A LANDMARK DECISION

The U.S. Supreme Court's June 29 abortion decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* almost certainly guarantees that the central core of the Court's 1973 holdings in *Roe* v. *Wade* and *Doe* v. *Bolton* will never again be in any significant danger of being obliterated or overruled by the nation's highest court.

Activist groups on both sides of the abortion issue have a strong self-interest—financial as well as emotional—for refusing to consider whether June 29 will, in retrospect, be recognized as the final high-water mark of America's intense struggle over whether a woman's right to choose merits constitutional protection as an undeniable aspect of the individual liberty guaranteed by the Fourteenth Amendment. But *Casey* very likely *is* that high-water mark, and if indeed it is, the joint opinion for the Court authored by Justices David H. Souter, Sandra Day O'Connor, and Anthony M. Kennedy will rightfully come to be recognized as one of the most important statements about individual rights and the judiciary's role in affording them constitutional protection issued by the Court in this century.

The landmark importance of the joint opinion in *Casey* has in part been obscured by the disingenuous reactions of leading interest groups, but knowledgeable Court-watchers and leading constitutional specialists quickly recognized what the Souter-O'Connor-Kennedy trio had achieved. Most notably, as Harvard Law School professor Laurence H. Tribe emphasized, the joint opinion "puts the right to abortion on a firmer jurisprudential foundation than ever before." Similarly, Linda Greenhouse of the *New York Times*—a truly gifted reporter and interpreter of the Court—characterized the joint opinion as providing "a tightly reasoned framework for a constitutional right to abortion" that was "in some respects . . . clearer and stronger than [*Roe*] itself." Unlike the 1973 opinions in *Roe* and *Doe*, where great emphasis was placed upon the medical history of abortion, in *Casey* both the joint opinion and the concurring opinions of Justices John Paul Stevens and Harry A. Blackmun focused on the undeniable centrality of the right to choose for advancing gender equality in present-day America.

Many statements in the joint opinion may come as very pleasant surprises to people who have only a gray, stereotypical image of Souter, O'Connor, and Kennedy. "Some of us as individuals find abortion offensive to our most basic principles of morality," said one section of the joint opinion read by Justice O'Connor from the bench, "but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code." Justice Kennedy, undeniably the most unexpected member of the pro-*Roe* majority, likewise orally delivered another portion explaining the constitutional importance of reproductive choice: "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." In abortion, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."

The joint opinion also reflects a clear-eyed realism about modern American life. "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," and "an entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." While two decades of medical advances have "overtaken some of *Roe*'s factual assumptions . . . the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the state's interest in fetal life is constitution-

ally adequate to justify a legislative ban on nontherapeutic abortions."

But the remarkable stature of the *Casey* decision stems not only from the constitutional and social conclusions it articulates; it comes also from the special judicial forms that the Souter-O'Connor-Kennedy trio chose to employ. "Joint" opinions—those explicitly presented as multi-authored—are exceedingly rare in Supreme Court history, and are employed only on extraordinarily special occasions. The entire Court took that step in 1958 in *Cooper* v. *Aaron*, invoking all of its institutional stature to ringingly reaffirm *Brown* v. *Board of Education of Topeka* in the face of Arkansas' official refusal to comply with federal court orders mandating the token desegregation of Little Rock's Central High School. For the trio to choose to employ the "joint" format was hence a conscious step of remarkable significance: for the three justices then to *each* deliver a portion of that opinion orally from the bench was an even more "extraordinary step," as the *Washington Post* noted; it may very well *never* have previously occurred in the Court in this century.

The relationship to *Cooper* and to *Brown* was clearly in mind. In the portion of the opinion read orally by Justice Souter, a section that Greenhouse rightly described as reflecting "a remarkable sense of personal passion and urgency," the comparison of *Roe* to *Brown* was made explicit, and Souter declared that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."

As New York University jurisprudential scholar Ronald Dworkin, writing in the August 13 *New York Review of Books*, accurately noted, the *Casey* joint opinion "may prove to be one of the most important Court decisions of this generation." And, as Dworkin similarly emphasized, the *Casey* majority's upholding of some of the Pennsylvania statute's anti-abortion provisions—particularly the twenty-four hour "waiting period" requirement—was explicitly provisional: "its decision on the point was tentative in a way that many newspaper reports have not made sufficiently clear." Pro-choice lawyers inescapably have several years of difficult lower court litigation ahead of them, in Pennsylvania and elsewhere, to build a powerful and persuasive record of why "waiting periods" and mandatory doctor-patient readings of state-authored anti-abortion propaganda set-pieces are "substantial obstacles" or "undue burdens" to the constitutionally protected right to choose—litigation that will be difficult because of the plethora of hostile Reagan-Bush appointees now staffing lower federal courts—but that struggle too is a winnable one.

And it's winnable in significant part because of the Souter-O'Connor-Kennedy joint opinion's most important if nonetheless ineffable and subtle achievement: the final and much-delayed elevation of *Roe* to the special, "higher law" status accorded to initially controversial landmark rulings such as *Brown*. *Brown* itself took at least sixteen years to win meaningful acceptance and application, and the case upon which *Roe* was largely based, *Griswold* v. *Connecticut*, the 1965 decision eliminating the criminalization of the use of birth control and according explicit constitutional protection to a right of marital privacy, did not attain such unchallengeable acceptance until 1987, when its most notorious critic, Robert H. Bork, saw his attacks upon it rejected both by the Senate and—even more overwhelmingly—by American public opinion.

Without *Griswold*, without the legal recognition it gave to the potential expanse of reproductive liberty and autonomy, neither *Roe* nor *any* judicial recognition of constitutional protection for an individual right to choose abortion would have followed. But given *Griswold*, and the powerful influence *Griswold* had on early abortion activists, *Roe* was—as Justice Stevens noted in *Casey*—in many ways almost inevitable. As the *New York Times* recently declared, Justice Blackmun's 1973 opinions in *Roe* and *Doe* were "a brilliant resolution of seemingly irreconcilable interests." But very few people still appreciate that, in large part because most of the critical damage that *Roe* has suffered over the last two decades has been inflicted by *pro-choice*, not right-to-life, commentators. While the most notable salvo in this attack still remains John Hart Ely's April 1973 essay in the *Yale Law Journal*, formerly "liberal" columnists and journals continue the assault today. Undoubtedly the most notorious such voice remains the *New Republic*, which recently castigated not only *Roe*, for "creating by judicial fiat a right that should be protected by politics," but also by implication *Griswold*, which it termed "flimsy." While the *New Republic* volunteered that "We can imagine any number of plausible ways that *Roe* might have been clearly overturned," the magazine's editors failed to explain why if a woman's choice was indeed "a right," it should be protected only "by politics," and not by the Constitution and by the judiciary. Judge Bork, please call home.

But Bork and the *New Republic* are now far outside the constitutional mainstream, as the achievement of Justices Souter, O'Connor, and Kennedy in *Casey* so powerfully and surprisingly

makes clear. And their greatest achievement, the elevation of *Roe*'s central holding to a firmer status than it ever before has attained, will, like *Griswold*, in all likelihood receive its most powerful affirmation in the world of politics, rather than in law: never again, after what Souter, O'Connor, and Kennedy have done, can *any* plausible nominee for the Supreme Court—irrespective of whom the president might be—go before the Senate Judiciary Committee and refuse to do anything less than to endorse *at least* the trio's joint opinion in *Casey*. Just as in recent years even Judge Bork had to stretch and tear all of his jurisprudential notions so as to fit a firm and explicit affirmation of *Brown* into his world-view, and just as nominees Kennedy and Souter felt bound to offer endorsements of *Griswold*, henceforth each and every nominee will have to endorse at a minimum the trio's articulation of individual choice as a Fourteenth Amendment liberty in *Casey*. Barring only the election of fifty or more Jesse Helmses to the U.S. Senate, *Roe*'s right to choose now stands more firmly and unchallengeably ensconced in American constitutional law than ever before. Many difficult pro-choice struggles remain ahead, but the biggest battle is now indeed over, even if the most committed partisans on both sides of the struggle do not yet recognize or acknowledge it. And for that, Souter, O'Connor, and Kennedy deserve significant credit. As Justice Blackmun himself said, the joint opinion was "an act of personal courage and constitutional principle," and one whose legacy, much as Blackmun hopes, will quite certainly prove powerful and enduring. □

Richard Rothstein

WHO ARE THE REAL LOOTERS?

The television reporter on the scene was incredulous. A looter, unconcerned with television cameras, police, or the stares of fellow neighborhood residents, walked by, arms laden with stolen property. The reporter raced after, trying to shove her microphone in the looter's face: "Why are you doing this?" The looter shrugged. "Don't you feel guilty?" the reported pleaded. "No," the looter said matter-of-factly, and walked off.

Another looter came by, also laden with someone else's property. "Why are you doing this?" This time the looter turned to the reporter and gloated, "Because it's free!"

Back to the news anchors. "Of course it's not free," one of them pontificated. The cost of looting, he said, is enormous: businesses destroyed, jobs lost to the community, lives wasted, children destined to go hungry, a generation's opportunities devastated. No, it's not free.

The looters, those grinning, arm-laden, amoral thieves, didn't stop to give their names to our on-the-scene television reporter. Who might they have been? We can only guess at their identities. But let's try. Perhaps we've run across them before.

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One of the looters seemed to emerge from a store that sold electronic devices. Could he have been John Welch, Jr., chairman of General Electric, who oversaw increasing growth of RCA production work at his plant in Kuala Lumpur, Malaysia, where unions are illegal; where teenage girls from rural villages can be had for factory assembly work at a wage of forty-five cents an hour, so long as their fingers are nimble; and where the supply of other girls to replace them is seemingly limitless? Did Welch feel guilty about the devastation of communities like Bloomington, Indiana, where five hundred RCA workers lost their jobs in the 1980s? Welch may have thought the profits were free. Perhaps the television anchor wanted to remind him of the cost to Malaysian girls crowded with a dozen others into one-room dormitories so they can work round-the-clock shifts. Or perhaps the anchor was thinking of a Bloomington woman, forced to sell her home after being laid off, because the only jobs available now are table waiting, at one-third her former wages.

Could one of the looters have been Raymond Hay, chairman and chief executive officer of the LTV Corporation, who put his firm into bankruptcy in 1986, claiming it couldn't afford to pay $2 billion in