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# Art of Judgement in *Planned Parenthood v. Casey*

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# ART OF JUDGEMENT IN

## *Planned Parenthood v. Casey*

— BY JAMES BOYD WHITE

*This article was excerpted and abridged with permission from a chapter in Professor White's recent book* Acts of Hope: Creating Authority in Literature, Law, and Politics. *In the book, he explores the nature of authority in verious cultural contexts. Here he examines the Joint Opinion in* Planned Parenthood v. Casey, *which has been been attacked both from the right, on the grounds that it tried to keep* Roe v. Wade *alive, and from the left, on the grounds that it significantly weakens the force of that case. Professor White, by contrast, admires it greatly, and in this chapter explains why.*



When the Supreme Court faces a precedent it disagrees with, the authority of the past becomes a real issue for us, not merely a theoretical one, for we must repeatedly ask to what weight the earlier decision is entitled. Is the present Court bound by a prior case, even if it thinks the judgment wrong or undesirable? Or is the prior case to be read simply as advisory: Here is what some people have thought, after putting their minds to the question; you should take it seriously so far as you respect the quality of their work, but no more seriously than any other thought on the subject by, say, a professor or journalist or a politician? On this view, precedent would simply be another source of information about ways to think about the case. Or is there a different view?

I want to explore this matter in connection with the abortion issue, which raises it in a stark and public form. One way to put the question is by asking whether *Roe v. Wade*, the 1973 case establishing a woman's constitutional right to decide whether to continue a pregnancy, should be regarded as authoritative and hence binding on the present Court, which, as I write in 1992, has a large majority that apparently would have voted the other way in *Roe*. It is not simply that these justices disapprove of abortion as a moral matter; they believe that *Roe* represented a serious misreading of the Constitution. What attitude should they then have towards *Roe v. Wade*? One cannot really begin to think about this question without thinking about the cases that precede *Roe*, with an eye both to their meaning and to their authority.

## PRIOR LAW

As the Constitution was originally adopted, virtually no argument could have been made that it prohibited the states from adopting "anti-abortion" laws. The reason is that, with the exception of a small number of provisions in Articles I and IV, the Constitution did not limit the power of a state over its citizens at all. It was primarily meant to allocate governmental power among the three branches of the national government and between the national government on the one hand and the states on the other. The Bill of Rights, adopted in 1791, did not change this as far as the states were concerned, for its provisions and protections were limitations only on the federal government. The states were free to violate them as much as they wished, as indeed was necessary if some of them were to maintain the institition of human slavery.

Only after the Civil War was the Constitution amended to regulate the relation between the citizen and the state. The method chosen was not, however, simply to apply the Bill of Rights to the states; rather, the new amendments focused on the rights of the newly freed slaves and other African Americans. The Thirteenth Amendment prohibited slavery; the Fifteenth provided that the vote should not be withheld on the grounds of race; the Fourteenth, for our purposes the most important one, spoke in more general language, providing that no state should deprive any person of "life, liberty, or property without due process of law" or deny any person "equal protection of the laws." What is this language to mean? In answering this question, the Supreme Court created a jurisprudence deeply affecting many aspects of the relation between the citizen and the state.

## LOCHNER

At first, this jurisprudence was fashioned by a conservative Court, hostile to social legislation and in particular to state laws regulating the economy. In a case that has become symbolic of the era, *Lochner v. New York* (1905), it struck down New York laws that prohibited bakers from working more than ten hours a day or sixty hours a week, on the grounds that this was an impermissible interference with liberty of the workmen to contract for their labor. Other welfare laws were invalidated for similar reasons. The idea of "due process" that these laws were held to violate was substantive, not merely procedural: however correct its processes of lawmaking, the state could not interfere with an economy working by the principles of the market without a clear need articulated on recognized grounds.

This position of the Court, of course, was gradually overturned. The legislative program of the New Deal was based on very different premises: that our economy and society were partly made by human beings, that they were properly subject to reform and transformation, and that the health of the economy required a prosperous working class to serve as its customers. Through changes of mind and personnel, the Court came to support legislation based on these views, at the state and national levels alike.

In the process, the authority of *Lochner* and its kin was thoroughly repudiated, the Court insisting that these decisions represented an inappropriate form of judicial legislation, involving the imposition of partisan political or economic values on the legislatures to whom our democratic system assigned authority for resolving those questions. The Court's task, it was said, was not to impose its view of the economy or society but to confine itself to interpreting the limitations found in the Constitution.

## OLMSTEAD AND GRISWOLD

During the 1920s, while the conservatives were still in power, the Court decided a case of enormous significance for the future development of the law relating to abortion, though at first glance it would seem to have a wholly different subject. This case, *Olmstead v. United States* (1927), held that wiretapping by federal officials was not a "search" within the meaning of that word in the Fourth

# IT IS NOT SIMPLY THE PAST THAT DECIDES.

Amendment, defining the term, as though it were obvious, in terms of a physical invasion or trespass.[1] The main significance of the case lay not in its holding, however, but in the dissents of Holmes and Brandeis, especially the latter, who thought the majority's view unduly narrow and technical.

Brandeis believed that the Constitution should be regarded not simply as a set of commands to be read in an unimaginative and literal way, but as a text meant to govern our polity for generations; its language should be read not restrictively but generously, whether one speaks of grants of power to legislatures or of definitions of the rights of citizens. A particular provision, such as the regulation of "searches," should accordingly be read not only in light of the particular kinds of abuse with which the framers were familiar, and which animated the provision in the first place, but in light of principles defining the abuse in its more general form. For Brandeis the basic principle of the amendment was the protection of privacy. It was adopted not to protect property, but to protect the right of people to be let alone. When that right is violated as effectively by technology unknown to the framers as it would be by a physical search, it should be held within the constitutional prohibition.[2]

In the 1950s and after, the Court became activist once more, but in quite a different way from the *Lochner* Court. Again the "due process" and "equal protection" language of the Fourteenth Amendment was read expansively, but this time mainly to protect not economic rights but civil rights and liberties. To a large extent the provisions of the Bill of Rights were read into the due process clause, or considered "incorporated" in it, especially those that protected the freedom of press and religion and those that governed the rights of those suspected of crime. The most important single case was *Brown v. Board of Education* (1954), holding state-enforced racial segregation in public schools to be a violation of the equal protection clause.

Much of this was opposed as shocking judicial activism, the conversion of neutral constitutional law into value-based politics, but often by those who would have supported *Lochner,* and defended, often in self righteous terms, by those who would have regarded *Lochner* as a low point of judicial irresponsibility, indeed as a subversion of the constitutional process. Insofar as these two sides were defined by their affiliation with one Court or another, both of them were presented with the same problem: how to disapprove of *Lochner* without also disapproving of the Warren Court, or vice versa.

Another of the crucial cases of this era, from the point of view of theory and consequence alike, was *Griswold v. Connecticut* (1965), which held unconstitutional a Connecticut law prohibiting the use of birth control devices, even by married couples. This was obviously, to most of the Court, an undesirable, bad, even "silly" law — but how was it unconstitutional? Speaking for the majority, Justice Douglas explicitly refused to be guided by the analogy to *Lochner,* a case he loathed, but instead looked to the Bill of Rights, most of which had by now been incorporated in the Fourteenth Amendment. None of these provisions, it is true, spoke of birth control or reproductive freedom, or of privacy, but many of them, taken together, could be seen to serve the fundamental value of human privacy. This is an extension of the kind of reading Brandeis gave the Fourth Amendment in *Olmstead.* To make up for the want of helpful language, Douglas spoke of "penumbras" formed by "emanations" from these provisions, for which he was widely ridiculed.

Others, notably Justice Harlan, found in the due process clause itself an injunction to the Court to insist upon the protection of those rights that have been fundamental to our society.[3] To determine these, it is not enough to look within the self, at one's own values; one must look without, at our history and culture. The Constitution chose to protect these rights under such vague language because in the nature of things they cannot be spelled out more precisely. Their definition and elaboration is entrusted to the Court because the way the Court works — by the decision of particular cases, carefully argued on both sides; by the refusal to decide more than is actually before it; by the resulting particularity of the judgment, informed as it is by the ways in which conflicting values present themselves in real cases — entitles it to a trust and an authority that a more political or less disciplined branch of government would not deserve.

Like Brandeis, Harlan rejected the idea that the Constitution should be regarded as simply speaking in plain English, saying just what it means, and for much the same reason: that the Constitution is meant to serve the highest purposes of government and collective life and that these cannot be reduced to a code. Instead, the Court must accept responsibility for judgment, which for Harlan means a responsibility to educate itself at the hands of its own past. As Harlan sees it, the extraordinary duty and privilege of the judge is to reconstitute this source of authority in his own prose. The line between self and world is in this way blurred, as the mind of the judge is partly made by the very material it transforms.

But this was only his view. There were six judges in the majority in *Griswold,* each of them writing a separate opinion, on a different theory, leaving the law, to say the least, unsettled.

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1 For an extended discussion of this case, see my *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), chapter 6.

2 For a proposed analysis of this case that is neither so literal minded as the majority nor so expansive as Brandeis, see Clark Cunningham, "A Linguistic Analysis of 'Search' in the Fourth Amendment: A Search for Common Sense," 73 *Iowa Law Review* 541 (1988).

## ROE

Such, in extremely reduced outline, was the state of affairs at the time *Roe v. Wade* was decided in 1973. As everyone knows, this case held that a woman has the right to terminate her pregnancy during its early stages. But the opinion of the Court, written by Justice Blackmun, focused less on the nature of her right than on the nature of the interests that the state asserted as the ground for limiting it. In this, it was reminiscent of *Lochner* itself, for the idea of both is that state interference with individual freedoms is invalid unless based on good reasons (expressed in terms of public health, safety, and morals in *Lochner*, and of legitimate, substantial, or compelling state interests in *Roe*).

In *Roe* the Court held that during the first trimester, before the fetus quickened, the decision about abortion was solely for the woman and her doctor. After that the state had a sufficient interest to justify regulation to protect the woman's health, for now abortion presented greater dangers to the woman than childbirth did. In the third trimester, when the fetus became independently viable, the state could act to protect that future human life by prohibiting abortion, except in the case of danger to the woman's life or health.

This opinion was widely criticized, not only by those who simply opposed abortion but on institutional grounds. *Roe* was felt by many to be an unwarranted interference with the rights of the people of the states to decide such questions for themselves through the political process. While the Court can invalidate state legislation that is inconsistent with the Constitution, here there is no constitutional language justifying such action — nothing about "abortion" or "privacy" — and no earlier precedent supporting it, except maybe *Griswold,* which was felt to be an unwarranted piece of judicial activism, and one or two cases building upon it. Nor is *Roe* supported by the prior practice of the states, which was nearly uniformly to regard abortion as subject to their prohibition or regulation, at least in recent decades.

Finally — for some most importantly — the form of the opinion was legislative rather than judicial. It consisted not of the decision of a particular case under general constitutional standards, but the decision of an abstract issue by the articulation of a regulatory code of the sort we normally associate with legislation. Whatever the Constitution may be thought to say about the principles of privacy or reproductive rights, it is ludicrous to think that it speaks in terms of trimesters. To make rules of this sort, the argument goes, is peculiarly the task of the legislature, because by their nature such rules work as approximations that rest on estimates of factual probability which the legislature is in a far better position than the judiciary to make. My own judgment at the time, for what it is worth, was that the Court was wrong as a matter of constitutional law, though on the underlying moral issue of abortion I was unsure what was right.

More can of course be said about *Roe,* but for our purposes this is enough to suggest that the situation of the Court in 1992, faced with a challenge to that case, was a complex and difficult one. *Roe* established both a general principle, that the right to control reproduction lay within the right to privacy, and a set of quasi-legislative rules, which may be entitled to significantly less authority than its central holding. And the status of the principle itself can be questioned, to say the least: the case was controversial when it was decided, on institutional as well as substantive grounds; it depended on *Griswold,* itself a case that many people felt to be wrong in principle and method alike. To what, then, should authority be given in deciding *Casey*, and why?

## CASEY

On both substantive and procedural grounds, *Roe* has been controversial from the day it was decided. It was the object of excoriation by the Republican party in particular, with both Presidents Reagan and Bush seeking to appoint justices who would overrule it. Of those on the *Roe* Court only Blackmun, who wrote the opinion, and White and Rehnquist, who dissented, were left on the Court at the time of *Casey*. All but White had been appointed by Republican presidents, four of them by Reagan or Bush. In a series of inconclusive cases, the Court had avoided either reaffirming or overruling *Roe*, though Rehnquist and Scalia repeatedly called for its rejection.[4] *Casey* presented the issue of *Roe*'s continued vitality not so much because its facts required the judgment as because the recent appointment of Clarence Thomas was thought to give the overrulers the majority they needed. It was widely believed that the Court would face and resolve it, but no one could confidently predict how the Court would vote, largely because it was uncertain what Justices O'Connor and Souter would do.

The legislature in *Casey* did not attempt to prohibit abortion entirely but instead regulated it, with a series of requirements: that the doctor give the woman certain information about abortion itself and about the availability of adoption agencies and others who would support a decision to carry the

[3] His views are best expressed in his famous opinion in an earlier stage of the Griswold case, *Poe v. Ullman* (1961).

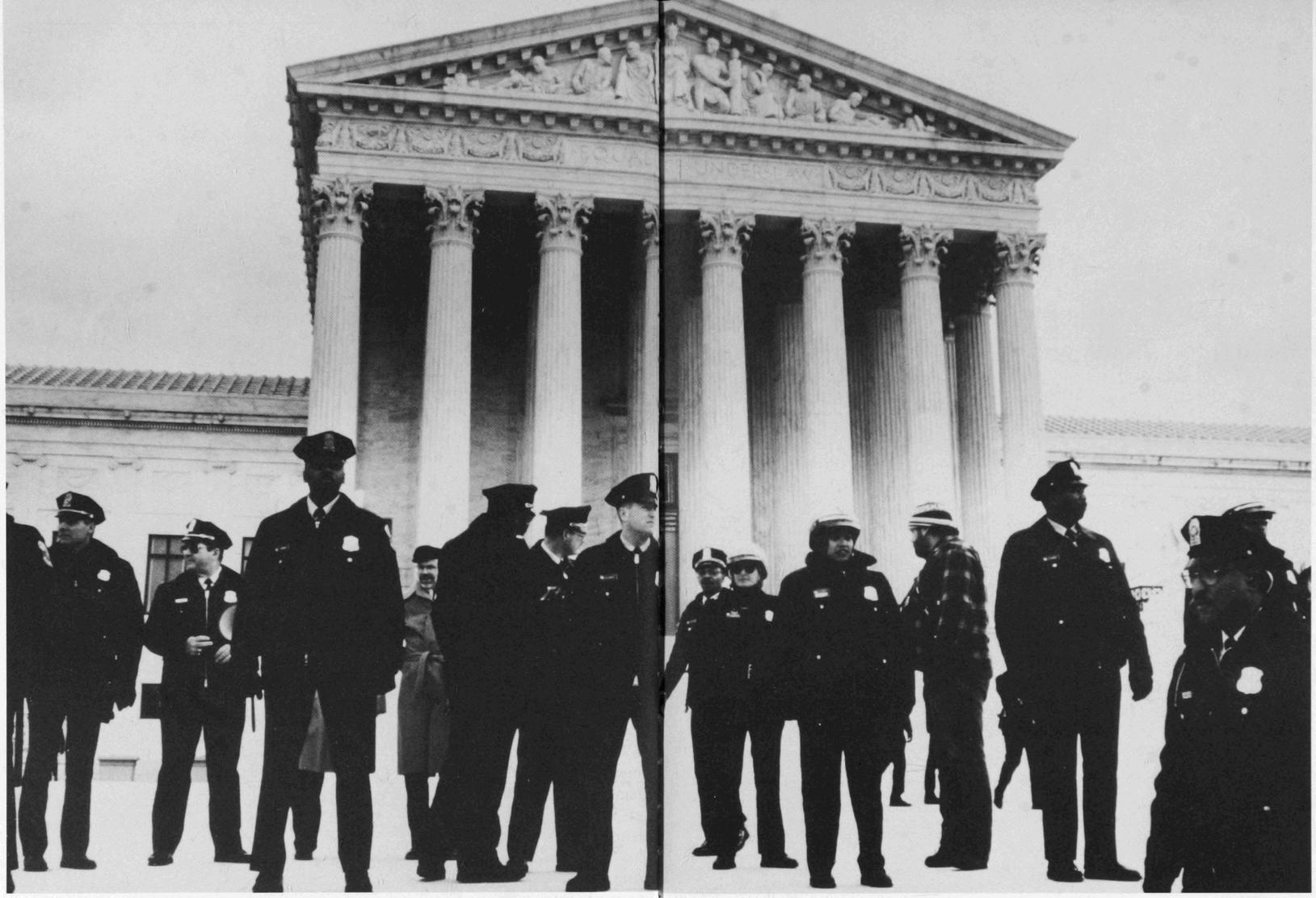
[4] See, for example, *Webster v. Reproductive Health Services*, 492 U. S. 490 (1989); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U. S. 747 (1986); *Akron v. Akron Center for Reproductive Health*, 462 U. S. 416 (1983); *Maher v. Roe*,432 U S. 464 (1977); *Planned Parenthood of Central Mo. v. Danforth*, 428 U S. 52 (1976); *Doe v. Bolton*, 410 U S. 179 (1973).

# THE COURT MUST ACCEPT RESPONSIBILITY FOR JUDGMENT

fetus to term; that minors obtain the consent of their parents, except in certain cases; that a woman wait twenty-four hours after first coming to the clinic or hospital before actually having the abortion; and that a married woman inform her husband of her plans to have an abortion. It would have been possible to determine the validity of the regulations, especially in their favor, without addressing the underlying issue, whether *Roe* was still good law. But no one on the Court favored that; all wanted to face the central question.

There are two relatively easy ways to think about it: that *Roe* was right and therefore still is the law, and that it was wrong, and therefore is not. Justice Blackmun, and to some degree Stevens, adopted the first approach, while Justices Scalia and Rehnquist, with Thomas and White voting with them, took the second. Justices Kennedy, O'Connor, and Souter wrote an opinion that takes a different approach, and one that is remarkable in several respects. It was jointly written and signed, a rare event in the history of the Court.[5] It was largely written, I think, by the justices themselves and not by their clerks. It was without a single footnote. Most important, it addressed not just the "rightness" or "wrongness" of *Roe* abstractly considered, but the kind of weight and respect it should be accorded under the doctrine of *stare decisis*, even by those who disagree with it.

[5] This happened also in *Cooper v. Aaron*, 358 U.S. 1 (1958) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).



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## THE AUTHORITY OF THE PAST

In *Casey* the Court reaffirms what it calls the "essential holding" of *Roe* — that prior to viability it is the woman alone who should decide whether to terminate the pregnancy. Other parts of the holding viewed as less essential are discarded: the idea that the state has no interest at all in protecting the future of a fetus before quickening, for example, and the rigid trimester structure. Rather, for the authors of the Joint Opinion, the critical line is viability: prior to that point the state may regulate abortion, but it may not take away the woman's right to choose nor may it subject that choice to "undue burdens." In this way they reaffirm the central core of *Roe*. But they do so less because they personally agree with *Roe* as an original proposition than because they believe that respect for the Court's own past requires it.

In this they are not simply knuckling under to what they regard as an unavoidable command, as cogs in an authoritarian intellectual machine, but acting out of a complex conception both of this case and of the Court, which they strive in this opinion to make real and comprehensible to their audience. This is not a reluctant or joyless opinion; its writers find in their understanding of their role and situation under our Constitution a way of thinking and talking about this issue that, in my view at least, dignifies both it and them. Indeed, it is partly because they would not originally have voted for *Roe* that the conception they have both of themselves and of that case, which leads them to affirm it, has such force and gravity.

To start with the merits of *Roe*, the authors describe this case in a way that does not commit them to the view that, taking everything into account, it was "right" when decided; rather, they explain why, on the merits, the case is entitled to a high degree of respect. They define *Roe*, that is, not as an unjustified or bizarre decision which they might be entitled to disregard, but as an important effort by the Court to speak to a crucial issue that is entitled to real respect — certainly not deserving the derisory sneers of the chief justice and of Justice Scalia. Here is what they say:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey v. Population Services International*, 431 U. S., at 685. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U. S. 438, at 453 [emphasis in original]. Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

This is idealistic language, and it exposes its authors to the contempt of those who cannot stand that way of talking. However, it catches an essential point: that for the state to prohibit abortion is to take a position on an essentially religious topic, the nature of human life, which it is the aim of our Constitution to leave in private hands. Not that an anti-abortion law is a full-fledged establishment of religion in violation of the First Amendment, but it has overtones of that kind, for its effect is to preclude an individual woman from addressing this essentially religious issue on her own. The effect of this in turn is to dwarf or limit her capacity for matura-

THE COURT TURNS ITS MIND TO THE WAY CITIZENS RESPOND TO ITS DECISIONS, ESPECIALLY TO THOSE THEY DISAGREE WITH.

tion and responsibility as a full human being. On this view, it is natural to see the issue as the Court frames it, not in terms of a specific right to abortion but as an aspect of the "liberty" explicitly protected by the Fourteenth Amendment. The point of liberty, so conceived, is not simply freedom from constraint, but the creation of conditions in which the possibilities for human life can be most fully achieved.

To conceive of what a legislature intrudes upon when it prohibits abortion not as a "right" but as an aspect of "liberty" not only ties the holding more firmly to the language of the Constitution, but it connects its two aspects, the affirmance of *Roe* on the merits and the institutional obligation to protect the liberties defined by the Constitution, in a consistent and coherent way. As the first sentence of the opinion, in a sense organizing the whole, puts it: "Liberty finds no refuge in a jurisprudence of doubt." This sentence calls on the Court to determine whether liberty includes a woman's right to make her own decisions with respect to abortion, not in the abstract, as if the issue were wholly new, but in light of their obligation as a Court to preserve the liberties established by prior decisions.

This in turn calls for a process of "reasoned judgment," a phrase that the Court will define for us in the rest of what it says. What it tells us now, in the first sentence, is that it will not proceed in the quasiscientific manner that characterizes so much legal analysis, as though the issues before it could be separated into wholly discrete entities, but with the acknowledgment that for them the judgment on *Roe* is necessarily at the same time a judgment about the authority of the past. These issues are interdependent; the Court thus establishes a mode of proceeding that is comprehensive and integrative in character, rather than linear and abstract.

## LIBERTY

For the writers of the Joint Opinion, the central modern text is not the majority opinion in *Griswold,* upon which *Roe* is usually thought to depend, but Harlan's earlier opinion in *Poe v. Ullman* (1961), in which he urged that the Court strike down the same Connecticut statute. This opinion is perhaps the classic definition of a certain view of "due process": Harlan refused to reduce it to a code or to specific rules or practices of the past — for the essence of liberty cannot be protected that way — yet at the same time refused to see it simply as the imposition of contemporary or evolving political values. The task of the judge, as Harlan defined it, is to engage with the traditions of the law and of our country in a responsive and responsible way; to defer in all reasonable ways to the judgments of others; to educate, and thus transform, his own mind by full consideration of what others have said and done; and, in a case which calls for it, to make his judgment whether the state has interfered with a liberty defined by that tradition. He sees that an essential part of the tradition lies in its principles of self-transformation. Conservation requires change.

The very fact that the power the Constitution has given the Court cannot be reduced to rules, but rests on principles and understandings necessarily broad and indeterminate, means that great restraint is essential to its exercise and continued existence. Such power will be tolerated in unelected officials only when used sparingly and well. Likewise, the act of judgment must be reasoned, and in this sense justify itself: it is not simply the past that decides, as if you could take any modern issue and see how others dealt with it, nor simply the present, as if the meaning of the case could adequately be cast in terms of contemporary political debate. The task of the judge is to educate himself, to modify his own sensibilities by engagement with our tradition, so that in the end it is neither he alone, nor the past alone, that decides, but he as formed and educated by engagement with the past. The Court's term for this is "reasoned judgment." The idea of tradition with which Justice Harlan works is not as a set of discrete decisions that are entitled to authority, but as a process of development and change, to which it is the judge's task to contribute in an intelligent and responsible way. In invoking the shade of Harlan as their guide, the writers of the Joint Opinion ask to be tested by his standards of intelligence, responsibility, and humility. What sort of education in the law, and our own traditions, does this text reflect? What sort of education does it offer its reader?

They begin by describing the kind of "liberty" that the abortion laws invade, but in so doing they are careful not to speak as though it could be abstracted from the context in which they in fact face it — the context defined by the existence of *Roe* itself. It is not the case for them, as it is for more abstract thinkers, that legal questions should be decided as questions of theory, out of time and place as it were, but the opposite of that: the case before them cannot be separated into the "merits of *Roe*" and the "obligation to follow the law." Both aspects are before them, and they interact: "The reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*." This insistence upon the actual context and upon the interrelatedness of the decisions before them, like their earlier invocation of Justice Harlan at his greatest, enacts a kind of conservatism very different from radical dogmatism of our era. It is a cultural conservatism, of which an important element is the location of authority outside one's own dispositions, and outside one's own ratiocinations, in the culture, as this is reconstituted by an attentive mind.

## STARE DECISIS

Their explicit discussion of *stare decisis*, to which they next turn, proceeds from the double assumption that some obligation to follow the past is necessary both to the idea of law and to the legitimacy of the Court, yet that the past cannot be followed slavishly. The Court thus explicitly resists the temptation to collapse a complicated inquiry into a slogan, but recognizes that the twin necessities they describe define a field for what they have called "reasoned judgment" which they will now undertake to exemplify.

They begin their performance by looking to the other cases in which the Court has been faced with the issue of *stare decisis*. In considering the degree of authority to be given the past, that is, they proceed by first considering the past itself. What they claim to discover is that this judgment has been guided by several factors: whether the case in question has proved unworkable; whether its continuance is supported by reliance that would make its overruling especially burdensome or inequitable; whether doctrine in related fields has developed to such a degree that the case in question is merely a "remnant" of an abandoned view; and whether the factual perceptions that supported the original decision have changed in such a way as to undermine it. Asking of *Roe* the questions these criteria suggest, they not unsurprisingly find that it has not proven unworkable, that doctrine has not developed in such a way as to leave it behind — quite the reverse in fact — and that while the factual context has changed owing to medical advances, it has done so in ways that affect only the trimester scheme of *Roe*, not its essential holding.

With respect to reliance, their argument is more complex, difficult, and important. First, they acknowledge that this is not a case in which people have advanced sums of money in reliance upon a rule of property or contract in such a way as to make it unfair to change it on them. But this should not exhaust the meaning of reliance:

> To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, e.g., R. Petchesky, Abortion and Woman's Choice 109, 133, n. 7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

This passage connects the issue of reliance, which bears on the issue of stare decisis, with a larger sense of the nature and importance of a judicial decision of this character. Such an opinion becomes a part of the culture, they say: it affects the ways in which people conceive of themselves and their possibilities for life. Insofar as it is not to be repudiated on one of the grounds suggested, this is a large and deep reason for its continuance.[6] In Burke's terms, the significant decisions of the Supreme Court help shape our "prejudices," the attitudes and feelings, the ways of imagining our world and affiliating ourselves with it, that makes us what we are.

## OVERRULINGS

The Court could stop here, but it goes on to consider the two instances of overruling that cut most powerfully against what it has said: the rejection of *Lochner* in the 1930s and the repudiation of the "separate but equal" doctrine in *Brown v. Board of Education*.

With respect to the Lochner tradition, the key case was *West Coast Hotel v. Parish* (1937), overruling *Adkins v. Children's Hospital of D.C.* (1923), which had struck down a statute requiring employers to pay adult women a minimum wage. This case was properly overruled, the Court says, and on the grounds that do not reach *Roe*, for Adkins unlike *Roe* rested on "fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimum levels of human welfare." Even if one does not oneself believe these assumptions false, that does not blunt the force of the Court's point: to the overruling Court in *West Coast Hotel* the assumptions were plainly false in a way for which there is no analogue in *Roe*.

Assimilating *Brown* to the model of *West Coast Hotel*, the Court in *Casey* focuses on language in *Plessy v. Ferguson* (1896) which denies, as a factual matter, that the mere separation of the races, in this case on trains, stamps one race with inferiority. Admitting that the justices may not in fact have believed this — How could they? — the Court says that it is nonetheless the "stated justification" for their opinion, and by the time of Brown this factual assumption was seen as plainly wrong.

In a final section of its opinion, before reaching the particular provisions of the Pennsylvania statute before it, the Court expands on what it thinks is at stake in its decision: the legitimacy of the Court

[6] Compare the famous remark of Brandeis in *Olmstead v. United States*, 277 U.S. 438, 485 (1927), that "the Government is the potent, the omnipresent teacher."

itself, and its capacity to perform its essential and unique role in our democracy. To discharge its responsibilities and maintain its position, the Court must seek to decide cases on the ground of principle, or what it earlier called "reasoned judgment." "The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make." Essential to this goal is respect for the decisions of the past; frequent overruling of its own decisions would be a statement by the Court itself that they were not entitled to respect.

Where, as here, the Court decides a matter intensely divisive of our polity, it is especially important to respect the choices that have been made by the past. "Only the most convincing justifications" could demonstrate that an overruling in such a case was "anything but a surrender to political pressure." Once the decision is made, it is essential to live with it unless it is plainly wrong. This is the point where the Court comes closest to acknowledging the existence of the enormous forces at work in our country on abortion, making it a focus of opposition that has some of the characteristics of a civil war itself. The extraordinary character of the issue makes principled judgment and adherence to prior authority all the more important. To reverse oneself under pressure will give the impression, perhaps correctly, that the Court is nothing but another vehicle for political life — and that (though they do not say this) the appointment of new justices can properly rest on purely political and result-oriented judgments rather than on qualities of mind and character traditionally thought essential to the judicial role.

There follows now an extraordinary moment in the history of American law. The Court turns its mind to the way citizens respond to its decisions, especially to those they disagree with. Of course it is easy to support the Court when it comes out your way, and of course many people who disagree respond with simple and continuing opposition or resistance. It is not with either of these groups that the Court concerns itself, but with those who disagree with the result, yet "struggle to accept it, because they respect the rule of law." To them the Court must keep its promise; for if it does not, but reverses itself too easily, in the end "a price [will] be paid for nothing."

The Court does not explicate this point further, but what they mean, I think, is this: they are imagining the moral drama that occurs when a person is opposed to a law yet respects it, a drama in ordinary life that parallels the one they are experiencing as judges. This drama is seen as a painful but also as a good thing. It is good because only at such moments is the commitment to the rule of law a meaningful one: when you agree with the law, there is no problem; when you resist and oppose, you are refusing to accord the law respect. Only when you disagree on an important matter are you given the opportunity to engage in the moral practice of respecting it. Such a moment is a stage in the development of an essential ingredient of civic character; it is a part of an education, not purely practical or intellectual or a matter of training but an education of the whole self. In this it would be recognizable by Plato and Aristotle, both of whom saw education as the development of the character through testing and the development of habit. A person who has been through the struggle the Court describes will know, as no one else really can, the importance of the rule of law itself; and having respected it against his own inclination, he will be in a position to insist that others respect it against theirs.

On such a view of civic life in general, and of the activity of the Court as well, the Court is resisting many tendencies of our culture: the attitude stimulated by our consumer economy, and given theoretical standing by certain schools of economics, that reduces all choices to preferences and treats them all as equal; the comparable view in the political arena that democracy means the collective preference of the majority, however uneducated or biased it may be; the way in which certain political candidates address the voting public by trying to stimulate whatever feelings will move it to vote for them, often in impossibly simplistic language, and the view that the Court is really just another political agency, to be staffed by those who will carry out the president's political agenda, and that all its opinions are really just the rationalization of the exercise of power. The Joint Opinion resists all of those assumptions, seeing in the citizen a capacity for responsible tension and growth, and seeing in the process of law — especially in the work of the Court — a source of education for itself and the polity. It defines the life of the citizen as an ethical drama, and its own life as one, too, providing a basis on which one can find possibilities for meaning in our shared life that are worthy of humanity. So read, this opinion enhances the dignity of the Court and the nation alike.

LQN

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