

SARAH TRYPHENA PHILLIPS LECTURE

## Politics, the Constitution and Abortion

RICHARD HODDER-WILLIAMS

*University of Bristol*

### I

I DO not know what Sarah Tryphena-Phillips's views on abortion were, and I am not going to discuss the morality, or otherwise, of abortion this evening. Nor, indeed, am I going to analyse the strengths and weaknesses of the very many opinions which the Justices of the Supreme Court have handed down these last seventeen years since the landmark case of *Roe v. Wade* which first asserted that the constitutional right of privacy was 'broad enough to encompass a woman's decision whether or not to terminate her pregnancy'.<sup>1</sup> Although Chief Justice Hughes's aphorism that 'the Constitution is what the judges say it is'<sup>2</sup> is clearly an over-simplification,<sup>3</sup> few would disagree that the Supreme Court has played the leading role in enunciating the meaning of the Constitution. Since the primary interface between politics and the Constitution has historically been the Supreme Court, it seems appropriate to focus upon that institution.

General propositions have a greater immediacy when set within a specific context and so I have chosen to weave the saga of the abortion controversy into the general arguments I wish to make. Abortion is clearly a political issue of high saliency and it is also clearly a matter of dispute whose resolution has been sought in large part in the federal courts. Litigants have attempted to prevail by persuading a majority of the Justices

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973) at 153.

<sup>2</sup> C. E. Hughes, *The Supreme Court of the United States* (Columbia University Press, 1928).

<sup>3</sup> L. Fisher, *Constitutional Dialogues: interpretation as political process* (Princeton University Press, 1988).

that *their* interpretations of the Constitution are correct. When the Supreme Court agreed to hear *Webster v. Reproductive Health Services*<sup>4</sup> in 1988, no less than seventy-eight *amicus curiae* briefs were submitted, thus eclipsing the record previously held by *Regents of the University of California v. Bakke*,<sup>5</sup> the first of the affirmative action cases. The interaction of politics and law could hardly be more obvious.

Any student of an introductory course on American Government or History is familiar with the idea that the Supreme Court is a political institution, but this simple phrase conceals several possible connotations. It is frequently employed outside the classroom in common political discourse not to make a descriptive statement but an evaluative, and usually a derogatory, one. Herein lies an important confusion. The Court is accepted in the tripartite system of national government as political but it is simultaneously attacked for being political. There are, I believe, at least six different, and analytically separable, connotations of that beguiling phrase and I intend to use the abortion controversy to illustrate them.

## II

The first is essentially definitional. Although there is no universal agreement over what constitutes the essence of politics, there is a general acceptance that politics in the state is the process through which competing choices over public policy are made and which legitimates the exercise of state power to enforce those choices. In David Easton's ugly, but accurate, formulation, politics encompasses the behaviours which produce for a political unit 'the authoritative allocation of values'.<sup>6</sup> This stresses the twin essence of a political decision: its authoritative status and its normative nature as a choice between competing values.

Courts of last resort throughout most of the world issue judgements which are authoritative and, because they temporarily resolve disputes, normative.<sup>7</sup> Only rarely are their decisions simple, technical applications of the law; on the contrary, they involve exacting choices between existing precedents, between competing rights, often between the rival claims of different but equally legitimate bodies. Precisely because these disputes

<sup>4</sup> 109 S.Ct. 3040 (1989).

<sup>5</sup> 438 U.S. 265 (1978).

<sup>6</sup> D. Easton, 'An approach to the analysis of political systems', *World Politics*, 9, (1956-7), 383-400.

<sup>7</sup> R. Hodder-Williams, 'Courts of last resort', in R. Hodder-Williams & J. Ceaser (eds), *Politics in Britain and the United States: comparative perspectives* (Duke University Press, 1986), pp. 142-72.

require judgement, rather than measurement, such problem cases reach a country's highest court. It was the consequences of this *fact* which upset people when the Supreme Court handed down its decision in *Roe v. Wade*; it seemed to double guess the legislatures. But my point is that, even if Byron White's dissent had been the majority opinion, power would still have been exercised, values still authoritatively allocated. As Justice Robert Jackson wrote in the last months of his life, 'any decision which confirms, allocates, or shifts power . . . is . . . political, no matter whether the decision be reached by a legislative or a judicial process'.<sup>8</sup> Definitionally, therefore, the Court always has been, and necessarily always will be, political.

### III

The second connotation is empirical. Americans have traditionally litigated to achieve political ends. This may be explained by a peculiarly dominant legal culture in the days of the Republic's conception, or by a 'higher law' tradition which challenges the untrammelled sovereignty of legislatures, or by a formal structure in which the Constitution is the supreme law, or even by the sheer fecundity of lawyers.<sup>9</sup> Whatever the cause, the end result is clear. The Constitution can be seen as a resource, by businessmen at the turn of the century to ward off the limitations of regulation, by the civil rights community more recently to liberalize the practices of conservative state governments. So individuals go to court to pressurize governments and interest groups have increasingly sponsored or assisted in such suits to enhance their own concerns.<sup>10</sup> In short, Americans *use* the courts for their political purposes.<sup>11</sup> It matters, therefore, who sits on that Court. The extraordinary, indeed unprecedented, interest group

<sup>8</sup> R. H. Jackson, *The Supreme Court in the American System of Government* (Harvard University Press, 1955), p. 55.

<sup>9</sup> L. M. Friedman, *A History of American Law* (Simon and Schuster, 1975); E. S. Corwin, 'The "higher law" background to American constitutional law', *Harvard Law Review*, 42 (1928–9), 149–85, 365–409; J. K. Lieberman, *The Litigious Society* (Basic Books, 1981).

<sup>10</sup> Most obviously the NAACP as recorded in R. Kluger, *Simple Justice* (Knopf, 1976) and the ACLU as recorded in S. Walker, *In Defence of American Liberties: a history of the ACLU* (Oxford University Press, 1990). But conservatives in the past and increasingly in the present are also deeply involved; see: C. E. Vose, *Constitutional Change: amendment politics and Supreme Court litigation since 1900* (Lexington Books, 1972) and L. Epstein, *Conservatives in Court* (University of Tennessee Press, 1985).

<sup>11</sup> R. Hodder-Williams, 'Litigation and political action: making the Supreme Court activist', in R. Williams (ed.), *Explaining American Politics: issues and interpretations* (Routledge, 1990), pp. 116–43.

involvement in the failed nomination of Judge Bork makes abundantly clear how important the composition of the Court is to political activists.<sup>12</sup>

The Justices of the Supreme Court did not, in the manner of an Americanized Law Commission, seek out some anomaly in the Constitution and create *Roe*; it came to them.<sup>13</sup> Linda Coffee and Sarah Weddington, the young Dallas lawyers who instigated the litigation, were consciously looking for a plaintiff to challenge Texas's restrictive abortion laws.<sup>14</sup> Norma McCorvey, the Jane Roe of *Roe v. Wade*, was carefully checked out for suitability. Her role was marginal, although essential: she had to provide, as Article III of the Constitution requires, 'a case or controversy' in the first place and thereafter not to withdraw, in the long process from the initial filing of the case on 3 March 1970 to the final judgement on 22 January 1973. The extent of her personal stake in the litigation is reflected in her discovery of victory virtually by accident, when a friend, as a matter of common feminine interest, drew her attention to the newspaper's reporting of the decision.<sup>15</sup>

However, there was no inevitability about the Court's addressing the core issue of the constitutional protection, if any, for abortion. The popular American belief that one can appeal right to the Supreme Court is only partly true. Although there used to be some exceptions (and even these have recently been removed), the Court has for over half a century exercised discretion in deciding which cases to review, through the granting of a *writ of certiorari*. Litigants may appeal; but they have no right to expect that their appeal will be granted.<sup>16</sup> A man did once pursue all the

<sup>12</sup> R. Hodder-Williams, 'The strange story of Judge Robert Bork and a vacancy on the Supreme Court', *Political Studies*, 36 (1988), 613–37; E. Bronner, *Battle for Justice: how the Bork nomination shook America* (W. W. Norton, 1989); P. B. McGuigan & D. M. Weyrich, *Ninth Justice: the fight for Bork* (Free Congress Research and Education Foundation, 1990).

<sup>13</sup> cf. R. Jackson's comment that the Court is by nature 'a substantially passive instrument, to be moved only by the initiative of litigants'. *The Supreme Court*, p. 12.

<sup>14</sup> M. Faux, *Roe v. Wade: the untold story of the landmark decision that made abortion legal* (Macmillan, 1988). See also F. W. Friendly & M. J. H. Elliott, *The Constitution: that delicate balance* (Random House, 1984), pp. 202–8.

<sup>15</sup> Friendly & Elliott, *The Constitution*, p. 207.

<sup>16</sup> cf. Chief Justice Taft's comments to Congress in 1925: 'Litigants have their rights sufficiently protected by a hearing or trial in courts of first instance and by one review in an intermediate appellate Federal Court. The function of the Supreme Court is conceived to be not the remedying of a particular litigant's wrong, but the consideration of cases where decisions involve principles, the application of which is of wide public or governmental interest', quoted in J. Schmidhauser, *The Supreme Court: its politics, personalities and procedures* (Holt, Rinehart, 1960), p. 122; or Chief Justice Fred Vinson addressing the American Bar Association in 1949: 'To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolutions will have immediate importance far beyond the particular facts and parties involved', quoted in W. F. Murphy and H. C. Pritchett (eds), *Courts, Judges and Politics* (Random House, 1st edn, 1961), p. 55.

way to the Supreme Court his claim that his right to travel was unconstitutionally infringed by 'No Left Turn' restrictions but the Court chose not to grant *certiorari*.<sup>17</sup> And this was true also of the initial abortion cases; the Court declined earlier opportunities to review the issue, although Douglas was keen to face the question earlier than his colleagues.<sup>18</sup> The Justices, as they sift the *cert* petitions day by day, year by year, observe a new legal problem as it emerges. That happened when the Court involved itself in reapportionment litigation; a steady increase in cases in the lower courts, often decided in different ways, persuaded a majority of the Justices that the time had come to reconsider the whole question of the Constitution's application to reapportionment.

Much the same occurred with the issue of abortion. Sarah Weddington was not the only lawyer with a client prepared to challenge restrictive abortion laws. In the Autumn of 1970, there were already five such challenges on the Court's docket; there were more than twenty before three judge federal courts; and eleven states had cases in their own courts.<sup>19</sup> The academic journals, noted by the Justices' law clerks, were also beginning to carry articles on the subject<sup>20</sup> and newspapers had already started to cover the issue as a constitutional as well as a moral matter. Thus, the constitutionality of abortions was placed upon the public agenda in a way that no Justice could fail to notice.

Not only was the quantity of such litigation rising, the decisions being handed down were often contradictory. In September 1969, the Californian Supreme Court had held, in *People v. Belous*, that part of the state's abortion statute was unconstitutionally vague;<sup>21</sup> in November, the District Court for the District of Columbia struck down part of the DC's abortion law.<sup>22</sup> In 1970 a federal court in Wisconsin, by contrast, upheld a state law against the same claim of unconstitutional vagueness that had convinced

<sup>17</sup> W. Brennan jnr, 'The National Court of Appeals: another dissent', *University of Chicago Law Review*, 40 (1973), p. 478.

<sup>18</sup> For the story of that case, see P. Irons, *The Courage of their Convictions: sixteen Americans who fought their way to the Supreme Court* (Free Press, 1988), pp. 253–80. The judgement of the district court against Jane Hodgson was affirmed under *Hodgson v. Randal*, 402 U.S.967 (1971), but 'Mr Justice Douglas is of the opinion that probable jurisdiction should be noted and the case set for argument'.

<sup>19</sup> R. Roemer, 'Abortion law reform and appeal: legislative and judicial developments', *American Journal of Public Health*, 61 (1971), p. 502.

<sup>20</sup> The critical path-breaking article was R. Lucas, 'Federal constitutional limitations on the enforcement and administration of state abortion statutes', *North Carolina Law Review*, 46 (1968), pp. 730–78.

<sup>21</sup> *People v. Belous*, 71 Cal 2d 954, 458 P2d 194.

<sup>22</sup> *United States v. Vuitch*, 305 F.Supp. 1032 (1969), reversed by the Supreme Court in *United States v. Vuitch*, 402 U.S. 62 (1971), on the grounds that the DC law was *not* unconstitutionally vague.

the Californian judges and Judge Gesell in Washington.<sup>23</sup> Surveying the scene below, the Court felt it time to address the issue. *Roe* chanced to be the vehicle for that review.

It is somewhat disingenuous, however, to presume that the court is at the mercy of a litigious American public. The discretionary *certiorari* authority does permit the Court to close the door on issues it feels inappropriate to take and there have been several technical formulae, like the wonderfully malleable 'political question' doctrine, used over the years.<sup>24</sup> Such self-abnegation could return, as indeed seems to have occurred in death penalty cases where the Court now routinely refuses to hear many cases which would have been reviewed in the 1970s. But the fundamental expectations of the American people, to the discomfort of conservative lawyers, are that the judicial branch is obligated to fulfil its judicial function when citizens properly bring claims, however novel, into the federal courts. To the extent that a majority of the Justices accept this responsibility, de Tocqueville's oft-quoted observation that 'scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question' remains correct.<sup>25</sup> The second connotation, therefore, draws attention to the involuntary way in which the Constitution has historically been used by political actors as one of their many political resources. As litigation has increased in importance as a political strategy in recent decades, the Court has been drawn more obviously and more inevitably into the political domain.

#### IV

The next three connotations relate to the Court's processes of decision-making. Justices are human enough to want their conceptions of the Constitution to prevail and, as individuals, they seek to persuade their colleagues to agree with them. I distinguish this natural wish to prevail from the notion of goal-oriented judges, whose motive force is supposed to be personal policy preferences. These I shall come to later. The papers of retired Justices make it quite clear that attempts have regularly been made to influence the votes of colleagues; but the greatest effort is expended on influencing the rationale of the Court's decision set forth in the opinion for

<sup>23</sup> *Babbitz v. McCann*, 310 F.Supp. 293 (E. D. Wis. 1970).

<sup>24</sup> *Baker v. Carr*, 369 U.S. 186 (1962); P. Strum, *The Supreme Court and 'Political Questions': a study in judicial evasion* (University of Alabama Press, 1974).

<sup>25</sup> Alexis de Tocqueville, *Democracy in America* (Doubleday, 1969), p. 281.

the Court.<sup>26</sup> Sometimes, influence at this stage can change votes and hence constitutional law itself.<sup>27</sup> It is also well-known that the Chief Justice can, and does, exercise his power to nominate, when he is in the majority, the author of the majority opinion and thus affect the jurisprudential underpinning, and hence reach, of the decision.<sup>28</sup>

The resources at a Justice's disposal vary from case to case and from person to person. There is, of course, sheer intellectual power; there is flattery; there is the appeal to friendship and loyalty; there is an implicit threat to dissent or to write a concurring opinion; there is the readiness to create a rival coalition to confront the opinion writer.<sup>29</sup> Some Justices have been more ready and adept than others at this kind of influence, but few have altogether eschewed the opportunity to shift the authoritative utterances of the Court towards their way of thinking.

*Roe v. Wade* illustrates this admirably. The Conference which discussed this case (and its companion case *Doe v. Bolton*<sup>30</sup>) did not reach clear conclusions. Indeed, Burger apparently intended the cases to be vehicles for establishing new principles to reduce the flood of cases originating from disputes involving state law that contributed so much to the Court's expanding docket, by requiring such cases to run the full gamut of state courts before being reviewed by the Supreme Court.<sup>31</sup> That issue, however, had been disposed of early in the Conference and so the issue facing the Justices was abortion itself.

To most of the Justices, it looked as though there were four, perhaps five votes to strike down some at least of the challenged Texas and Georgia statutes, but no single rationale was held even by the putative majority.<sup>32</sup> On the following day, Chief Justice Burger circulated the assignment list, which astonished and angered William Douglas, the senior Associate Justice. It seemed as though Burger had, against the traditions of the Court, made assignments even in the cases where he was not part of the

<sup>26</sup> W. F. Murphy, *Elements of Judicial Strategy* (University of Chicago Press, 1964).

<sup>27</sup> B. Schwartz, *The Unpublished Opinions of the Warren Court* (Oxford University Press, 1985); J. W. Howard, 'On the fluidity of judicial choice', *American Political Science Review*, 62 (1968), pp. 43–56.

<sup>28</sup> D. O'Brien, *Storm Center: the Supreme Court in American Politics* (Norton, 1986), esp. chap. 5.

<sup>29</sup> Excellent examples of all these are to be found in J. P. Lash (ed.), *From the Diaries of Felix Frankfurter* (Norton, 1975).

<sup>30</sup> 410 U.S. 179 (1973).

<sup>31</sup> B. Woodward & S. Armstrong, *The Brethren: inside the Supreme Court* (Simon & Schuster, 1979), p. 165.

<sup>32</sup> The next paragraphs draw heavily on Bernard Schwartz, *The Unpublished Opinions of the Burger Court* (Oxford University Press, 1988) which broadly confirms the account published earlier in Woodward & Armstrong, *The Brethren*, pp. 165–89, 229–40.

majority. Douglas fired back an angry memorandum.<sup>33</sup> Burger admitted his errors on two cases, but stood his ground on the abortion cases, arguing, not without some justice, that the voting was so unclear that it was best for a draft opinion to be written by the undecided Harry Blackmun. He added, ominously for Douglas, that the cases were 'quite probable candidates for reargument'. This was precisely what Douglas feared. Potter Stewart, he believed, was a weak reed (he had, after all, dissented in *Griswold v. Connecticut*<sup>34</sup> which had found a statute banning the sale of contraceptives an unconstitutional invasion of personal privacy and which would necessarily provide the constitutional foundation of the final abortion opinion); he was doubtful about Blackmun's position; he was sure that Burger wanted to uphold the state laws as he knew White did. The two new Nixon appointees had, he presumed, been carefully chosen to cut back on any expansive reading of the due process clause of the Fourteenth Amendment.

As the months passed, the silence from Blackmun's chambers on the abortion cases worried the three most liberal members of the Court. When the draft opinion finally emerged, those who had voted to strike down the state laws (and they included Stewart) were dismayed; although Blackmun was prepared to find them unconstitutional, he wanted to do so on the grounds that they were too vague.<sup>35</sup> Brennan promptly sent Blackmun a memorandum calling upon him to met the 'core constitutional question' head on; he asserted that four of the Justices (himself, Douglas, Stewart and Marshall) thought it had been agreed that 'the Constitution required the invalidation of abortion statutes save to the extent they required an abortion to be performed by a licensed physician within some limited time after conception'.<sup>36</sup> Douglas, having read Brennan's note, sent one of his own reiterating the same points. Blackmun, however, was faced not only by pressure from the liberal wing. More dangerously, White's draft dissent effectively demolished Blackmun's argument that the statutes should be struck down on vagueness grounds<sup>37</sup> and this, Blackmun felt, might well drive from his majority Stewart, for whom the logic and precedential bases of an opinion were important; and Burger, whose position was strengthened not only by his status as chief but also by his long-standing personal connection with Blackmun,<sup>38</sup> was lobbying for reargument on the

<sup>33</sup> M. I. Urofsky (ed.), *The Douglas Letters* (Adler & Adler, 1987), p. 181.

<sup>34</sup> 381 U.S. 479 (1965).

<sup>35</sup> Schwartz, *The Unpublished Opinions*, pp. 120–40.

<sup>36</sup> Schwartz, *The Unpublished Opinions*, p. 144.

<sup>37</sup> The full draft dissent is printed in Schwartz, *The Unpublished Opinions*, pp. 141–3.

<sup>38</sup> The two Justices had been best man at each other's weddings. There is some suggestion that, by 1971, their relations were less cordial: Woodward & Armstrong, *The Brethren*, pp. 173–4.

grounds that so important an issue should be heard by a full nine man court.

This alarmed Brennan and Douglas. They immediately changed their positions and pushed for the opinion to come down that Term. The votes were there, they argued, and the cases had been thoroughly examined. Douglas's note to Blackmun was entirely political, mixing flattery with pragmatism: 'Those two opinions of yours in *Texas* and *Georgia* are creditable jobs of craftsmanship and will, I think, stand the test of time. While we could sit around and make pages of suggestions, I really don't think that is important. The important thing is to get them down. . . . Again, congratulations on a fine job. I hope the 5 can agree to get the cases down this Term, so that we can spend our energies next Term on other matters'.<sup>39</sup> But Blackmun himself had become too involved in the cases to go public with White's powerful dissent hanging over him. Still a relative newcomer and increasingly hurt by the popular sobriquet applied to him and Burger—the Minnesota Twins—he wanted to write an opinion that would mark him out as an effective Justice with a mind of his own. He was also emotionally involved in the whole issue as a result of his close links with the medical fraternity as counsel to the Mayo Clinic, and he wanted more time to think the arguments through.<sup>40</sup> So he, too, suggested that there should be reargument. Justices William Rehnquist and Lewis Powell, who had joined the Court in January, voted for reargument. Once White had agreed, there were five votes for reargument and the liberal Justices had lost their battle.

Ironically, however, they won the war. Blackmun spent much of the summer of 1972 researching on the abortion issue and, when the Conference reconsidered the issue in the autumn after reargument, the voting was not only clearer, it was also decisive. While Rehnquist joined White in dissent, Powell joined the old majority, to which Burger attached himself reluctantly. Furthermore, Blackmun's opinion was strikingly different from that which he had circulated in May; on this occasion, he did face the core controversy and, although weighed down with medical exegesis and detours into peripheral issues, his opinion unequivocally asserted the fundamental right of a woman in the first trimester of pregnancy, after consultation with her physician, to decide whether or not to carry a fetus to term. If *Roe v. Wade* had come down in the summer of 1972, it would have been a minor opinion, a footnote to theses on the 'void for vagueness doctrine', and remembered more for White's hatchet job of decimation than Blackmun's

<sup>39</sup> Urofsky (ed.), *The Douglas Letters*, pp. 183–4.

<sup>40</sup> Woodward & Armstrong, *The Brethren*, pp. 183–9.

cautious opinion. Who now remembers the *Vuitch* decision?<sup>41</sup> As it happened, the liberals' political failure was turned into triumph and Burger's political success into partial defeat.

We do not possess the documentation to unravel the processes by which later abortion cases came to be decided and the opinions came to be written in the way that they have been. But it is possible to read between the lines. Let me start with *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>42</sup> decided in the last days of Warren Burger's chief justiceship. It is clear that the Court was deeply, even bitterly, divided. White's dissent is harsh, even by his sometimes acerbic standards. More significantly still, his opinion, which Rehnquist joined, stated quite plainly: 'In my view, the time has come to . . . overrule [*Roe v. Wade*]'<sup>43</sup>. Burger's shift from upholding *Roe* against most challenges to dissent repeated Solicitor-General Charles Fried's invitation to the Court to rethink the principles of *Roe* itself.<sup>44</sup>

Read John Paul Stevens's concurring opinion, however, and he seems to be talking specifically to White in the way he praises, quite unnecessarily, the logic which had led White to be part of the *Griswold* majority: '... I have always had the highest regard for his view on the subject. In this case, although our ultimate conclusions differ, it may be useful to emphasize some of our areas of agreement in order to ensure that the clarity of certain fundamental propositions not be obscured by his forceful rhetoric'.<sup>45</sup> Here I think he began his attempt to build a consensus between the outright overrule apparently sought by Rehnquist and White and outright refusal to countenance any regulations in the first semester, which the majority apparently preferred. Stevens went out of his way to praise the logic which led White to be part of the *Griswold* majority.

Three years later *Webster* was decided.<sup>46</sup> Some at least of Stevens's hopes seem to have borne fruit. Rehnquist's opinion, in which White joined, no longer publicly sought to overrule *Roe* (indeed, it cited with approval past precedents from which he and White had dissented);<sup>47</sup> its attack on *Roe* basically incorporated O'Connor's powerful argument

<sup>41</sup> *United States v. Vuitch*, 402 U.S. 62 (1971).

<sup>42</sup> 476 U.S. 747 (1986).

<sup>43</sup> *Thornburgh*, at 788.

<sup>44</sup> See L. Caplan, *The Tenth Justice: the solicitor general and the rule of law* (Knopf, 1987), pp. 135–54.

<sup>45</sup> *Thornburgh*, at 772–3.

<sup>46</sup> 109 S.Ct. 3040 (1989).

<sup>47</sup> *Webster*, at 3058: 'This case affords us no reason to revisit the holding of *Roe* . . . and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases'.

against the trimester formula in *Akron*;<sup>48</sup> it seemed to be a move towards building, although it did not yet create, a new consensus which might embrace O'Connor and Stevens, both of whom were ready to countenance regulations limiting any absolute right to an abortion but were unprepared to overrule so enduring a precedent. Scalia's withering attack on O'Connor's refusal to address *Roe* head on almost certainly made it less likely that she would, in the immediate future, vote to overrule and thus reduced the chances of putting together a majority to overturn *Roe*. In 1990 this last presumption gained credence from O'Connor's vote in *Hodgson v. Minnesota*<sup>49</sup> to strike down a Minnesota regulation as unduly burdensome; it is noticeable that Kennedy's dissent, in which Rehnquist and White joined, does not mention even the possibility of overruling *Roe*. Stevens effectively had his five votes in *Ohio v. Akron Center for Reproductive Health*,<sup>50</sup> when Kennedy's opinion concentrated on the balance of interests between the state and the pregnant woman. To the extent that this balancing exercise favoured regulation, Scalia's vote could be counted in addition. The notion that abortion in the first trimester was a 'fundamental' right was ignored and thus the possibility of states involving themselves in regulating the early stages of pregnancy was enhanced. But O'Connor and Stevens, at least, were prepared to weigh the 'burden' of regulation against the 'right', even if attenuated, of abortion and find against the regulation. *Ohio* may yet be seen as more significant than *Webster*, because it may have created a new majority on the abortion issue and new principles by which to judge state regulations.

Time will doubtless throw light on the intra-court discussions which lay behind the judgements and opinions on abortion in 1989 and 1990 and the role that Stevens played in them. It seems clear enough to me that the emerging majority, divided though it has been over how to deal with the constitutional claims involved in abortion cases, has nevertheless been trying to build a more acceptable consensus, even if that has meant shifting absolutist positions to accommodate the positions of Stevens and O'Connor. It is entirely possible that Rehnquist has been a party to this accommodation.<sup>51</sup> The politics of negotiation and compromise, the very stuff of the other branches, are alive and well in the judicial branch.

<sup>48</sup> *Akron v. Akron Center for Reproductive Health*, 462 US. 416 (1983), at 452–475, where White and Rehnquist supported her emphatic preference for using an 'undue burden' test in abortion cases.

<sup>49</sup> 110 S.Ct. 2926 (1990).

<sup>50</sup> 110 S.Ct. 2972 (1990).

<sup>51</sup> Several observers of the Court in the late 1980s felt that Rehnquist would be able to lead the Court more effectively than Burger, partly because of his genial disposition and partly because of his intellect, and they observed that Rehnquist was becoming more centrist, presumably in order to marshal the Court better. The hard evidence for this view, however, is not strong. See D. W. Rohde and H. J. Spaeth, 'Ideology, strategy and Supreme Court decisions: William Rehnquist as Chief Justice', *Judicature*, 72 (1988–9), pp. 247–50.

## V

The fourth sense in which the Court may be thought of as political is a prudential one. I am thinking here of the usage that occurs when we say that a particular course of action would be politic, implying that it would be wise and sensible, rather than principled. Justices are not like nuns, unworldly, cloistered, ignorant of the passions outside, resolutely and consistently principled and answerable only to themselves and their God. Indeed, contact with the 'real world', through good relations with their articulate wives and daughters, almost certainly affected the votes of both Stewart and Blackmun in 1973.<sup>52</sup> Perhaps the most obvious example of the Justices struggling to accommodate the law with political realities was the process through which the two *Brown* decisions were made.<sup>53</sup> The Court at the time was deeply fractured and its members represented a range of jurisprudential positions; but the *Brown* decisions were unanimous. All the members were acutely aware of the likely response, especially in the South, to their decision to dispose of the principle of segregation and their deliberations indicate how they tried to square a major policy goal with legal niceties and attempted to fashion a remedy which would be practicable.

It is essential for the survival of the institution that its decisions should be broadly acceptable in the wider community. The Court has no instruments of coercion; its judgements are merely pieces of paper; it depends upon its continuing status and the people's and politicians' readiness to obey. Nobody was more aware of this reality than Harry Blackmun in January 1973. When decisions are handed down, the author of the Court's opinion normally summarizes in a cursory fashion the finding and basic justification of the decision. In a memorandum of 22 November 1972, Blackmun had reiterated a point he had made in Conference, that 'the decision, however made, will probably result in the Court's being severely criticized' and, just before he circulated the final version of his opinion, he sent round another Memorandum which began: 'I anticipate the headlines that will be produced over the country when the abortion decisions are announced' and he enclosed a copy of the statement he had carefully crafted to explain precisely what the findings of the Court actually were in

<sup>52</sup> Personal communications; Woodward & Armstrong, *The Brethren*, p. 167.

<sup>53</sup> See B. Schwartz, *Super Chief: Earl Warren and his Supreme Court* (New York University Press, 1983), pp. 72–127; Kluger, *Simple Justice*, pp. 543–699; P. Elman, 'The Solicitor-General's office, Justice Frankfurter, and civil rights litigation, 1946–1960: an oral history', *Harvard Law Review*, 100 (1986–7), pp. 822–45.

the hope that 'there should be at least some reason for the press not going all the way off the deep end'.<sup>54</sup>

The prudential tactic can be played both ways. Scalia, for example, has publicly argued that the Court's involvement in the abortion controversy is against the Court's interests: 'leaving this matter to the political process is not only legally correct, it is pragmatically so. That alone—and not lawyerly dissection of federal judicial precedents—can produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process'.<sup>55</sup> Douglas, on the other hand, pretended to have no time for pragmatism when pressing for *Roe* to come down in 1972: 'Both parties have made abortion an issue', he wrote in a Memorandum to the Court. 'What the parties say or do is none of our business. We sit here not to make the path of any candidate easier or more-difficult. We decide questions only on their constitutional merits. To prolong these *Abortion Cases* into the next election would in the eyes of many be a political gesture unworthy of the Court'.<sup>56</sup>

Pragmatic arguments can thus be dismissed as demeaning to the truly judicial role of the judge or advanced as a necessary calculation for a prudent judge. It is clear from the Justices' private papers that they are as well aware of their lack of obvious democratic legitimacy as their critics, but they are also aware of the functions imposed upon the Court by the American people. Taking the pragmatic, what I would call a political, view is sensible and probably essential, too. Since the American people have in effect devolved the process of amending their 18th-century Constitution to the Court, it must retain its image and reputation as an

<sup>54</sup> Schwartz, *The Unpublished Opinions*, p. 151.

<sup>55</sup> In *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972 (1990), at 2984. Scalia believes it is both improper *and* impossible for the Court to manage the abortion controversy and, therefore, it ought to withdraw. See, additionally: *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), at 3064, 3065: '... this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not judicial—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive ... the fact that our retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of the Court'; *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990), at 2961: 'The random and unpredictable results of our consequently unchannelled individual views make it increasingly obvious, Term after Term, that the tools for this job are not to be found in the lawyer's—and hence not in the judge's—workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so'.

<sup>56</sup> Urofsky, *The Douglas Letters*, p. 185.

independent arbiter.<sup>57</sup> If that means noting public opinion (and in the 1990s perhaps the resurgence of pro-choice feelings), it is a small price to pay when a legal institution is virtually forced to play so significant a political role in the system.

## VI

I come at last to the sense in which most observations about the political nature of the Court are couched. This sense is perjorative, intended to draw critical attention to the Court's failure to ground its actions firmly and exclusively in the law. If the fundamental purpose of politics is the attempt to translate policy goals into law (as surely it is), for many critics of the Court, the Justices appear to be as goal-oriented as political actors, rather than rule-bound judges, setting out from personally sanctioned policy preferences towards a constitutional justification for them. As one author has put it, the Justices use the Constitution 'as a kind of letter of marque authorising them to set sail at will among laws, striking down any they find displeasing'.<sup>58</sup> Robert Bork more recently has argued that judges who are not limited by textually discoverable rights feel free to invalidate duly enacted laws 'in accordance with their own philosophies'.<sup>59</sup> Both imply not merely that Justices are goal-oriented but that those goals are so dominant that legal arguments become no more than pro forma wrapping of policy preferences.

It would be wrong to dismiss this view out of hand. The *Brown* decision, although even a strict constructionist like Robert Bork says he supports it, was quintessentially such a political judgement.<sup>60</sup> We know that Robert Jackson openly sought a legal path to achieve the end of segregation which he sought.<sup>61</sup> There is little doubt that Douglas, especially in his later years, imposed his conception of liberty on to the Fourteenth

<sup>57</sup> R. Hodder-Williams, 'Making the Constitution's meaning fit for the 1980s', in J. Smith (ed.), *The American Constitution: the first 200 years, 1787-1987* (Exeter University Publications, 1987), pp. 97-110.

<sup>58</sup> W. Berns, 'The least dangerous branch, but only if . . .', in L. J. Theberge (ed.), *The Judiciary in a Democratic Society* (Gower, 1979), p. 15.

<sup>59</sup> R. Bork, *The Tempting of America: the political seduction of the law* (Free Press, 1990), p. 220. See also pp. 115-16: '[In the years since *Roe*] no one, however pro-abortion, has ever thought of an argument that even remotely begins to justify *Roe v. Wade* as a constitutional decision. . . . There is no room for argument about the conclusion that the decision was the assumption of illegitimate judicial power and usurpation of the democratic authority of the American people'.

<sup>60</sup> R. Maidment, 'Policy in search of law', *Journal of American Studies*, 9 (1975), pp. 301-20.

<sup>61</sup> Schwartz, *Super Chief*, p. 89.

Amendment without much concern for its intellectual moorings. In the *Roe* saga, too, the position of some of the Justices can only be explained in terms of personal preferences. Burger, I would hold, evinced a remarkable degree of consistency, but it was a consistency which was driven by an underlying personal value. He was never fully happy with the broad sweep of parts of Blackmun's *Roe* opinion and his concurring opinion makes this quite clear; for him, there was no place for abortion on demand. He stuck to that through most of *Roe*'s progeny, often penning a brief concurrence reiterating his position.<sup>62</sup> When *Thornburgh* was decided, and yet a further set of regulations were found to impinge too closely on the fundamental right to choose an abortion, he believed, and I think believed correctly, that a majority of the Court as then constituted had in fact reached a point where any limitation on obtaining an abortion in the first trimester would always be found to conflict with a woman's 'fundamental right' and would therefore be unconstitutional;<sup>63</sup> his 'crossing the floor' was, thus, a logical step.

Justice Powell, on the other hand, could write a powerful and explicit reaffirmation of *Roe* in one year,<sup>64</sup> only to deny its basic premiss (that the right of privacy protected sexual behaviour) three years later.<sup>65</sup> There is evidence that he only changed his mind at the very last moment,<sup>66</sup> almost certainly because *Akron* concerned abortion, the need for which flowed from normal sexual activity, while *Bowyers* concerned sodomy, to Powell clearly an abnormal activity.

What confuses many critics of the Court is the failure to see that different philosophical principles dictate different results, so that policy consequences follow inevitably from a Justice's basic jurisprudence. For example, those who see the fundamental role of the Court as the protector of the individual, particularly the unpopular individual, against the power of the state, will necessarily be activist (defined here as a willingness to find unconstitutional the laws and actions of duly elected officials); those who defer to elected officials except where the most egregious breakings of the Constitution have taken place, will naturally seem self-restrained.

<sup>62</sup> See *Roe v. Wade*, 410 U.S. 113 (1973), at 207–8; *Maher v. Roe*, 432 U.S. 464 (1977), at 481.

<sup>63</sup> *Thornburgh*, at 782–5.

<sup>64</sup> *Akron v. Akron Center of Reproductive Health*, 462 U.S. 416 (1973), at 420: '... the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today and reaffirm *Roe v. Wade*'.

<sup>65</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), at 197–8.

<sup>66</sup> Irons, *The Courage of Their Convictions*, p. 391.

Each of these jurisprudential positions has strong supporting arguments. In fact, they represent polar positions on a continuum, so that the centre of judicial gravity in the post-New Deal Courts has tended to shift around a moving central bloc of Justices. But this does not mean that decisions are not principled. Writing for a majority inevitably involves some coalition building and therefore internal inconsistencies in an opinion (and between opinions). Criticism of the Justices' principles is a very different thing from assuming that they have no principles at all. I would argue strongly, therefore, that the policy implications of the Court's judgements flow, with only a handful of exceptions, from something much more profound, more intellectual, more proper indeed than personal preference on discrete policy issues. Whether one favours the underlying principles or not is a very different matter.

## VII

The final connotation once again places the Supreme Court's interpretations of the Constitution in the political process. Robert Jackson's facility with the pen has left us several splendidly pithy sayings, which deceive as much as they enlighten. 'We are not final because we are infallible', he once wrote; 'we are infallible because we are final'.<sup>67</sup> But he was quite wrong. This notion of finality bears little relationship to reality. The Court's opinions, like stones cast into a pond, always produce some ripples in the political world; sometimes, they are seismic in their consequences.

This was true for *Roe*. It galvanized the pro-life lobby into a variety of actions designed to reverse, or decisively cut back, that decision. The lobby was already in existence, having been formed to challenge the gradual liberalization of abortion laws which were taking place in the states in the late 1960s and it widened the range of its activities beyond traditional forms of influencing legislators. It organized marches and demonstrations; it kept vigils; it challenged those attempting to have abortions and those who administered them; it attacked clinics; it made clear to candidates that their position on abortion could determine their chances of electoral success; it hounded Blackmun himself and, to a lesser extent, the other Justices in the *Roe* majority. Douglas, for example, wrote only half jokingly to Brennan and Blackmun in January 1974: 'On this anniversary week of our decision on Abortion, I am getting about fifty letters a day. I'll be happy to share

<sup>67</sup> *Brown v. Allen*, 344 U.S. 443 (1953), at 540.

them with you if you feel neglected'.<sup>68</sup> Despite the massive increase in *legal* abortions,<sup>69</sup> the pro-life lobby was relatively successful in establishing limits on abortion, partly by denying public funds for non-therapeutic abortions and partly by hedging the right in with regulatory constraints.<sup>70</sup>

*Webster*, like *Roe* galvanized people into action. It would need an additional lecture to cover Americans' ambivalent response to the decision, but some indication of the immediate repercussions is important. The Governor of Florida summoned a special session of the state legislature to pass restrictive legislation, only to find no majority among representatives for his initiative.<sup>71</sup> Legislators in Louisiana and Idaho passed stringent laws only to have them vetoed by the Governors. Ohio legislators decided that there would be no victors in a legislative struggle over fresh abortion laws and agreed to hold off. In Pennsylvania, where restrictive abortion laws had a recent history, there was a clear bipartisan majority ready to pass another restrictive law, but the restrictions were themselves restricted by the Governor's unwillingness to sign any bill which he thought might be unconstitutional. Careful liaison between the governor's mansion and pro-life advocates produced a bill which was not as restrictive as they had hoped or the pro-choice lobby had feared.<sup>72</sup> Even so, a Pennsylvania court has recently found it unconstitutional.<sup>73</sup> These are but a few examples of the response to *Webster*.

The Court, then, is a generator of political action. The more its cases take on the character of interest group conflict, the more its decisions become yet another part of an ongoing saga. We should not speak of a seamless web, for the Court's actions are clearly discernable moments when the struggle is decisively moved in a definite direction. Just as the Constitution is used as a political resource by political actors in the United States and thus impels the Supreme Court into the political arena, so also the judgements of the Court, relating as they so often do to issues on which there are disparate and vocal views, redefine the political debate and thus elicit responses from affected parties. This continues until a genuine consensus emerges, a development for which there are currently few positive signs.

<sup>68</sup> Urofsky, *The Douglas Letters*, p. 187.

<sup>69</sup> About 1.5 million women each year now obtain abortions, representing more than one pregnancy out of four. H. Rodman, B. Sarvis & J. Bonar, *The Abortion Question* (Columbia University Press, 1987), p. 1.

<sup>70</sup> L. H. Tribe, *Abortion: the clash of absolutes* (Norton, 1990), pp. 151–72.

<sup>71</sup> Tribe, *Abortion*, p. 183.

<sup>72</sup> T. J. O'Hara, 'Pennsylvania Catholics and the Abortion Control Act of 1989', unpublished paper presented to the American Political Science Association Convention, San Francisco, September 1990.

<sup>73</sup> *New York Times*, 14 September 1990.

## VIII

I have attempted in this lecture to advance two general arguments. The first has been explicit and requires little recapitulation. It is this: every student of American politics and history is taught that the Supreme Court is a political institution, but few are taught that so simple a phrase conceals within itself a complex of different connotations. It is political by definition; it is made political by the actions of Americans using the flexible contours of the Constitution as a political resource; its mode of operation is political, in terms of intracollegial influence, awareness of consequences, and goal orientation; its decisions are political to the extent that they infuse and energize other parts of the American political system with its variegated and multiple points of access. Any critical analysis of the Court which does not take all these aspects on board is deficient.

The implicit argument perhaps needs a little more teasing out. I want to take issue with Hughes's famous aphorism, which I cited at the beginning of my talk. 'The Constitution is what the Judges say it is', is misleading in three important ways. In the first place, it suggests that a decision, which is, after all, nothing more than printed words, in fact translates into action. We know this is not true. It was not true of *Brown*, which supposedly outlawed segregation in public schools;<sup>74</sup> it was not true of *Engel*, which supposedly outlawed the saying of prayers in the public schools;<sup>75</sup> it was not true of *Roe*, which supposedly established a woman's right to terminate a pregnancy.<sup>76</sup> Of course, these decisions had important political consequences and pushed much of the United States along public policy paths it would not otherwise have gone; but they were not as significant and irresistible as many observers imagine.

In the second place, the aphorism implies that the Court operates with a *tabula rasa* when choosing cases and asserting constitutional interpretations. This, too, is false. In *Roe*, particularly, the building blocks upon which the case was first granted *certiorari* and then decided were a great deal more substantial than is often credited.<sup>77</sup> The right to privacy was not,

<sup>74</sup> J. Peltason, *Fifty-Eight Lonely Men: southern federal judges and school desegregation* (Harcourt, Brace, 1961).

<sup>75</sup> F. H. Way, 'Survey research on judicial decisions: the prayer and Bible reading cases', *Western Political Quarterly*, 21, (1968), pp. 189–205.

<sup>76</sup> Tribe, *Abortion*, pp. 161–94.

<sup>77</sup> Tribe, *Abortion*, pp. 77–112. Note also how Justice Brennan used *Eisenstadt v. Baird* to add another brick to the edifice of abortion rights. 405 U.S. 438 (1972). Although *Baird* involved contraception only, Brennan's last paragraph read, at 453: 'If the right to privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child' (my italics).

as Robert Bork would have us believe, conjured from nowhere. While Scalia's complaint that the issue of abortion should never have ended up in the courts clearly resonates with those who seek for simple solutions to constitutional problems, it seems to me improper to deny litigants a judgement on a claim which does raise substantial, if embarrassing, issues of principle. Hence, we must see *Roe* as part of a longer story which predates January 1973 and, clearly, continues long past it.

And this brings me to the third way in which Hughes is mischievously misleading. For a few brief moments, the Constitution may indeed mean what the Judges say it is. But those moments are short. Immediately, the American political system activates itself to refine, amend, and reformulate, the principles of a decision. *Roe* may not have required the direct action of march and countermarch, vigil and harassment, even the bombing of clinics, but these were all responses which affected the way in which *Roe* and its progeny operated on the ground. It is inevitable that courts of last resort 'authoritatively allocate values' or, if you will, act politically. But that allocation of values, as a matter of empirical fact, is neither nationally applied nor permanently fixed. For a brief moment it will be the law; but the law is not the same as practice; nor is the law immutable. *Roe* was a compromise between a woman's right to control her body and the states' right to care for potential human life. It invited litigation; and that is the sort of invitation Americans are congenitally incapable of passing up.