



Spring 3-1-2014

Why Strive for Balance in a *Roe* Symposium?

Samuel W. Calhoun

Washington and Lee University School of Law, calhouns@wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Constitutional Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Samuel W. Calhoun, *Why Strive for Balance in a Roe Symposium?*, 71 Wash. & Lee L. Rev. 817 (2014).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol71/iss2/7>

This *Roe* at 40: The Controversy Continues is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Why Strive for Balance in a *Roe* Symposium?

Samuel W. Calhoun*

Those who attended this Symposium disagreed in many ways regarding abortion, but I doubt that anyone disagreed with our title, *Roe at 40: The Controversy Continues*. A tiny sampling of the public comments made in January 2013, *Roe*'s actual fortieth anniversary, confirms this fact. University of Chicago Law Professor Geoff Stone described *Roe* as “a triumph of American constitutional law.”¹ On the other hand, New Jersey Congressman Chris Smith labeled *Roe* “infamous, reckless and inhumane.”²

How should one organize a symposium about a subject that evokes such dramatically conflicting points of view? Our principal objective was balance.³ Symposium attendees and the readers of this volume must be the ultimate judges, but I believe that we succeeded.⁴ Why, though, was balance thought to be a worthwhile goal?

* Associate Dean for Academic Affairs and Professor of Law, Washington and Lee University School of Law. Thanks to the Frances Lewis Law Center for its financial support.

1. Geoffrey R. Stone, *Roe at 40!*, HUFFINGTON POST (Jan. 22, 2013, 10:29 AM), http://www.huffingtonpost.com/geoffrey-r-stone/roe-at-40_b_2526350.html (last visited Jan. 28, 2014) (on file with the Washington and Lee Law Review).

2. Eric Tucker, *March for Life 2013: Abortion Opponents March in Washington*, HUFFINGTON POST (Jan. 25, 2013, 11:04 PM), http://www.huffingtonpost.com/2013/01/25/march-for-life-2013_n_2552570.html (last visited Jan. 28, 2014) (on file with the Washington and Lee Law Review).

3. The Symposium program referred to a “commitment to balance” and stated that “[a] distinguishing feature of the ‘*Roe at 40*’ Symposium will be its inclusion of varying perspectives on abortion.” Program, Washington and Lee Law Review, *Roe at 40: The Controversy Continues* (Nov. 7, 2013) [hereinafter Symposium Program] (on file with the Washington and Lee Law Review).

4. In addition to the differing views contained in this volume, the Symposium’s sponsors also reflected balance: American Civil Liberties Union of Virginia, the Frances Lewis Law Center, University Faculty for Life, Virginia National Organization of Women, the *Washington and Lee Law Review*, and the Provost’s Office of Washington and Lee University. *Id.*

Part of the answer comes from the Symposium's venue, Washington and Lee University School of Law, an educational institution. Any conscientious educator believes that delving into a controversial topic requires exposure to a variety of perspectives.⁵ But did we actually think that any Symposium presentations or papers would change anyone's mind on abortion?⁶ Several factors would seemingly have made any such hope unrealistic.

For one thing, the two sides view the abortion issue from radically different perspectives. To pro-choicers, the freedom to choose abortion is integral to a woman's equality, dignity, and liberty—a critical dimension of a woman's right to control her own body.⁷ Moreover, since *Roe*, this freedom to choose is cherished as an indispensable constitutional right.⁸ On the other hand, "[t]o pro-lifers, a woman who chooses abortion does not simply exercise sovereignty over her own body, but also takes the life of another human being. And pro-lifers view the *Roe*-declared constitutional freedom as illegitimate, a usurpation of the right to democratic self-government on the issue of abortion."⁹

5. This should be especially true of educators who are also passionate advocates. Assuming that some teacher-advocates desire to advance their cause through their teaching, there is no better strategy than to ensure that students are exposed to arguments on both sides of divisive topics. This is the only way to foster a new generation of advocates well-equipped not only to critique weaknesses in the other side's position, but also to defend their own views against the strongest possible attacks. Despite these incentives for a teacher-advocate's comprehensively teaching controversial topics, it is challenging to do so fairly. See generally Samuel W. Calhoun, *Impartiality in the Classroom: A Personal Account of a Struggle to Be Evenhanded in Teaching About Abortion*, 45 J. LEGAL EDUC. 99 (1995).

6. The Symposium program stated the "commitment to balance is not intended to suggest that advocates should give up their principled stances It is not expected that attendees will likely change their views." Symposium Program, *supra* note 3.

7. See Stone, *supra* note 1 (noting that Justice Blackmun recognized "pregnancy can be harmful to the physical health of the woman, that unwanted offspring may force upon the woman a distressful life and future, and that bringing a child into a family already unable . . . to care for it can have devastating consequences" (internal quotation marks omitted)).

8. See *id.* (praising *Roe*).

9. Samuel W. Calhoun, *Stopping Philadelphia Abortion Provider Kermit Gosnell and Preventing Others Like Him: An Outcome that Both Pro-Choicers and Pro-Lifers Should Support*, 57 VILL. L. REV. 1, 4 (2012); see also EDWARD P. LAZARUS, *CLOSED CHAMBERS* 360–61 (1998) (describing the pro-life opposition to

In addition to pro-choice and pro-life advocates' diametrically opposing perspectives, some basic characteristics of human nature make it difficult for us to change our minds.¹⁰ All humans are prone to cling to what we want to believe, despite any facts to the contrary. Psychologists refer to such thinking as "motivated reasoning" and "confirmation bias."¹¹ "We start off with what we want to be true, look for evidence that supports our hopes, and screen out that which does not."¹² There is even a physiological aspect to this. Professor Noreena Hertz states that academic literature on decision making reveals that when we humans "find data that supports our hopes[,] we appear to get a dopamine rush similar to the one we get if we eat chocolate . . . or fall in love."¹³

Thus, one would have been justified in concluding that prospects were dim that anything worthwhile would result from the Symposium. But even though the challenges were admittedly great, it would have been a mistake to disband the Symposium at its outset. The very fact that many came to an event publicized as balanced suggested an interest in being exposed to both sides of this complex issue. And after being warned about confirmation bias,¹⁴ those attending the Symposium were hopefully more on guard against humans' natural tendency to immediately reject

Roe from both a moral and legal point of view).

10. Another barrier to altering one's views on abortion is the difficulty of compromise due to the physiology of pregnancy. "To allow abortion will necessarily destroy fetal life, and to protect fetal life by prohibiting abortion will necessarily and significantly restrict a woman's freedom. Thus, it is not surprising that the two sides have settled into a sullen stand-off and often view each other with suspicion, if not hostility." Calhoun, *supra* note 9, at 4.

11. James Graff, *The Week*, THE WEEK, Nov. 1, 2013, at 3, 3.

12. *Id.* A recent essay by Robert Wright cites a 1954 study in which Dartmouth and Princeton students, after watching a rough football game between the two schools, differed radically "about which side had played dirtier." Robert Wright, *Why We Fight—And Can We Stop?*, ATLANTIC MONTHLY, Nov. 2013, at 102, 109. Why? "[T]he problem was that both groups consisted of human beings. As such, they suffered from a deep bias—a tendency to overestimate their team's virtue, magnify their grievances, and do the reverse with their rivals." *Id.* at 109–10.

13. Noreena Hertz, Op-Ed, *Why We Make Bad Decisions*, N.Y. TIMES (Oct. 19, 2013), <http://www.nytimes.com/2013/10/20/opinion/sunday/why-we-make-bad-decisions.html?pagewanted=all&r=0> (last visited Jan. 31, 2014) (on file with the Washington and Lee Law Review).

14. My introductory remarks at the Symposium called attention to this common phenomenon.

anything that deviates from our existing views.¹⁵ Perhaps the same will be true for those reading the various Symposium papers. Even if no minds are changed, Symposium attendees and readers will all be better informed.

But becoming more educated is not the only reason why balance was a core Symposium goal. Another human trait is stereotyping our opponents in unfavorable ways. We all tend to divide the rest of humanity into two main groups: those who agree with us and those who disagree. According to the late Professor Arthur Leff, we are further prone to subdivide the disagreeing group into “the usual residuary categories: ignorance, insanity, and evil.”¹⁶ This negative stereotyping is rampant in the

15. Although, being human, we all no doubt faced the temptation of agreeing wholeheartedly with the concept of confirmation bias, but only as it applied to those on the other side of the abortion debate. *They* are the ones who need to fight against the distorting impact of the bias. *We*, on the other hand, are always careful to take all the facts into account. Mark Twain wrote of this human foible in *Huckleberry Finn*. The Widow Douglas severely criticized Huck for smoking even though “she took snuff . . . of course this was all right, because she done it herself.” MARK TWAIN, *ADVENTURES OF HUCKLEBERRY FINN* 12 (Signet Classics 2008). Robert Wright warns that “if psychology tells us anything, it is to be suspicious of the intuition that the other guys are the problem and we’re not.” Wright, *supra* note 12, at 118.

16. Arthur Allen Leff, *Law and Technology: On Shoring Up a Void*, 8 OTTAWA L. REV. 536, 543 (1976). A recent study helps explain this human tendency, at least for some people. According to Kaitlin Toner and Mark Leary,

Belief superiority—the belief that one’s own viewpoints are notably more correct than other people’s—is tied to political extremism

[P]eople who held more extreme attitudes . . . tended to feel superior about those attitudes, regardless of whether they supported a liberal or conservative position. . . . These findings shed some light on how people become so polarized in their opinions: They do not just take a side, but they also believe everyone who disagrees with that view must be egregiously wrong.

Kaitlin Toner & Mark Leary, *Superiority Complex*, POLITICO MAGAZINE (Dec. 16, 2013), <http://www.politico.com/magazine/story/2013/12/extreme-politicians-who-re-are-moderates-100784.html> (last visited Jan. 31, 2014) (on file with the Washington and Lee Law Review). To the editors of *The Week*, belief superiority not only explains “why so many of today’s intensely partisan pundits, politicians, and even commenters on online articles sound so smugly confident of their views, and so certain that the other side is 100 percent wrong.” *Are Your Political Views Always Right?*, *THE WEEK*, *THE WEEK*, Dec. 27, 2013, at 12, 12. The concept also explains why others’ differing views are sometimes characterized as “evil.” *Id.*

Toner and Leary end their article with a plea for “a little openness to divergent viewpoints and a dose of humility in our politics.” Toner & Leary,

abortion debate.¹⁷ Pro-choicers and pro-lifers commonly view the other side as the enemy with few, if any, redeeming qualities.¹⁸

There are various ongoing efforts to fight this tendency that we all share. One is the Civil Conversations Project, premised in the work of NPR's Krista Tippett.¹⁹ The Project's goal is to help those who disagree on controversial topics put a human face on their opponents so that they would no longer be simply viewed as the "other."²⁰ How does this occur? It occurs by interacting at a basic human level.²¹ This is what Princeton philosopher Anthony Appiah calls "sidling up to difference."²² To Appiah, explicit conversation about points of difference is not the key step. Instead, the indispensable need is for ordinary conversation on the common things of life, like the Super Bowl or each other's favorite football team.²³ Appiah urges us to seek out ordinary discourse with those with whom we disagree.²⁴

supra. "[A]ll of us would do well to try to understand why our political opponents hold the positions they do. It may be that they truly are the un-American morons we suspect them to be. Our guess, however, is that we will be surprised by how much we find in common." *Id.*

17. See Calhoun, *supra* note 5, at 102–03 (discussing stereotypes and polarization in the abortion debate, which was an expectation of students in his seminar).

18. See *supra* note 10 (noting that the two sides of the abortion debate are often hostile towards one another).

19. See Krista Tippett, *The Civil Conversations Project*, ON BEING, <http://www.onbeing.org/ccp> (last visited Jan. 23, 2014) (highlighting recent episodes of the project and briefly describing what the project does) (on file with the Washington and Lee Law Review).

20. See *Krista Tippett on Civil Conversations*, MPR NEWS (Sept. 13, 2012, 11:15 AM), <http://minnesota.publicradio.org/display/web/2012/09/13/daily-circuit-krista-tippett-civil-conversations> (last visited Apr. 15, 2014) (discussing the civil conversations project, how it came about, and what purpose it serves) (on file with the Washington and Lee Law Review).

21. See *id.* (describing Ms. Tippett's approach as encouraging people to relate on an everyday human level before starting a conversation about contentious issues).

22. Krista Tippett, *Kwame Anthony Appiah on Sidling Up to Difference: Social Change and Moral Revolutions*, ON BEING (Aug. 15, 2013), <http://www.onbeing.org/program/sidling-difference/175> (last visited Apr. 15, 2014) (on file with the Washington and Lee Law Review).

23. See *id.* ("You talk about soccer or you talk about rock music or whatever it is you have in common as an interest.").

24. *Id.*

Why is this crucial? Because such exposure can be transformative. Take strong ideological differences. Our common tendency is to write off entire groups of people. Don't we all catch ourselves referring to those moronic, holier-than-thou conservatives or those intellectually pretentious, infidel liberals? But things would not be quite so simple for those who follow Tippet and Appiah's approach. What if a liberal eats lunch with a conservative or a conservative has morning coffee with a liberal? From that point on, there is a particular human face associated with what before was just an easily condemned category. It is no longer those damnable conservatives or liberals, but instead "Joe, he's a nice guy," or "Susan, her kids are the same ages as mine."²⁵

I hope it is obvious how Tippet and Appiah's concept relates to the *Roe* Symposium. Our balanced program meant that all participants could become acquainted with scholars on the other side of the divide. Those in the audience had such opportunities too. And readers so inclined can also seek to broaden their circle of relationships.

But, on a personal level, why should anyone actually attempt to do what Tippet and Appiah endorse? One motivation could be religious. Christianity, for example, imposes a duty to love that extends even to one's enemies.²⁶ Remaining in a state of permanent hostility toward others is hardly loving one's enemy.

25. Krista Tippet refers to a pastor and a gay activist who had coffee together. Afterwards they could no longer conduct themselves in the same way again because now there was a human face associated with someone who previously was consigned to the impersonal category of "them." See Tippet, *supra* note 20 (describing this interaction).

Tragically, the beneficial impact of personal interaction has limits. Human history is full of examples in which groups with even close personal relationships have nonetheless engaged in horrific conduct, even brutal violence, toward one another. This phenomenon is beyond the scope of this Essay, which focuses on abortion as a moral, political, and legal dispute within our American democracy. In this context, I hope what I say about abortion has obvious implications for other difficult public policy conflicts.

26. This sentence should not be taken to mean that disputants on the abortion issue will invariably view one another as enemies. But to the extent that a Christian does so, the Bible requires that the enemy be loved. See *Matthew* 5:44 ("But I say to you, love your enemies and pray for those who persecute you . . ."). Krista Tippet notes that while religious voices have in the past contributed to the strident tone of public discourse, a shift is now occurring, led in part by Christians who stress the obligation to love. See Tippet, *supra*

Another motivation is to view Tippett and Appiah as calling us all to meet a duty of citizenship. It is obvious to everyone that civil conversation on policy disputes is increasingly rare in America today. Learning to relate to our opponents as human beings will go a long way toward softening those angry and harsh aspects of public discourse that we all find so disagreeable.

Thus, as you turn to the varied, uniformly excellent entries in this Symposium issue, I hope that you will do so with an open mind—open not only to learn more from the articles themselves, but also open to the prospect of reaching out personally to those with whom you differ on the seemingly intractable issue of abortion.²⁷

note 20 (describing this shift).

27. “Of all the battles in our half-century culture war, perhaps none seems further from being resolved, in our laws and in our consciences, than abortion.” Meaghan Winter, *My Abortion*, NEW YORK MAG., Nov. 18, 2013, at 28, 30.