

Roe Über Alles

William Murchison

Our time, this moment we all inhabit with varying degrees of appreciation, is—I was on the verge of saying “about as nutty” a time as anyone can remember experiencing or reading about. For the sake of a vanishing cultural ideal, i.e., civility, suppose we change “nutty” to “morally ambiguous.” It likely comes to the same thing in the end.

I write a mere month or so after the controversial nomination of Judge Samuel Alito to the U. S. Supreme Court, which event followed the controversial and failed nomination of Harriet Miers to the U. S. Supreme Court, which event in turn succeeded the controversial if ultimately successful nomination of John Roberts to the chief justiceship of the United States. As I write, the Senate Judiciary Committee waits with fungo bats and brass knucks for Alito to enter its lair. I’ve no idea, nor has anyone else, how this business will conclude—with Alito’s Senate confirmation or his humiliation and eventual replacement by someone else. I’ve ample idea as to the tenor and tone of the examination process: loud, rude, rancorous, divisive, bitter, partisan, disfiguring, melodramatic, mendacious. Have I left out anything?

Any rearview mirror into which we look will show us the pure loopiness of the situation. When Potter Stewart was named to the High Court, in 1958, were Americans inspired to go at each other’s throats over the suitability of such a choice? No. What about, a decade later, the nomination of Lewis Powell? How many outside the Beltway gave the matter more than civic-minded attention? The moment of course was quite different from this present one. The nation’s highest court had not yet taken up, much less adjudicated, the claimed constitutional right to expel from the womb a commodity known by various contrasting names: “fetus,” “product of conception,” “unborn baby.”

Whereas the whole range of Stewarts and Powells passed muster on the basis of brains and political backing, today we want to know just one thing about a Supreme Court nominee: Where does he come down on *Roe v. Wade*? A Supreme Court nomination these days isn’t about things like brains and integrity. It’s about abortion. Which means, if you back away farther and gaze, it’s about us, and the culture in which we live. If you call it “culture.”

We get our national work done through unanimous acceptance of our written constitution. How we understand that document seems nowadays to

William Murchison is Radford Distinguished Professor of Journalism at Baylor University.

depend on how we react to, or analyze, the handiwork of seven Supreme Court justices, every one of them dead now. Do we proclaim the handiwork of *Roe v. Wade*'s 7-2 majority to be the essence of American jurisprudence? Or do we castigate the decision and seek its reversal? Such are the questions with which we wrestle, and will continue to wrestle, whether or not Samuel Alito ever joins the court on which they formerly sat.

It's all about *Roe*. Up to a point at least.

A *Wall Street Journal* story Nov. 1, 2005, called abortion "the crucible of American judicial politics." Only a couple of days earlier, the chairman of the Senate Judiciary Committee, Pennsylvania's Arlen Specter, said of the Alito nomination, "The topic which dominates the discussion, as we all know, is a woman's right to choose." The liberal interest group, People for the American Way, was taking no chances on this one. So soon as the nomination came down, PAW's Ralph G. Neas made known that "Replacing a mainstream conservative like Justice [Sandra] O'Connor with a far-right activist like Samuel Alito would threaten Americans' rights and legal protections for decades." NARAL Pro-Choice America quickly handed down its own verdict: "Alito's confirmation could shift the Court in a direction that threatens to eviscerate the core protections for women's freedoms guaranteed by *Roe v. Wade*, or overturn the landmark decision altogether." Stop him! Stop him at once! The *New York Times* weighed in a couple of weeks later: "[T]here is reason to believe that Judge Alito could do significant damage to values Democrats have long stood for." Still later, the *Times* figured out that Alito is "an ideologue," navigating "far outside the legal mainstream." Sen. Ted Kennedy—remembered for prophesying the end of nearly everything should Robert Bork take a seat on the Court—characterized Alito's known views as "extremely troubling."

At least two women who serve in the Senate—California's Dianne Feinstein, a Democrat and Judiciary Committee member; and Maine's Susan Collins, a nominal Republican—served notice of their readiness to vote against Alito should they come to believe he truly questions *Roe*'s legitimacy.

Not all the gnashing of teeth proceeds from contemplation of *Roe*. Alito's critics—like the critics of Roberts and Meirs, who are in fact the same critics—raise related questions, such as where is the nominee on civil rights? What are his obligations, if any, to the "Christian right?" Would his religious faith ever blind him to secular needs and concerns? Yet, when the critics talk of these matters, it is more often than not in an everyday voice. When *Roe* comes up, that is when veins bulge and menace creeps into the intonation. We are made to know, hardly for the first time, that *Roe* is the big enchilada—the idea around which rotate all other ideas. In a perverse way it may be.

How we got to this point requires some figuring. That's what I want to do here—figure.

Let's start with a *Wall Street Journal* editorial which addressed the question last November. *Roe v. Wade*, said the *Journal*, “in one fell judicial swoop, took this deeply divisive social issue out of the hands of voters and their elected legislators. The year was 1973. The consequences have distorted American law and politics ever since.” *Roe* “stopped democracy cold. Without *Roe*, we likely would have had a decade or so of political battles in 50 state legislatures. Our guess is that we would have ended up with a rough consensus close to where every poll shows the American public stands on abortion: Legal in the first trimester, with restrictions later in pregnancy and provisions for parental and spousal notification.” The *Journal* quotes Watergate prosecutor Archibald Cox as likening the Court's behavior to that of “a body of Platonic Guardians, charged with bringing the Constitution up to date . . . without regard to the past or the long-run sentiment of the people.”

So far, so good. I think the *Journal* is right factually—in spite of the wrench one feels upon acknowledging substantial public sentiment for any kind of abortion. Nor, I might add, is there anything unusual about defending spiritedly whatever legal or constitutional gain has come one's way. One might not enjoy imagining one's self a board member of NARAL, but if one happened to be such, and saw out of the corner of the eye an emerging threat to the maintenance of hard-won privilege—well, the sight might terrify. Certainly it would scandalize. One might have to take decisive action: as, come to think of it, various Southerners acted variously to thwart the advance of civil rights as promoted by the Supreme Court in the two decades following *Brown v. Board of Education*. I think we need to acknowledge, if not necessarily to appreciate, this cast of mind.

All this fails nonetheless to account fully for the outpourings of, I think, genuine horror at the notion that abortion policy might end up some day in the hands of state legislators. No choice as to abortion? Sen. Feinstein and the *New York Times* both suggest, without exactly saying so, that things don't get much worse than that. Never mind how smart and honest and capable Sam Alito might be, and never mind the growing incapacity of American politicians to be fair and civil. None of this seems to matter, as against the maintenance in constitutional law of *Roe v. Wade* and the right to abortion.

If you cared to throw some familiar language in the general direction of *Roe*'s defenders, you might venture that *Roe* has become for them 1) an “ideology,” defended by “ideologues” and 2) “a litmus test” in political terms. That is because it has become both.

An ideology is a human construct—communism, fascism, Islamic

jihadism, etc.—around which the whole of life is organized. The Big Idea (Aryans trump Jews, Moslems trump Jews, vegetables trump meat, negotiations trump precision-guided missiles, etc., etc.) is kept on constant display for the edification of wan-faced worshippers. Only, don't think to argue with the worshippers. What would the point of that be? They're right, and you're wrong. No more needs saying. So shut up. That is how ideology triumphs and stays triumphant—through closing off variant viewpoints.

Modern liberals often refer to conservatism as ideology—a habit the late Russell Kirk strongly discouraged. Conservatism, Kirk liked to say, is the negation of ideology, valuing that which grows without benefit of blueprint; a living organism, like pre-Katrina New Orleans; illogical, untidy, with rough, splintery edges. All the more lovable for it, too. As firmly as pro-life people defend the value of unborn human life, they do so in deference either to divine mandate or to a human sensibility that no human has devised, rather just understood, without prompting. It is the sensibility—odd and grating as it may seem to the coldly rational—that Life is good. Good, even when damaged or soiled or stained.

The second term, “litmus test,” reeking of the science lab, hints likewise at a priority of values—with a bit more, but not too much, room for competing notions. The litmus paper, when dipped in solution, tells all: A thing is either acidic or it's basic. Once we know which, we know how to proceed.

So with a Supreme Court nominee facing confirmation in these times, when the ideology of *Roe v. Wade* is under sustained and serious assault at the judicial level. How does the nominee look when litmused? Will he uphold *Roe v. Wade*, or will he vote to reject it? Will he—getting right down to it—provide the vote that makes the difference, one way or the other, on a closely divided Court? That is what the *Roe* ideologues want to know. It is, from their perspective, what they *need* to know. You don't suppose, do you, they would go along with the seating of a justice likely to challenge the ideological order of things? When hell freezes over, they might.

Thus the proponents of *Roe* don't really care, deep down, where a nominee for Supreme Court went to law school or what grades he made there; whether he was law review or what judge he later clerked for; what posts afterwards came his way or what honors he won, what praises of his integrity and brains have resounded through courthouse corridors. All day long you could trumpet his character, intelligence, and prospects for citizenship in heaven. Still, what you want—what you *need*—to know is where the nominee stands on *Roe v. Wade*. Would he or wouldn't he try to destroy it?

That is partly because *Roe*, in addition to being a litmus test, is a code

phrase. The energy a judge sends off, when it comes to *Roe*, lights up other corners of his mind. A judge amenable to overturning *Roe* might oppose other projects of the blue-state elite—assisted suicide, ridding the public square of religious language and symbolism, etc. By the same token, those projects might escape the censure of someone inclined to let a pregnant woman act, shall we say, in her own interest.

Again, so far, so good in the quest to understand what goes on. No time to stop, though. How ever did a Supreme Court decision become ideology? We need to step back farther still—enlarge the viewing area.

Could it be that for 30 years we have underestimated the profound social changes that 20th-century feminism has wrought? That's my next question.

We thought of feminism, when it came along—or, rather, revived—in the 1970s as just one more expression of grassroots dismay over group repression. What we might call advanced feminism, as distinguished from the quest for greater workplace equality between men and women, closely followed, then overlapped, the national revolt against Jim Crow. It was easy to conflate the two movements, and to sympathize, shyly at least, with both. And so, beginning in the '70s, Americans of both sexes embraced with growing fervor or diffidence the “women's agenda”—the agenda that specific women designed—as if to embrace it were somehow to clamber aboard the freedom train before it left the station.

Feminism's identification with the cause of abortion is like popcorn's identification with salt. “Reproductive freedom” is the ideal—the freedom to “control” the body. As Elizabeth Fox-Genovese noted, a decade ago, “More than any other single issue, support for a woman's right to choose to have an abortion has become the litmus test [that phrase again!] of feminism.”

If, in other words, you oppose abortion, you oppose feminism; if you oppose feminism, you oppose women; if you oppose women, you likely call your wife “babe,” badmouth her cooking, ridicule her makeup, and force her to subsist on an allowance. You're a male chauvinist, in other words; and what Modern Man wants to be that? As Fox-Genovese explains, “[F]or those who defend the woman's right to choose, denial of abortion kills women—either physically through back-alley abortions or spiritually through the curtailment of their autonomy. The struggle thus reduces to a decision in favor of the unborn child or the life of the pregnant woman. Which side are you on?”

A powerful question, yes. Yet the indicated answer—“I'm on the woman's side”—falls short of explaining the passion and venom that a post-*Roe* Supreme Court nomination reliably generates, with all eyes on the outcome. We need to back up farther for the big picture.

So—why the new hands-off-my-bod ideology in the first place? Is it because this whole thing is less about abortion than about sexual freedom? Plain old down-to-earth sex—is that the key (assuming anything about sex is “plain” or “old”)? Sex without consequences. Sex on demand. Sex for a purpose or none at all. Sex on the merest of whims. As one feminist, Joan Williams, puts it: “Like most women of my class, I view an active sexual life as an entitlement.”

There you are—it’s *ours*, and no Supreme Court justice is going to wrest it away in the name of constitutional principle or whatever. Feminism—an intermittent passion whose origins go back at least to the early 19th century—made its late 20th century comeback amid the moral chaos of the ’70s, when younger Americans were asserting the right to pretty much anything: especially to sexual freedom. Anti-war movement, “counterculture,” and “women’s lib” merged neatly as to motive and intended targets for destruction, meaning authority figures of all sorts and descriptions. Whoever trafficked more often in “shoulds” and “oughts” than in “you bets” and “go right aheads” was the kind of person, whether standing at a pulpit or a lectern, or sitting at the family breakfast table, who plainly warranted no serious attention. Hadn’t “authoritarians” of this sort been making life miserable and unequal for centuries? Enough already.

Scarcely had the dew settled on the mid-’60s before this novel (in context) outlook hardened into orthodoxy. Theoretically wise authority figures were spotted wagging their heads acquiescently—either because they agreed with the new orthodoxy or because they understood and feared it too little not to agree. Autonomy became the rage: not just a pose of the alienated (hippies) or those dedicated to the destruction of cultural fences and guard rails (Timothy Leary, Tom Hayden, Herbert Marcuse, etc.).

Now this thing comes together. *Roe v. Wade*, at root level, isn’t about abortion. Or even about sex. It’s about autonomy.

There’s your real ideology. To the familiar ideological watchwords of our times—“*Deutschland über alles*,” “All power to the soviets,” “Make love, not war”—add this one: “It’s all about me.” Yes, little me, the center of the universe. As God withdraws, seemingly, to the periphery of human affairs, unable to compete with current attractions, a good portion of his human handiwork steps forward: asserting, demanding, claiming. “All about me” means a multitude of things: not least, nobody—*nobody*—for any reason whatever, has the right to compromise my physical autonomy, my control of my personal space. Which is *mine*, got that?

Got it. At least the part of it leading to the conclusion that rules are off

and appetite dominates; that to want is to get, or anyway to expect as constitutional entitlement. The elected politician scanning the electorate's wish list quickly sees how much safer and just downright pleasant it is to grant rather than to resist insistent demands. That's especially the case when those demands, rolled up together like a scroll, constitute theology—the Law and the Prophets for 21st century denizens.

You can see maybe—just a bit?—why the political and journalistic glares thrown Sam Alito's way are so strong, so searing; the determination to block his confirmation so powerful (and possibly fruitful by the time this article sees print, though many of us fervently hope otherwise).

Roe über alles—*Roe* first, last, and always—*Roe* as the test of purity and probity—*Roe* as everything there is in life: so wacky this test; so morally off-center. And so modern. So tragically Today.