the public supports abortion rights in the first trimester, but wants to see significant legal restrictions in the second trimester, restrictions declared out of bounds under *Roe*'s viability rule.[65]

By protecting abortions that many Americans find distressing, the viability rule has fostered pro-life mobilization.[66] In the debate over "partial-birth abortions," a significant popular majority responded to vivid descriptions of the "dilation and extraction" (D&X) or "intact dilation and evacuation" (intact D&E) method used in a small percentage of second- and third-trimester abortions.[67] In opposing a federal ban on the procedure, the dissenting Justices in *Gonzales v. Carhart* argued that the much more common "D&E by dismemberment"[68]—employed in most second-trimester abortions—is "equally gruesome," making it irrational to forbid one procedure and not the other.[69] When even those who most strongly support constitutional protection for second-trimester abortions acknowledge that the prevailing method can be characterized as "brutal,"[70] it does not

See Saad, *Common State Abortion Restrictions Spark Mixed Reviews*, *supra* note 61; Lydia Saad, *Abortion Views Reviewed as Alito Vote Nears*, GALLUP (Jan. 20, 2006), http://www.gallup.com/poll/20983/abortion-views-reviewed-alito-vote-nears.aspx; Lydia Saad, *Americans Agree with Banning "Partial-Birth Abortion,"* GALLUP (Nov. 6, 2003), http://www.gallup.com/poll/9658/americans-agree-banning-partialbirth-abortion.aspx; Lydia Saad, *Americans Walk the Middle Road on Abortion*, GALLUP (Apr. 10, 2000), http://www.gallup.com/poll/3016/americans-walk-middle-road-abortion.aspx.

65. *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973).

66. *See* Ann MacLean Massie, *So-Called "Partial-Birth Abortion" Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301, 378–79 (1998) (claiming opponents of D&X abortions rely on "the shock value of the physical description of the procedure . . . in garnering support for their position").

67. The July 2011 Gallup poll found a 64%–31% split in favor of a law "which would make it illegal to perform a specific abortion procedure conducted in the last six months of pregnancy known as a 'partial birth abortion,' except in cases necessary to save the life of the mother." *See* Saad, *Common State Abortion Restrictions Spark Mixed Reviews*, *supra* note 61; *see also* Saad, *Americans Agree with Banning "Partial-Birth Abortion," supra* note 64.

68. Gonzales v. Carhart, 550 U.S. 124, 178 (2007) (Ginsburg, J., dissenting) (using term "D&E by dismemberment" to refer to standard D&E procedure).

69. *Id.* at 182 ("[T]he notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational." (quoting Stenberg v. Carhart, 530 U.S. 914, 946–47 (2000) (Stevens, J., concurring))).

70. *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting) ("Nonintact D&E could equally be characterized as 'brutal,' . . . involving as it does 'tear[ing] [a fetus] apart' and 'ripp[ing] off' its limbs." (quoting majority opinion)).

seem surprising that the pro-life movement has persuaded many citizens to make abortion a voting issue. *Roe*'s supporters have also been forced to defend difficult ground in connection with the reasons for terminating a pregnancy. Under the traditional reading of the viability rule, parents who want a male child, rather than a female,[71] or who do not want a child with a cleft palate,[72] have just as much right to a pre-viability abortion as a woman whose life is endangered by a pregnancy.

Greenhouse and Siegel doubt that *Roe* can be accused of shutting down politics with respect to abortion.[73] Certainly, *Roe* did not prevent people passionate about abortion from engaging in political activity based on their convictions. But *Roe*'s viability rule did disable legislators from negotiating a middle ground on the issue, barring the compromises that have been worked out in other countries. It entrenched the second-trimester abortions that a supermajority of Americans believe should be presumptively illegal, and channeled abortion-related political activity into national venues.

Even for a Court committed to a constitutional right to abortion, things need not have turned out the way they did. Imagine that instead of embracing the viability rule, the Supreme Court's initial opinion recognizing a right to abortion had looked more like the first draft of *Doe* (a right of unspecified duration) or even the second draft of *Roe* (a right during the first trimester).[74] No doubt there always would have been some people (this author included) who thought the Court's decision inconsistent with a fair reading of the text of the Due Process

71. *See* William Saletan, *Fetal Subtraction: Sex Selection in the United States*, SLATE (Apr. 3, 2008), http://www.slate.com/id/2188114/ (discussing statistical evidence that sex-selection abortions occur in the United States).

72. Health service officials in the United Kingdom were recently forced to disclose information on late term abortions. The data revealed that, in 2010, seven abortions were carried out in England and Wales before twenty-four weeks because of cleft lip and palate. *Court Ruling Prompts Late Abortion Data Release*, BBC (July 4, 2011), http://www.bbc.co.uk/news/health-14015096; *see also* Simon Caldwell, *Baby that Survived Botched Abortion Was Rejected for Cleft Lip and Palate*, THE TELEGRAPH (Apr. 29, 2010), *available at* http://www.telegraph.co.uk/news/worldnews/europe/italy/7652889/Baby-that-survived-botched-abortion-was-rejected-for-cleft-lip-and-palate.html.

73. Greenhouse & Siegel, *supra* note 1, at 2032 ("The backlash narrative conventionally identifies the Supreme Court's decision as the cause of polarizing conflict and imagines backlash as arising in response to the Court repressing politics . . . . [However,] the history that we examine shows how conflict over abortion escalated through the interaction of other institutions before the Court ruled.").

74. *See Doe* First Draft, *supra* note 24, at 9–11; *Roe* Second Draft, *supra* note 27, at 47.

Clause. But the political aftermath of the opinion would likely have played out very differently. Political conflict over abortion would have been fragmented into smaller, more localized clashes. Greater legislative flexibility to address the abortion conflict might have prompted the emergence of a diversity of positions on the issue and would have permitted state-specific compromises acceptable to a majority of state citizens (subject to some constitutional minimum enforced by the courts).[75] Instead, the Supreme Court unwisely and unnecessarily locked in place the existing constitutional protection for most second-trimester abortions, a rule out of step with public sentiment and inconsistent with international standards. The result has been a long-running conflict over the future of the Court with major consequences for electoral politics.

III.

One can critique *Roe* based on its consequences for our political life without drawing the lesson Greenhouse and Siegel fear from the backlash narrative, "that adjudication inevitably causes political conflict and polarization and is thus to be avoided at all cost."[76] The experience with *Roe* could instead teach a lesson about the virtue of judicial minimalism.[77] Unnecessary and expansive dictum, issued without briefing or argument, without a record prepared for the purpose, and without adequate explanation, may generate unforeseen consequences harmful to our political system. How different our constitutional and

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75. Greenhouse and Siegel argue that pro-life activists would not have been satisfied with a more circumscribed right to abortion:

> The fervent minority who entered politics to work against abortion rights before and after *Roe* sought criminalization and were not willing to settle for less. To those who believe that abortion is murder, there is no middle ground; it makes no difference whether a judicial or legislative decision permits abortion up to twelve weeks' gestation or twenty.

Greenhouse & Siegel, *supra* note 1, at 2074 n.163. But controversial issues can reach relatively stable political resolutions even if a significant minority of the population finds the outcome unsatisfactory. A less ambitious *Roe* opinion would have permitted legislative compromises that could gain majority support among citizens, even if activists on both sides objected.

76. Greenhouse & Siegel, *supra* note 1, at 2086.

77. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at ix (1999) ("A minimalist court settles the case before it, but leaves many things undecided.").

political history might have been if Justice Blackmun had been satisfied with a minimalist resolution of *Roe* and *Doe*, rather than aspiring to "spell out" in the Court's first substantive opinions on abortion rights "just what aspects are controllable by the State and to what extent."[78]

78. *See supra* text accompanying note 36.