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6-23-2022

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### Recommended Citation

Weisberg, Richard, "Sandy's Joyfully Divided Soul and a Glimpse at a Constitutional Poethics in View of Roe's Leaked Demise" (2022). *Online Publications*. 8.

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# Balkinization

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Balkinization  
an unanticipated  
consequence of  
Jack M. Balkin

Thursday, June 23, 2022

## Sandy's Joyfully Divided Soul and a Glimpse at a Constitutional Poethics in View of Roe's Leaked Demise

Guest Blogger

This post was prepared for a roundtable on [Law, Literature, and Other Performing Arts](#), convened as part of [LevinsonFest 2022](#)—a year-long series gathering scholars from diverse disciplines and viewpoints to reflect on Sandy Levinson's influential work in constitutional law.

Richard Weisberg

In his version of the iconic story, Goethe has his hero say, "There are two Fausts in my soul!"<sup>[1]</sup> And a century or so later, Camus' lawyer narrator in *The Fall*<sup>[2]</sup> puts his own first-person story under the sign of Janus, the Roman god with two faces looking in opposite directions. There is a bit of this doubleness in my friend Sandy's soul. I've thought for a while that his trained intuition follows a literary tune, but that his less Dionysical and more Apollonian mind points him towards history and the social sciences.

Fortunately for me and many others celebrating him now, Sandy has followed his intuition often in his presence and writing as a scholar. Appraising fairly recently his own most enjoyable and noteworthy career contributions, Sandy gave the gold medal to the famous University of Texas week-long symposium he organized some years ago on Law and the Performing Arts. At this gala event, the impresario in Sandy came to full fruition as famous stage directors, actors, musicians, and other artists joined with scholars to explore in a highly convivial environment created by Maestro Sandy the ties between law and performance.

Indeed, law and music can be linked on so many helpful if non-obvious levels that Sandy elsewhere decided to write quite well on the subject. His—and Cynthia's—interest in jazz, classical music, and musical theater enriches their lives, and it is noteworthy that the writings we celebrate today touch on so many of these performative enterprises.

Law and Literature, a far more developed field than say Law and Music, has also benefited from Sandy's leadership. His volume *Interpreting Law and Literature*, co-edited with Steven Mailloux, approaches its 35<sup>th</sup> birthday next year as still the go-to text on a part of the field that Sandy engaged in other ways—the Texas Law Review full number on legal hermeneutics comes to mind; but the Northwestern University Press<sup>[3]</sup> co-edited book stands as far richer and topical today than the earlier volume.

However, while very often present in the room when the law **in** literature is discussed, Sandy has balked, unlike other legal scholars of his generation like Robert Cover, Robin West, Richard Posner, Milner Ball, David Richards (and myself), at fully engaging **stories** as a jurisprudential source, a unique, cutting-edge methodology of understanding law.

Here my own sense is that the colder side of his remarkable self made him pull back from admitting that law is, in fact, an art. Little might have changed in his superb work as a scholar had he let his soul fly free to pursue a poethics, say, of constitutional law. He would have been terrific at that. Since he may not retire until the age of 120, let's watch to see what still lies ahead!

So it is that we celebrate this joyfully divided soul. Long may he and his wonderful family live and thrive!

MEANWHILE, urged by our convenors, I offer a glimpse of a "poethics"<sup>[4]</sup> of Con Law in light of the recently leaked draft of SCOTUS' plan to over-rule Roe.

A score of years after it came down, I—and certainly not only myself—predicted that *Roe v Wade*<sup>[5]</sup> would not last—NOT because of political events or the composition of SCOTUS at any given time but because it was so poorly crafted as an opinion:

"[Roe] produced moments of almost incomparable joy in many oppressed communities. [It failed] to capture in its writing the essence of the human situation it so courageously attempted to alleviate. . . . It failed to enter specifically the world of a woman privately struggling with a decision that is intensely personal and often agonizing. Roe did not couch its outcome in terms of human autonomy; too much attention is paid to science, and the opinion reads like a less-than-convincing medical text aimed more at doctors than at women (or even lawyers). . . . To focus on the viability of the safety of abortions and the so-called viability of the fetus was to blur—I would argue, fatally so—the central reality of the situation: a woman's right to choose among distressing but highly personal alternatives."<sup>[6]</sup>

Relying substantially on Judge Benjamin N. Cardozo's dictum that "Form is not something added to substance as a mere protuberant ornament. The two are fused into a unity,"<sup>[7]</sup> I saw that—in difficult cases especially—the judicial writer had to find exactly the right fit to assure the longevity of her doctrinal contribution. And this I found in a **concurring opinion** in Roe, that of Justice Douglas. The brilliance of his approach to the situation lay in the use of a single verb (found in bold print below) that encompassed the entire situation as follows:

"The Georgia statute is at war with the clear message of [earlier cases laying the groundwork]—that a woman is free to make the basic decision whether to bear an unwanted child. . . . a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of 'the Blessings of Liberty' mentioned in the preamble to the Constitution. Many of them, in my view, come within the meaning of the term 'liberty' as used in the Fourteenth Amendment [such as]. . . . the autonomous control over the development and expression of one's intellect, interests, tastes and personality. . . . [And then there] is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or **loaf** !!"<sup>[8]</sup>

I had not until then or even since seen the word **loaf** used in a key judicial opinion, not as a noun ("the parties must live with half-a-loaf," for a mundane example) but as a **verb**! It perfectly suited the substance of the case and should have been part of Roe's majority opinion. Consider that, whatever the condition of the fetus or the advice of the doctors, the woman alone as part of her right **to loaf** deserves—as most non-minority men take for granted—the easy control of her body at any stage of her life.

So the verb "to loaf" opened up a door for me as a privileged male not only as to Roe's ultimate meaning but also as to its application to many other activities and decisions—casual or highly significant—that men take for granted. While trending towards the equal protection rationale Justice Ginsburg had been saying would have been better doctrinally than its substantive due process foundation, Justice Douglas' concurrence managed to retain the latter while seizing the lived experience of a woman compared to that of a man and foregrounded the unfairness of the woman's enforced subservience to physical exigencies not well understood by legislators, judges, doctors, and other authority figures.

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<sup>[1]</sup> For a fine analysis of the Faust theme in Goethe and other writers, see Marguerite Allen, *The Faust Legend: Popular Formula and Modern Novel* (NY: Peter Lang, 1985).

<sup>[2]</sup> Albert Camus, *The Fall* (trans. by Justin O'Brien, 1956).

<sup>[3]</sup> Levinson and Mailloux, *Interpreting Law and Literature* (Evanston: Northwestern University Press, 1988).

<sup>[4]</sup> The term is used and defined in my *Poethics and Other Strategies of Law and Literature* (NY: Columbia University Press, 1992).

<sup>[5]</sup> Roe v Wade 410 US 113 (1973).

<sup>[6]</sup> *Poethics*, supra n. 5, pages 9, 10, 46: some liberties have been taken by the writer in the transmission of those sections for today's purposes.

<sup>[7]</sup> Benjamin N. Cardozo, *Law and Literature* (ed., M. Hall, 1947), p. 340.

[8] Roe v Wade, concurring opinion of Justice Douglas, 410 US 179 at 211-213.  
The infinitive "to loaf" is found on p. 213.

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