

Did *Roe v. Wade* Pass the Arbitrary and Capricious Test?

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I. INTRODUCTION

Justice Blackmun sat on 3,653 cases during his twenty-four terms on the Supreme Court,² yet he will surely be best remembered for his role in one case, *Roe v. Wade*.³ Seldom has a judicial decision been more controversial. True, many opinions are harshly criticized. But the criticisms of *Roe* were distinctive. According to critics, *Roe* was not merely bad law, in some sense it was not law at all. One particularly outspoken critic recently calls *Roe* “perhaps the most indefensible ‘constitutional’ decision ever reached by this Court to date”⁴ as well as “manifestly and atrociously contrary to the Constitution.”⁵

The *Roe* dissenters were the first to charge that *Roe* was an arbitrary fiat rather than a legitimate, if misguided, decision. In dissent, Justice White accused the Court of lawlessness:

I find nothing in the language or history of the Constitution to support the Court’s judgments. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. . . . As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.⁶

In other words, according to White, *Roe* was a simple exercise of judicial fiat, with no pretense to legitimate legal analysis.

1. Sho Sato Professor of Law, University of California at Berkeley. Portions of this essay draw on a chapter of a forthcoming book with Suzanna Sherry. © Daniel Farber and Suzanna Sherry. Very helpful comments were provided by Steven Goldberg and by participants in the “Reflections on Judging” conference and in a workshop at Vanderbilt Law School.

2. See “Blackmun, Harry Andrew,” in CQ Supreme Court Collection, <http://library.cqpress.com/SCC>.

3. 410 U.S. 113 (1973).

4. Michael Paulsen, *Paulsen, J., dissenting*, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION 213 (Jack M. Balkin ed., 2005).

5. *Id.* at 214.

6. *Id.* at 221-22 (White, J., dissenting).

Dissenters are often irate, as are ideological opponents of a decision. But *Roe* received equally harsh criticism from the academic community. Perhaps most strikingly, the opinion was lambasted by John Hart Ely, perhaps the leading liberal constitutional theorist of the century.⁷ Although he dedicated much of his work to supporting the Warren Court rulings, Ely denounced *Roe* as lawless. He termed *Roe* a “very bad decision” because it was “bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”⁸ *Roe* was, he thought, uniquely open to the charge of being utterly constitutionally ungrounded, “a charge that can responsibly be leveled at no other decision of the past twenty years.”⁹ He found no legal basis for the decision. “What is frightening about *Roe*,” Ely said, was that the “super-protected [abortion] right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure,” – nor, he added, from the relative political weakness of the group being protected.¹⁰

This a damning indictment. In this Essay, I will not add to the gargantuan literature¹¹ about *Roe*’s rightness or wrongness.¹² Instead, I will focus on the characterization of the opinion as being in some sense worse than merely wrong, as being an exercise of raw power rather than a legitimate exercise of judicial authority. I want to use this characterization to ask more generally what is required to ground a constitutional ruling properly.

The argument proceeds as follows. Part II addresses the role of judgment in constitutional law. If the need to exercise judgment could be eliminated, the difference between correctness and legitimacy would also disappear: a legal conclusion would either be provably correct or simply false. But judgment is inevitable in law, and this means there must be some legitimate

7. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

8. *Id.* at 947.

9. *Id.* at 936.

10. *Id.* at 935-36. I find his argument on the last of these points unconvincing, though it is stated with so much verve that seeing through it takes some thought. Ely argued that fetuses are even more of a disempowered minority than women, so that women are not the *relatively disempowered* group in this situation. *Id.* at 934-35. But this argument simply assumes that fetuses are entitled to be politically represented, and if Ely really thought that, he should have viewed abortion as murder rather than favoring abortion reform as he did.

11. For a sampling of views on this topic, see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984); David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1997 SUP. CT. REV. 1.

12. For what they are worth, my views on that question are found in Daniel Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); I must confess to an absence of fresh insight about the abortion issue on my part since then.

range for differences of opinion, because views will differ about how to make these judgment calls. Unlike mathematics, law leaves us in the position where we must sometime say: “the result in that case is wrong in my view, but the court’s opinion is reasonable.”

Judgment is a subject of great interest to philosophers and psychologists. As a lawyer, however, I find it more productive to turn to another area within the law itself for guidance about how to assess “judgment calls” by decision-makers. Congress gives administrative agencies considerable discretion, but courts nonetheless review the soundness of the agency’s judgments under the “arbitrary and capricious” test. By analogy, we can apply the same standard to judicial decisions. The analogy to administrative agencies is especially compelling because, like courts, agencies are charged with interpreting and implementing legal rules created by others. The “arbitrary and capricious” test is the standard for determining whether the agency has remained within legal bounds.

Before considering the application of this standard to *Roe*, we need to consider how to translate it from administrative law to constitutional law. A key element of the “arbitrary and capricious” test is that the decision includes all (and only) the relevant factors. This naturally raises the question of what factors are legitimate considerations in constitutional decisions. Part III explores the dispute between these constitutional considerations. In my view, the key factors are precedent, history, and social values. Ideally, a judicial decision in a hard case should draw on all three. Of course, mentioning the factors is not enough; the decision must be based on a reasoned analysis of the relevant factors.

Part IV then returns to *Roe*, asking whether the Court’s decision was arbitrary and capricious. If an administrative agency made a similar decision on similar grounds, would it be reversed for doing so? My answer, in a nutshell, is that outright reversal would not be warranted, but that the decision would probably be remanded for further explanation and fact-finding. The Court’s analysis of the right to privacy is sketchy but would be defensible with a little fleshing out. The Court’s trimester system, which is used to balance the rights of women with the state interest in potential life, is much more vulnerable because the court presented it with virtually no explanation, consideration of alternatives, or factual analysis.

Finally, Part V closes with a brief summary. Essentially, the Court did a much more satisfactory job when it revisited the abortion issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹³ both in terms of justifying the right to abortion and devising a test for violations of that right. *Casey* provides a much firmer grounding for the right, and its “undue burden” test provides more flexibility and room for fact-finding. Of course, by that time, the Court had the benefit of many years of experience with the abortion issue, which it obviously lacked at the time of *Roe*.

13. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (reaffirming the right to abortion as a part of constitutional “liberty” but replacing the trimester system with an “undue burden” test).

II. THE ROLE OF JUDGMENT IN CONSTITUTIONAL LAW

First-year law students generally expect to learn a complex system of clear-cut rules. When they learn that the rules are often murky and contestable, they often swing to the opposite view that law is merely a matter of judicial whim. The hard lesson for students to learn is that the law is both flexible and structured: issues often do not have determinate answers, and yet some answers are better than others (and others are no good at all). Thus, being a lawyer or judge requires the exercise of good judgment, not just knowing a lot of rules.

Often, even those who can accept this reality in a common law area like torts, resist it in constitutional law. We want constitutional law to be a clear, objective mandate, free from the historical currents that drive areas like torts. With judgment comes flexibility, and we seem to have difficulty admitting that the Supreme Court really does have flexibility in construing the Constitution. While this resistance to acknowledging the Court's leeway in constitutional cases is understandable, it is also misguided. In reality, flexibility is inevitable, and the only useful question is how to channel it.

A. The Unavoidability of the Exercise of Judgment

The most obvious way to deal with the problem of judicial flexibility is to "solve" it by providing a formula for deciding hard cases.¹⁴ This effort to provide a formula for deciding constitutional cases has become known as foundationalism, because it seeks to build constitutional law from a basic assumption, much as geometry is based on simple axioms. Of course, no one who offers such a formula thinks that following that formula is always going to be a straightforward, worry-free task. Still, foundationalists hope to provide a formula that can resolve constitutional cases, and they claim that their particular formulas are embedded in the constitutional order or in the nature of the judicial role. Thus, the ideal foundationalist theory creates a pipeline from fundamental norms like majoritarianism, liberty, principled decisionmaking, or equality, to a well-defined judicial methodology.¹⁵ That methodology may not guarantee that judges will find the right answer in every case, but faithfully following the methodology guarantees the decision's legitimacy.¹⁶

14. One popular approach directs judges to follow the original understanding of constitutional provisions. This approach seeks to ground constitutional interpretation in historical inquiry.

15. See DANIEL A. FARBER AND SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 1-9 (2002).

16. I am, of course, skeptical of foundationalism. See *id.* (critiquing leading foundationalists and explaining the barriers to any successful foundationalist theory of constitutional law).

For nonfoundationalists, matters are not so simple. Still, the nonfoundationalist might hope to accomplish something along the same lines, beginning with a more complex set of constitutional norms and ending with a recommended judicial methodology, albeit one that is more nuanced than the foundationalist's.¹⁷ What ultimately defeats these hopes is pluralism. A good constitutional decision, as I will argue later, must be based on some workable understanding of history, precedent, and public values. Each one of these can involve complex issues of interpretation, and there is no preset formula for resolving conflicts between them.

Even for the strictest foundationalist, however, there would be no way to eliminate the exercise of judgment. A purist believer in originalism would be faced with the problem of drawing conclusions from a complicated, incomplete and conflicting historical record. Deriving conclusions from history is not always easy; reasonable historians can well differ. In such situations, the originalist must rely on the judge's good judgment¹⁸ in reaching a conclusion. The same is true of any other method of constitutional interpretation – there will always be gaps and gray areas where judgment is required.¹⁹

Solutions to constitutional problems must be designed with an eye to the functions of constitutional law. One function of law is social stability, and one appeal of a formulaic approach is its promise of stability. Fortunately, we can have the stability without having the formula because stability requires only that most cases be reasonably predictable. Because there are easy cases, most of which never reach the Supreme Court, constitutional law can provide a stable framework for government. We know that the presidential term is four years from the text; we know that racial segregation is unconstitutional from judicial decisions – and in neither case is there any uncertainty about the law. It is important to note that many cases that would have been quite hard to

17. For a discussion of the non-foundationalist approach, see *id.* at 152-156.

18. To speak of the "judge's good judgment" as a necessary virtue seems almost tautology, which highlights the oddity of constitutional theories that try to deny the necessity for this trait.

19. A judge in a hard case is trying to solve a difficult problem. In general, there is no simple recipe for problem solving, whether the problem arises in law, business, engineering, or medicine. We can help prepare people to solve such problems in various ways – giving them basic tools they need to analyze the problem, talking in general terms about good ways to approach problems, and exposing them to case studies of similar problems. That is, for example, how business schools train corporate managers, and how law schools try to train future lawyers and judges. But there is an element of creativity in finding solutions that simply cannot be reduced to a formula.

No doubt, it would be wonderful to have some clear program for making hard decisions. But I rather suspect that the absence of such a program is simply part of the human condition. Life presents us with hard choices. In making these hard decisions, we expand our knowledge, revise our understanding of who we are, and better grasp our fundamental values. Of course, a great many decisions are easy, and that is an important fact about constitutional law. What is true in personal life is also true in constitutional law. The big decisions cannot be reduced to a formula.

decide immediately after a constitutional provision was adopted may later become easy simply because they are controlled by precedent. Thus we need not fear that the law will be reduced to chaos if we abandon the quest for the perfect decision-making formula.

Even so, we are left with a serious concern, because the remaining cases are often most important. Those hard cases raise the greatest controversy and evoke fears of an imperialist judiciary. If we want to claim that courts engage in something more than raw policymaking when they decide hard cases, we need some standard other than preferences for assessing those decisions. In short, if we cannot provide an *ex ante* recipe, at least we need an *ex post* standard of performance.

If we are stuck with the exercise of judgment by courts, and if we cannot give them a recipe that will guarantee correct outcomes, how *do* we evaluate the exercise of judgment? What is the difference between an indefensible opinion and one that is reasonable, even if arguably wrong? In short, what makes law an exercise in reasonable judgment rather than an application of arbitrary force? Defining what makes a judgment reasonable (even if debatable) is not easy. We can, however, find guidance from other legal contexts where the question has arisen, such as administrative law.

B. Assessing Exercises of Judgment

A simple description of legal decision-making would say that easy cases are covered by existing legal rules, while hard cases involve gaps in the law where judges exercise discretion, creating new law in much the same way as legislators. This is too simple a picture for two reasons. First, cases do not fall neatly into two groups, one in which no legal doubt exists and the other in which the law offers no guidance. Almost all appellate cases involve at least a little legal uncertainty (or the lawyers on one side would be fined for wasting the court's time). Thus we are dealing with matters of degree rather than a dichotomy.

Second, this model may not be true to the internal decision-making process used by judges. "Discretion" may be the wrong word, and the analogy to legislation may be simplistic. Judges in hard cases may feel that they are exercising discretion, but they may equally feel that they are trying to solve a puzzle that really does have a "right answer." And in resolving the case, they may feel that they are not reaching "outside the law" for a policy solution but "inside the law" for the concepts and values. Thus, the analogy between judicial and legislative "discretion" is only approximate.

For present purposes, another problem with the simple model of discretionary "gap filling" is significant – it does not provide enough of a basis for evaluating judicial decisions. According to the model, easy cases produce only one legitimate answer, while in hard cases every answer is equally legitimate legally and the sole remaining question is whether the judges have

made the best policy choice.²⁰ Yet judges are not in the same position as legislators in terms of their access to information or their freedom from past precedents. So, if judges are going to try to identify the best policy choice, the goal cannot really be the same as it would be in the legislative setting. It must also include the costs of ignoring legal texts or precedents. Yet if the best policy choice simply means something along the lines of “the best decision for a court to make, taking everything into account,” this standard provides little or no guidance in evaluating decisions.

What we want, in short, is a form of analysis that recognizes the existence of judicial flexibility but tries to get a handle on how to assess its exercise. Discretion is a helpful analogy, but legislative discretion is too different from judicial flexibility. A closer analogy can be found in administrative law, where courts scrutinize an agency’s decisions to determine if it has exceeded or abused its delegated authority. Like courts, an agency must justify its actions in terms of its legal mandates, though at the same time it has some leeway in applying that mandate. This analogy has the advantage of being less politically freighted than constitutional decision-making so that we are less distracted by political agendas in thinking about the proper limits of decisionmaking. Another advantage is that administrative law seems to be quite well-settled, unlike the hotly contested arena of constitutional theory. Bear in mind, however, that this is only an analogy: the Supreme Court is also different from an agency in some obvious and important ways.

One advantage of the administrative analogy is that it invites us to consider the idea of reasoned decision-making in more mundane contexts than abortion or affirmative action, which should leave our thinking less clouded by emotion. The construction of a highway through a park in Memphis, a much less dramatic issue than abortion or affirmative action, provided the backdrop for the leading administrative law case regarding agency discretion, *Citizens to Preserve Overton Park, Inc. v. Volpe*.²¹ A federal statute barred funding for any highway through a park unless there was “no feasible and prudent alternative.”²² The agency argued that this phrase, particularly the reference to prudence, was essentially a grant of legislative discretion to the

20. In some sense, foundationalists share this model: their goal is to make as many cases as possible into easy ones because they fear the unbridled discretion invited by hard cases.

21. 401 U.S. 402 (1971). For more background on the case, see Peter Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992). The *Overton Park* test was strongly reconfirmed in *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (overturning the recission of an automobile airbag requirement as arbitrary and capricious).

22. *Overton Park*, 401 U.S. at 411.

agency.²³ But the Court rejected that argument, finding that the statutory language had real substance.²⁴

Still, what is “feasible and prudent” is generally going to be a judgment call. Thus the agency has real discretion in applying the phrase, although not the unlimited discretion of a legislature to implement its own views of wise policy. How does a court review the exercise of administrative discretion? Here the Supreme Court called for a two-step process, involving a searching review of the record. The first step is to ensure that the decision was based on a consideration of the relevant factors (and only the relevant factors).²⁵ This will normally require a determination that the agency considered all of the evidence in light of the relevant factors. The second step is to determine whether the agency committed a clear error of judgment.²⁶ Altogether, what the Court required from the agency is a reasonable explanation of how the evidence supported its application of the statutory standard. In the context of the *Overton Park* decision, this would mean a careful consideration of alternate routes, and mustering evidence to show that they were either infeasible for engineering reasons or were completely unacceptable for cost or other reasons.

In administrative law, the standard applied in these cases is called the “arbitrary and capricious” test.²⁷ This may sound like a very lax standard indeed. But in reality, the standard has real teeth, and it is not at all uncommon for a regulation by EPA or another regulatory agency to be sent back for further proceedings.²⁸

23. *Id.* at 410. In technical terms, the argument was that the decision was “committed to agency discretion,” or in other words, that “feasible and prudent” means whatever the agent says it means. *Id.*

24. *Id.* at 411-13.

25. *Id.* at 416.

26. *Id.*

27. *See id.* at 413-14.

28. Indeed, there is considerable controversy over whether the courts are *too* intrusive in applying this test. *See* Robert Glicksman and Christopher Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 L. & CONTEMP. PROBLEMS 249 (1991); Thomas McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997). For some examples of highly intrusive judicial review, see *Columbia Falls Aluminum Co. v. EPA*, 319 F.3d 914 (D.C. Cir. 1998) (rejecting EPA’s use of a standard toxicity test for treatment of aluminum waste, rejecting the agency’s interpretation of data from a site with extreme pH); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) (striking down ban on asbestos despite its link with cancer); *Ohio v. EPA*, 798 F.2d 880 (6th Cir. 1986) (subjecting EPA’s choice of a computer model for air pollution to “searching review”); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973) (reversing EPA’s determination that car manufacturers had failed to demonstrate the practical unavailability of catalytic converters).

The main issue in the *Overton Park* was how to apply the “feasible and prudent” standard, but there was also a preliminary question of what the standard meant.²⁹ In a more recent case, *Chevron, U.S.A., Inc. v. NRDC*, the Court clarified the agency’s role in issues of statutory interpretation.³⁰ In *Chevron* the question was whether the EPA could define the term “source” to include an entire industrial site or whether each building had to be classified as a separate facility.³¹ The answer to this apparently trivial question would make millions of dollars of difference in compliance costs. The Court engaged another two-step analysis. The first step was to consider whether the statute was ambiguous, applying ordinary rules of statutory interpretation.³² Assuming the statute was ambiguous, the second step was to determine whether the agency’s interpretation was a reasonable one.³³

The line between applying a rule (governed by *Overton Park*) and interpreting the rule (governed by *Chevron*) is not always clear. In constitutional cases, the Supreme Court does both. Part of its task is to scope out the meaning of a constitutional provision. Other cases require it to apply that meaning to a particular statute.³⁴ Attempting to determine which of these administrative law standards of review applies to which specific type of constitutional case, however, would be unilluminating. Rather, it is more fruitful to take some simple lessons from the administrative analogy. First, it is indeed possible to meaningfully review whether discretion has been exceeded or abused. We are not faced with a choice between pretending that administrative decisions are value free and saying that anything goes because “it’s all political.”

29. In *Overton Park*, the preliminary question involved deciding whether the agency had to show that alternatives to using the park were unacceptable or simply less desirable. *Overton Park*, 401 U.S. at 411.

30. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

31. *Id.* at 840.

32. *Id.* at 843.

33. *Id.*

34. The Due Process Clause provides an apt example. The requirement is that no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1. Does a particular state law violate the clause? This question may sometimes turn on large questions about the meaning of the clause: Does “due process” mean the specific legal procedures in use when the clause was adopted? Or a broader concept of fair procedure? When the Constitution says “due process of law,” does it mean only that some identifiable statute or administrative ruling must apply and that a hearing must be granted on factual issues? Or does it embody a more “natural law” conception, under which an enactment is not really “law” (and hence can’t be a basis for “due process of law”) unless it complies with certain fundamental requirements of justice? These look like questions of “interpretation.” In contrast, once these fundamental points are settled, the Court is still faced with the problem of determining precisely what procedures would have been used at the time of adoption, or what specific procedures are fair, or what laws are fundamentally unjust (depending on the interpretation). These all look like questions of application, and they are far more common in Supreme Court cases. But the difference is one of degree.

The same is true of the kind of judicial leeway involved in constitutional law. Constitutional law can involve a human factor without being purely political.

Second, the analogy sheds some light on how to assess judicial decisions. As administrative law teaches us, the proper exercise of discretion involves the reasoned analysis of the relevant factors.³⁵ The first task is to identify these relevant factors. Much of the dispute in constitutional theory concerns the question of what factors actually are relevant – for instance, originalists deny that evolving social values are relevant to constitutional interpretation.³⁶ Once we determine those factors, we can look at an opinion like *Roe* to determine whether the Court gave them appropriate consideration.

III. RELEVANT FACTORS IN CONSTITUTIONAL DECISIONS

It may be helpful to leave the stratospheric atmosphere of Supreme Court decisions and consider a much more mundane problem that an ordinary governmental employee might face. Suppose that you are new school principal and that a rule issued by the school board guarantees students a “fair hearing” before they are required to repeat a year. As principal, you are faced with the question of determining what procedures are required to provide students with such a hearing. You really want to be thorough: this is your first big decision as a principal and you want to get it right. Below is a list of questions that you might want to ask in deciding what procedures to use:

- What procedures did your predecessor and other principals use?

It might be unfair to impose an idiosyncratic set of procedures; in addition, previous practices may have created justified expectations on the part of students, and those practices also represent other principals’ judgments who may have known at least as much as you do. Of course, the circumstances for those other decisions may have been different, or your predecessors might have been incompetent, or there may have been a major change in educational philosophy since they were made, so you might want to consider a change in existing practice.

- Did the school board have anything specific in mind? For example, was the term “fair hearing” borrowed from another setting? Was the word “hearing” chosen to indicate a live proceeding, or does it include the opportunity to provide written submissions? Were there any specific abuses that motivated the rule? When the

35. See 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 13.3 (2d ed. 1997 & Supp. 2005).

36. This is essentially true by definition – if decisions are going to be based on the historical understanding of late Eighteenth Century, obviously current social values will not be part of the basis for the decision.

rule was first enacted, what procedures were used and were they accepted as fair? (Presumably, there is no formal legislative history for you to read, but you could probably call some experienced staff person at the school board and find out what she knows.) The older the rule, the less useful this inquiry is likely to be.

- What procedures do you consider fair for this kind of hearing? What rule would be better in the long-run for the school and its students? Too elaborate, a hearing could give an unfair advantage to students with educated, affluent parents or lawyers who can take advantage of the process. An overly elaborate process might also discourage teachers from recommending repeating a grade. On the other hand, too little procedure could encourage shoddy decision-making by teachers, make parents feel frozen out of the process and lead them to try other routes of influence. Or should the type of hearing depend on the circumstances of each case, rather than being subject to a general rule?

In short, as a school principal, you would want to look at history, precedent, and values. Once you have gathered this information, it may not all point in the same direction, which may leave you with a tough decision. The fact that it is a tough decision is not a license to act arbitrarily. Even if the decision turns out to be hard, some answers are more reasonable than others. Any answer simply is not as good as any other answer, even when there's no single "right answer."

Supreme Court cases involve a higher level of analysis, weightier social problems, and more divisive issues than our hypothetical high school principal must face. Nevertheless, there are also strong similarities. Like the principal, the Justices must consider precedent, history and values. A detailed discussion of each of these factors is in order.

A. Precedent

Hardly anyone denies that precedent plays a legitimate role in Supreme Court decisions.³⁷ Nevertheless, it is instructive to consider the reasons why precedent is so important, how precedent is used, and what the use of precedent tells us about the nature of constitutional law. For purposes of this section, the term precedent is used to mean judicial precedent. Previous deci-

37. But there are exceptions. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Paulsen, *The Corrupting Influence of Precedent* (unpublished manuscript on file with author). For a trenchant defense of the legitimacy of relying on precedents even when those precedents were wrongly decided, see Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789, 1822-24 (2005).

sions by Presidents, Congress, or others may also be entitled to some weight, but we defer that question until the next section.

There are obvious reasons why any decision maker, such as our hypothetical principal, should consider the views of her predecessors. It would be arrogant to assume that any one individual has a monopoly on access to true wisdom. The views of earlier judges are entitled to a respectful hearing for that reason alone. Justices John Marshall, Oliver Wendell Holmes, Jr., and Louis Brandeis come immediately to mind as great figures in the history of the Supreme Court, and it would take a hardy ego indeed to view their opinions as unworthy of consideration. Past rulings also have the advantage that they were uninfluenced by current passions – for example, the Judges who decided issues of presidential power during the Korean War obviously were not influenced by the current division of opinion about the Iraq war. Furthermore, older decisions have stood the test of time – we generally know that they have not caused big problems, whereas a change in rules might have unforeseen consequences. These reasons apply as much to the high school principal as to the Supreme Court Justice.

A somewhat more subtle set of reasons supporting *stare decisis* relate to the decision-making process. It is simply unworkable address every possible legal aspect of a dispute in every case. Imagine if, in every First Amendment case, the lawyers had to reargue basic questions, such as whether the First Amendment applies to the states or whether it covers non-political speech. Every brief would have to be a treatise, arguing every point of First Amendment doctrine from scratch, including such issues as whether free speech restrictions apply to the states and the protected status of non-political speech.³⁸ Unless most issues can be generally regarded as settled, coherent discussion is simply impossible. Anyone who has ever been on a committee knows this – there is always someone who wants to reopen the issues decided in previous meetings, which would make it impossible to hold a constructive discussion or make any progress toward a final decision.

Another set of reasons supporting precedent apply to some extent to the principal, but much more to the judge. One reason is the moral desirability of equal treatment. It is arbitrary for a case to be decided one way this week, perhaps leading to a prisoner's execution or some other serious consequence, and for an identical case to be decided the opposite way next week. This is not an unshakeable imperative, but it does caution against departing from precedent too readily. Given the critical issues that often come before the courts, consistency seems especially important. For instance, it seems obvious that death penalty cases should be treated as consistently as possible: life or

38. Moreover, different judges could adopt completely different First Amendment theories, so a lawyer in a case before the Supreme Court would really have to write nine different briefs based on inconsistent theories of the Constitution. Similarly, the Justices themselves would often find themselves unable to discuss the merits of particular cases with each other because they were operating within completely different conceptual frameworks.

death should not depend on the make-up of the bench or a judge's mood when a particular case comes up.

A related reason for stare decisis is that only by following the reasoning of previous decisions can the courts provide anything like a framework of rules, rather than a series of unconnected outcomes in particular cases. If the only available information is that an appellate court affirmed some criminal convictions and reversed others, it is difficult to know what rule applies in the future, especially before a different set of judges. By articulating binding standards for the future, courts create a current legal structure, rather than merely a barrage of individual rulings.

Stare decisis not only binds judges to the past but invites them to consider the future. The knowledge that a decision will function as a precedent has a powerful ex ante effect on the behavior of judges.³⁹ In deciding a particular case, a judge must provide reasons which will have precedential effect on later cases (both in the same court and in lower courts). Unless the decision is to be completely ad hoc, which will normally ensure its practical insignificance, the judge must provide some rule or principle with future applicability, which will be in turn the basis of future decisions. Thus, the judge is pushed to a form of neutrality – not the neutrality of being value-free, but the neutrality of articulating standards which one is willing to live with in the future. It is in this sense that “neutral principles” are important to judicial opinions. We expect judges, unlike politicians, to base their decisions on reasons that go beyond the latest opinion polls or the vagaries of political strategy. Respect for precedent pushes judges to seek generality and coherence in their decisions. To expect the law to provide generality and coherence across the board would be quixotic, but they are necessary ingredients of a viable legal system.

In a constitution that promises to “establish justice” and guarantee liberty “to ourselves and our posterity,” precedent may play a special role. One purpose of having a written constitution is to create a stable framework for government. This goal would be undermined if the Court failed to give special credence to bedrock precedents – precedents that have become the foundation for large areas of important doctrines.⁴⁰ It would not simply be imprudent to overrule these doctrines, but in an important sense, it would be run

39. This point was usefully emphasized by the legal process school. See Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

40. Some obvious examples involve the rulings of the New Deal Era upholding the validity of the Social Security system and other federal taxing and spending programs, and those recognizing federal jurisdiction over the economy. These omelettes cannot be unscrambled today, as even the most devoted believers in originalism generally acknowledge. Likewise, it is far too late in the day to invalidate independent agencies, or to undo the 20th century rulings that “incorporated” the Bill of Rights and made it applicable to the states, or to reconsider the constitutionality of segregation.

against the purposes of constitutionalism. Overruling these doctrines would create just the kind of uncertainty and instability that constitutions are designed to avoid. Originalists point correctly to the merits of a written constitution as a way of providing a stable framework of government. But interpretations of the text have varied greatly in a constitutional tradition that contains Abraham Lincoln as well as John Calhoun, Hugo Black as well as Antonin Scalia. Thus, text by itself is not enough of an anchor – respect for precedent is also needed to avoid violent swings in the constitutional framework.

Virtually everyone acknowledges that some precedents must simply be accepted as immutable, no matter how questionable they might have been as an original matter.⁴¹ But foundationalists of various stripes tend to underestimate the significance of this concession. The typical foundationalist response to bedrock precedent is to say: “this far, but not an inch farther. We are willing to tolerate the application of bedrock precedents on their own facts, but we will return to first principles in considering new issues.” But this is an untenable stance in a legal system that seeks some form of coherence. What sense does it make to say that social security is constitutional but that new government spending programs will be struck down? Or to try to limit the principle of *Griswold* to the sale of contraceptives to married couples? It would be hard to explain such rulings with a straight face to the general public. It is possible to have a sensible legal system in which there are a few small patches of doctrine that are retained because of practical imperatives but denied any influence over the decision of new issues. But a legal system in which huge swathes of the law are considered unprincipled, while small corners are governed by principle, makes no sense at all. Bedrock rulings cannot be “limited to their facts” if the legal system is to have any claim to integrity; rather, they must be given generative force as precedents.

Respecting precedent does not mean simply refusing to overrule past decisions, but taking them seriously as starting points for analysis in future cases. This is partly a matter of reasoning by analogy from similarities between the facts of cases, but more importantly a matter of giving credence to the reasoning in earlier opinions. Judges’ willingness to defer in this way to their predecessors – and their expectation of similar deference from their successors – transforms the Court from an ever-changing collection of individual

41. In any event, legitimate or not, these doctrine are here to stay as a realistic matter. Plenary federal power over fiscal and economic matters, independent agencies, and application of the Bill of Rights to the states are now integral parts of our system of government, in some ways they are more “constitutional” than some of the more obscure parts of the written Constitution. Which would be more shocking, a Supreme Court decision invalidating the social security system, or one upholding a requirement that certain homeowners rent rooms to military personnel in peacetime? Yet, in the Third Amendment, the Constitution speaks plainly to the latter situation, in a way that cannot be said of social security. Moreover, accepting these decisions as irrevocable can hardly be considered a judicial usurpation of power, for these New Deal and post-New Deal decisions have had a broad foundation of public support.

judges to an on-going institutional actor, one which is capable of building a continuing body of law rather than merely announcing an unending succession of one-time rulings. This kind of decision making is familiar to students of the common law system. As the history of the common law demonstrates, such decision making is structured enough to provide stability and coherence but flexible enough to allow improvisation and growth.⁴²

Like the common law, constitutional law is able to grow and change because of its reliance in precedent; and as with the common law, these changes are generally incremental. But constitutional law is not simply a subspecies of common law. It is not built purely on judicial precedents in the same way as the common law. In particular, as we will see in the next section, other forms of constitutional history also play an important role.

B. Text and History

Constitutional law is not just a matter of judicial doctrine. Other aspects of constitutional history matter, and are sometimes decisive: the adoption of the constitutional text in 1789 and its amendments, particularly those of the 1860s; the Federalist Papers and other writings of the Founding Fathers; and the practices of Presidents and Congresses over the years.

Let's begin with the text. The special status of the constitutional text is unquestioned, yet also puzzling. In a great many cases, the text plays no role – the terms “equal protection” and “due process” simply do not tell us very much about how to decide particular questions, nor does the phrase “the freedom of speech.” Often, the text is quietly ignored – for example, the First Amendment says that “Congress shall make no law” restricting the freedom of speech or religion. The textual implication is quite obviously that the President and the federal courts are free to censor speech or suppress minority religions, yet no one ever makes this argument.⁴³ Still, the constitutional text clearly tells us some things that no judge could ignore: that Congress has the power to regulate interstate commerce, that speech and religion receive some special form of constitutional protection, and that the President has some type of military authority.

It is tempting to say that the text of the Constitution is binding on us because it was validly adopted in 1789 and has never been revoked. But that argument is ultimately as misguided as it is tempting. Suppose that in the 1790s, the Constitution had simply failed to work. Imagine, for example, that the first Congress deadlocked and was unable to pass any laws or confirm any

42. This aspect of constitutional law is emphasized in David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003).

43. For example, since treaties are not made by “Congress,” the House and Senate together, but instead by the President with the advice and consent of the Senate alone, the implication would seem to be that treaties are unlimited by the First Amendment.

appointments to the cabinet or the judiciary; the whole system was simply a nonstarter. The Constitution would have become as irrelevant today as the Articles of Confederation, even if never formally revoked.⁴⁴ Or suppose that some modern scholar discovered some defect in the original adoption of the Constitution – for example, that the votes were miscounted or some of the voters improperly seated, so that it actually failed to get a majority in the necessary nine states. What difference would that possibly make to the binding force of the Constitution today?

These hypotheticals demonstrate the obvious: in the end the Constitution is binding, not because of events in 1789, but because Americans today regard it as part of their fundamental law.⁴⁵ There is no reason, however, to think that Americans take the raw language of the text as gospel in the same literalist way that some fundamentalists read the Bible, let alone that today's Americans believe that it should be construed in the same way as it was understood two hundred years ago. Indeed, as the religious comparison shows, it is possible to believe fervently in a text while also refusing to take it literally and accepting later elaborations through interpretation – the role of the Talmud for Orthodox Jews and of the teachings of the Church for Catholics both illustrate this. It is a fact that Americans regard the Constitution as the basis of our legal system; it is also a fact that they regard the Supreme Court's rulings as the "law of the land."

The words of the Constitution set the parameters for constitutional debate but are rarely decisive.⁴⁶ The big debates, those relating to the meaning of equality or liberty, or the extent of presidential authority or national power, are not settled by such vague terms as equal protection, due process, executive power, or "necessary and proper." Some additional insight can be gained, on occasion, by looking to historical context. Unlike originalists, I do not think that the original historical context of the Constitution is in any sense *binding* on us today. But reference to historical context clearly plays a role in our constitutional practices.

Originalism, despite the frequency and fervor with which it is espoused by some, is at the end of the day a peculiar notion.⁴⁷ In its most common

44. As a matter of fact, the Constitution nowhere says that it is revoking the Articles, so it might be possible to argue that the Articles still have some kind of continuing legal effect, if anyone were to care to make such an argument. But it would be a silly argument, since the Articles are an irrelevancy.

45. A similar point is made in Larry Alexander and Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMM. 455, 460 (2000).

46. Nor do I think they should be, notwithstanding the recent revival of textualism. See Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Symposium, *Textualism and the Constitution*, 66 GEO. WASH. L. REV. 1085 (1998).

47. Obviously, I am rather brusquely disposing of a large issue. The literature on this issue is now immense. For defenses of originalism, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Rich-

guise today, it insists that the meaning of the Constitution is fixed by what a reasonable reader of the text would have understood at the time of adoption.⁴⁸ One problem with this is its indeterminacy, given the difficulty of determining what such a reasonable reader would have known in the way of background or what methods of interpretation that hypothetical reader would have used.⁴⁹ In any event, it is difficult to see why constitutional law should be a branch of etymology. The Framers of the Constitution were of the generation of our great-great-great-great-great-great grandparents. Much as we may respect them, why on earth should our interpretations of the law be completely controlled by the understandings of their time?

While historical context does play a role in our constitutional practice, the conventional use of history looks quite different from originalist theory. The Federalist Papers are often treated in a way not unlike the great opinions of Chief Justice Marshall – as if they were bedrock precedents explicating the Constitution. Madison and Hamilton were, among other things, penetrating constitutional analysts, and it is not surprising that their views receive great deference.⁵⁰ But of course, they (and many of the other Framers) were also towering figures in American history. It is not by chance that they are called the Founding Fathers. So reference to their views is a way of connecting modern decisions to the very formation of our country, and hence to the American mythos. In short, these uses of history are a blend of the use of tradition and precedent.

ard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). For critiques of originalism, which I find ultimately persuasive, see JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Strauss, *supra* note 42.

48. See Caleb Nelson, *Originalism and Interpretative Conventions*, 70 U. CHI. L. REV. 519 (2003) (explaining form of originalism sympathetically and analyzing possible critiques).

49. This and other difficulties with originalism are discussed more extensively in Daniel Farber, *For Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI-KENT L. REV. 167 (2000).

50. The fact that interpretations disagreeing with Madison and Hamilton even during the adoption of the Constitution further demonstrate that, while they among the greatest thinkers in our constitutional tradition, their constitutional interpretations are not, and never were, infallible?

C. Public Values

Constitutional decisions are influenced by values – by what judges perceive to be the public interest.⁵¹ Sometimes this influence is conscious and explicit in the opinions. At least as often, it is less conscious and shapes the way a Justice reads precedent and understands history, perhaps without even their being aware of it.

For some, the intimate connection between values and judicial decisions is seemingly as shocking and distasteful as adolescent realization that one's parents must once-upon-a-time have engaged in sex. But discovering law and values in bed with each other should hardly be a shock. Law is a form of social governance, and it would be more shocking if its implementation were devoid of human values. Indeed, the Constitution itself recognizes as much: its goals include establishing justice, promoting the general welfare, and securing liberty. It would be odd for constitutional lawyers and judges to ignore these goals.

The real question is not whether values should enter into decisions but how they should do so. We begin by rejecting what is sometimes considered the pragmatist position, that judges should simply make whatever rules they think are best for social welfare over the long run (taking into account the social benefits of legal stability). This collapses adjudication entirely into policymaking. It is unclear whether anyone actually takes this position, though Richard Posner may at least come close,⁵² but in any event most lawyers would properly find this definition of the judicial role deeply misguided.⁵³

51. This is of course a point emphasized by supporters of legal pragmatism. *See, e.g.*, RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003); Thomas Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787 (1989).

52. For Posner's views, see Richard A. Posner, *Pragmatic Adjudication*, 18 *CARDOZO L. REV.* 1 (1996). One basis of uncertainty is what Posner means when he speaks about the judge "making the decision that will best serve the future," *id.* at 8; is this a reference to aggregate social welfare, or does it include other normative considerations?

53. First, even if judges wanted to adopt this view, they would often be unable to determine what decision would be promote social welfare. To see this, we need only consider government institutions that actually are designed to make this kind of decision. When EPA adopts a new pollution standard, it typically has the thousands of pages of material about the effects of the decision, some from its own scientists and analysts, much of it contributed by outsiders as part of the rule-making process. It will generally prepare an elaborate Regulatory Impact Analysis about the costs and benefits of the regulation, which will be carefully reviewed by economists at the Office of Management and Budget in the White House. Very little of this information and expertise is available to the Supreme Court when it issues a ruling in a constitutional case: there are no staff social scientists assembling data and making computations.

Second, "social welfare" is not the only value, and certainly not the only value to be enforced by judges. Increasing social wealth, or even increasing life-

That being said, courts inevitably will sometimes find themselves in circumstances where they must consider the impact of their decisions on social welfare. No one is likely to favor a decision that will dramatically harm the economy, increase violent crime, or destroy the educational system. Likewise, choices that benefit the economy, decrease crime, and strengthen education are likely to count in favor of a decision. When this is so, courts should strive to get the social welfare analysis right, rather than relying on hunches.

More often, judges face questions of values that are less global and more structured than “what is good for society?” These questions generally take one of two forms. Sometimes the judge must decide whether a particular value has constitutional status or how to find the boundaries of a value that admittedly has constitutional dimensions. On other occasions, the Court instead is faced with conflicting values and must somehow try to accommodate them. The former exercise tends to be more controversial, but the latter exercise is often at least as difficult.

How should judges go about identifying constitutional values? Obviously, the greater the agreement about a value, the more comfortable a judge can feel in utilizing it.⁵⁴ Courts will not always have the benefit of a clear

expectancy, are not the only thing our society cares about. We also care about norms such as equality and human dignity. Of course, philosophers and other academics endlessly debate the nature of these values and their significance compared with utilitarianism. But our society as a whole clearly endorses both personal welfare and more intangible values. Social welfare is an important value but should not be the only judicial concern.

Third, judges do not operate purely as individuals but as part of an institution. Governmental institutions are not interchangeable, and we must keep in mind the role of a constitutional court in a democratic society. I will not attempt to describe the precise parameters of that role; indeed, I doubt that a precise definition is possible. But it's clear that the large majority of policy determinations are left to other branches of government, and that the role of the Court is much more to establish basic ground-rules than to control outcomes.

54. This may seem like an irrelevancy for a constitutional court, since consensus is presumably reflected in the very legislation that the court is reviewing. But the truth is more complicated. First, on important issues, a national consensus may exist without being reflected in every region or locality. The most striking example was segregation, which was entrenched in the South but had little credibility at the national level. Recall that President Truman had already desegregated the armed forces, before the Court even considered the issue of segregation. Other examples were the ban on contraception in a handful of states in the 1960s, and the criminalizing of homosexual acts in a few states in the 1990s.

Second, contrary to the vision in which important value issues are fully deliberated through the legislative process before law is made, political actors have significant slack which they can use even in the face of a public consensus about values. Important constitutional interest can be invaded without full debate through executive fiat. A key role of the courts is to limit this practice. An important tool is the canon of interpreting legislation to avoid serious constitutional doubts, which means that the executive must return to Congress for clear authorization before step-

consensus, however. At the very least, judges should try to ensure that support for a value is not limited to a particular political perspective – for example, they should consider whether support for the value cuts across party lines. It is also here that “tradition” plays a role. Traditions do not come neatly packaged in a way that provides clear answers to constitutional questions. They often contain disparate strands and contested elements. But a judge should be able to show that a value has genuine roots of some kind in American traditions. The argument is even stronger if the judge can show that historic failure to apply a traditional value in a particular context is due to factors that do not deserve respect, such as racist or sexist prejudices or resentment of political dissenters.

IV. *ROE* REVISITED

With this background discussion behind us, it is time to take a look at *Roe* and see how it stands up under the “arbitrary and capricious” test. But first, it is necessary to determine exactly what *Roe* actually held.⁵⁵

A. *The Holding in “Roe”*

The first thing to observe is that what is called “*Roe*” was actually not one case but two: *Roe v. Wade*⁵⁶ and *Doe v. Bolton*.⁵⁷ The extent to which the Justices regarded the two as interconnected is shown by the haphazard way that the separate concurring and dissenting opinions are scattered between the two cases. Yet commentators generally read the opinion in *Roe v. Wade* without taking into account its Siamese twin, the *Doe* opinion.

It is helpful, particularly regarding *Doe*, to begin with the lower court opinions. In *Roe v. Wade*,⁵⁸ a three-judge district court issued a declaratory judgment against the constitutionality of the Texas abortion statute. That statute was a flat criminal ban on abortion, with only a narrow exception for abortions “procured or attempted by medical advice for the purpose of saving the life of the mother.”⁵⁹ The district court observed that “[f]reedom to

ping into constitutional dangerous territory. Even within Congress, constitutional issues can be suppressed, as when a rider is attached to critical legislation at the last minute. Constitutional litigation can help defend consensus values against such sneak attacks.

55. Information about the Court’s consideration of the case is now available from the files of several former Justices. For useful background, see LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 72-101 (2005); BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* 83-131(1988).

56. 410 U.S. 113 (1973).

57. 410 U.S. 179 (1973).

58. 314 F. Supp. 1217 (D. Tex. 1970).

59. *Id.* at 1219 n.2.

choose in the matter of abortions has been accorded the status of a 'fundamental' right in every case coming to the attention of this Court where the question has been raised."⁶⁰ The district court then cited two other district court opinions (in D.C. and Wisconsin), along with a South Dakota trial court decision and a decision of the California Supreme Court.⁶¹ The district court in *Roe* went on, however, to observe that "[t]o be sure, the defendant has presented the Court with several compelling justifications for state presence in the area of abortions," one of which "may well" be "[c]oncern over abortion of the 'quicken'd' fetus."⁶² But the district court held the statute to be fatally overbroad because it went so far beyond the arguably compelling justifications, and found it unconstitutionally vague because of the difficulty of determining what kind of risk to the mother's life would be sufficient.⁶³

Doe was another action brought before a three-judge district court, this time in Georgia.⁶⁴ The Georgia abortion statute was newer and more liberal than the Texas statute. (The Texas statute was a sweeping ban on abortions; the Georgia statute allowed a wider range of justifications for abortion, although it imposed stringent procedural requirements.) In reviewing the constitutionality of the statute, the court held that:

[A]lthough the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician.⁶⁵

In the court's view, the state's interest in potential human life gave it the power to regulate the quality and safety of the abortion decision, but not to review the ultimate basis for the woman's decision.⁶⁶ "[O]nce the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and Woman."⁶⁷ The court agreed with the apparent view of the Georgia legislature that this was primarily a medical decision "inasmuch as medical practitioners are in the best position by virtue of training to judge concurrently the basis as well as the risk inherent in such a decision."⁶⁸ The court said that the state could introduce safeguards such as "consultation with a licensed minister or secular guidance counselor" in order to "guard against the establishment of transient 'abortion

60. *Id.* at 1222.

61. *Id.*

62. *Id.* at 1223.

63. *Id.*

64. *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970).

65. *Id.* at 1055.

66. *Id.*

67. *Id.*

68. *Id.*

mills' by the occasional opportunistic or unethical practitioner and the concomitant dangers to his patrons and the public."⁶⁹ The court viewed the medical approval process of the Georgia statute (described in more detail below) as legitimate, but struck down the statute's restricted list of allowable reasons for abortions.⁷⁰

The parts of the court's order striking down portions of the statute were appealable to the Fifth Circuit, but the part upholding the medical approval process was appealable directly to the Supreme Court due to the vagaries of the law of federal jurisdiction at the time. The Supreme Court struck down most of the provisions regarding medical procedures and approval.⁷¹ Those provisions were actually quite onerous, requiring a hospital accredited by the Joint Commission on Accreditation of Hospitals (in addition to accreditation by the state) to perform the abortion; a written statement by the woman's physicians that she met one of the reasons specified in the statute; the written concurrence of two other physicians based on their own examination of the patient; and approval by a committee of at least three members of the hospital's staff.⁷²

Of all the many and often virulent criticisms surrounding the Court's abortion jurisprudence, I cannot recall anyone defending the procedural provisions of the Georgia statute. This is understandably so. Even assuming that states are completely free to place whatever substantive limits they like on abortion, these procedures would still be vulnerable to attack. Compliance would be extremely burdensome and the delay could well increase the risk of the procedure, thus a procedural due process challenge seems quite plausible. Indeed, in the first draft of Justice Blackmun's opinion, he held that the Georgia statute violated procedural due process because it provided "no opportunity to be heard, to know the reasons why she is denied an abortion, or to appeal an adverse decision."⁷³ Furthermore, the procedures implicate the right to privacy in the narrowest sense – they require the woman to be physically examined by non-treating physicians, and they require intimate aspects of her personal life (for example, her mental health) to be reviewed by an additional group of strangers. One need not believe in any sweeping vision of privacy to reject the idea that the State is entitled to subject women to such intrusive physical and mental examinations by strangers without having some strong justification.

Of equal significance, however, is the portion of the Georgia statute upheld by the Supreme Court. Given that the district court had struck down the list of permissible justifications that must be certified by the physician, all that was left was this: "it still remains a crime for a physician to perform an

69. *Id.* at 1056.

70. *Id.*

71. *Doe v. Bolton*, 410 U.S. 179, 194, 197, 199 (1973).

72. *Id.* at 184.

73. SCHWARTZ, *supra* note 55, at 98.

abortion except when . . . it is ‘based upon his best clinical judgment that an abortion is necessary.’”⁷⁴ This truncated provision was challenged on vagueness grounds.⁷⁵ The Court not only rejected the vagueness attack but also went out of its way to endorse the provision. As the Court interpreted the truncated provision, it required the physician to make this decision in “light of *all* the attendant circumstances,” ranging “farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.”⁷⁶ As the Court said, “[w]hether, in the words of the Georgia statute, ‘an abortion is necessary’ is a professional judgment that the Georgia physician will be called upon to make routinely.”⁷⁷ That judgment was to be “exercised in the light of all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient.”⁷⁸ The Court referred approvingly to the district court’s observation that a decision of medical necessity was generally made before other forms of surgery.

The Court had more to say about the physician’s role in *Roe*. Prior to the second trimester, the Court said, “the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”⁷⁹ Up to the point where the state’s interest in maternal health or potential life become compelling, “the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.”⁸⁰

The remainder of the *Roe* holding is the familiar trimester system – no state regulation in the first trimester, health regulation in the second trimester (because the abortion is then riskier than full-term pregnancy), and limitation to life or health justifications in the third trimester (because the state’s interest in protecting potential life becomes compelling after viability.)⁸¹

Read in the context of *Doe*, the trimester system has a subtle twist. The state can insist all the way through pregnancy that abortions be based on medical considerations (i.e., life or health of the mother). What the third trimester marks is not a change in the types of allowable abortion, but rather a change in how the state can implement the restriction. In the first two trimesters, the state must delegate implementation to physicians, reviewing their decisions only for good faith. In the final trimester, state can police more

74. *Id.* at 191.

75. *Id.*

76. *Id.* at 191 (emphasis added).

77. *Id.* at 192.

78. *Id.* at 192.

79. 410 U.S. 113, 163 (1973).

80. *Id.* at 166.

81. *Id.* at 164-65.

aggressively to ensure that medical necessity is present. In short, as *Doe* and *Roe* are written, the shift is from a subjective, good faith standard to an objective one.

The dissenters characterized the holding broadly:

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one of more of a variety of reasons – convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, . . . any woman is entitled to an abortion at her request if she is able to find a medical adviser willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus become viable, the Constitution of the United States values the convenience, whim, or caprice of the pregnant woman more than the life or potential life of the fetus⁸²

Chief Justice Burger's concurrence took a narrower view of the holding: "[T]he dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health."⁸³

Burger's characterization clearly seems the more accurate given that the Court had upheld criminal punishment for physicians who performed abortions without determining them to be medically necessary in *Doe*. Indeed, at one point in *Roe*, the Court quotes an AMA abortion resolution emphasizing "'the best interests of the patient,' 'sound clinical judgment,' and 'informed patient consent,' in contrast to 'mere acquiescence to the patient's demand.'"⁸⁴ Certainly, the Court did not seem to regard abortions as elective in the same sense as cosmetic surgery. So far as I know, no state has ever made it a criminal offense to perform nose jobs or tummy tucks without first making a written determination of medical necessity. If a state did so, no doubt this would be regarded as a substantial restriction on the availability of these procedures.

The upshot of *Roe* and *Doe*, then, is that the state may limit abortion to cases of medical necessity in the first two trimesters, but cannot exclude any factors that a reasonable physician might find relevant, nor single out abortion decisions for special oversight, unlike other medical procedures. After the third trimester the state can be more intrusive and forbid abortions, using the

82. *Id.* at 221 (White, J., dissenting).

83. *Id.* at 208 (Burger, C.J., concurring).

84. *Id.* at 143-44.

criminal law to oversee the decision. In assessing what the Court did in *Roe*, we must begin with what the Court said it was doing, not with the dissent's characterization.

In order to get to this result, the Court had to work its way through two related issues. First, it had to find some basis for heightened scrutiny. Clearly, abortion statutes are valid under the rational basis test, if only because that test is so utterly toothless. So the Court had to justify more stringent review. Then, it had to take into account the state's interest in protecting the unborn, to determine whether or when that interest was sufficient to justify abortion restrictions under the applicable test. The key to analyzing the "*Roe*" decisions is determining how well the Court performed these tasks and whether the rulings were arbitrary and capricious.

B. Assessing the Court's Argument for Heightened Scrutiny

Justice Blackmun conceded that the Constitution does not contain an explicit right of privacy.⁸⁵ He relied, however, on a series of rulings finding some aspect of privacy to be protected by the First, Fourth, Fifth, and Ninth Amendments, and by the concept of liberty in the Fourteenth Amendment.⁸⁶ He viewed these cases as showing that only fundamental rights or those inherent in ordered liberty are protected, and that privacy extends to aspects of "marriage, procreation, contraception, family relationships, and child rearing and education."⁸⁷ Blackmun then argued that this right of family/reproductive privacy was broad enough to cover "a woman's decision whether or not to terminate her pregnancy" for the following reasons:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.⁸⁸

As discussed earlier, a constitutional rule should consider precedent, history (including text), and public values. In reviewing precedent, Blackmun

85. *Id.* at 152.

86. *Id.*

87. *Id.* at 152-53 (citations omitted).

88. *Id.* at 153.

was correct to identify a cluster of cases protecting various aspects of privacy,⁸⁹ and a tighter cluster relating to intimate relations and reproductive choice.⁹⁰ This makes his characterization of abortion as a constitutionally protected decision plausible. Still, the analysis of precedent seems strikingly incomplete. It is not clear whether “privacy” is a sufficiently cohesive concept to hold the broader group of cases together. The narrower, intimacy/reproduction cluster of cases, are more apropos. But Blackmun could have done more to explain how these cases cohere, and how they relate to the Fourteenth Amendment’s reference to liberty. In this respect, Justice Stewart’s concurring opinion is much more satisfactory.⁹¹ Justice Blackmun’s discussion of the consequences of unwanted pregnancy suggests another possible line of argument, contending that abortion is a constitutionally protected decision because those particular types of harms are peculiarly “private” and akin to those involved in earlier family/reproduction cases.

The opinion also sketches an argument regarding public values as a basis for liberalizing abortion rules. The paragraph quoted above shows that banning abortion imposes serious harm on some women. Justice Blackmun also reviewed the history of abortion reform at the time, which showed a strong trend in the direction of liberalization.⁹² Moreover, he seems quite correct that the strong form of abortion opposition, which regards the fetus as a legal person and abortion as murder, has not taken hold in our legal system or commanded any societal consensus.

The opinion is at its weakest, however, in dealing with the second prong of constitutional argument – history. Blackmun makes no claim that family and reproductive rights in particular, or privacy more generally, concerned the drafters of the Fourteenth Amendment. He might have been able to mount a historical argument with regard to family and reproduction – after all, the drafters of the Fourteenth Amendment must have had the intrusions of slavery on human rights in mind, including the notorious destruction of family relations and elimination of sexual autonomy. Perhaps more seriously, Blackmun was faced with a strong contrary tradition of abortion prohibition extending back into the nineteenth-century. Blackmun does a bit to undermine the force of this tradition by showing that opposition to abortion was at least in part (and perhaps in large part) motivated by the riskiness of the procedure.⁹³ He also shows that the anti-abortion tradition is less deeply rooted than it might seem, because of indications that abortion was lawful at common law prior to quickening, and also because the moral status of the fetus has been disputed by philosophers and theologians for centuries.⁹⁴ This is all

89. See cases cited *id.* at 152.

90. See cases cited *id.* at 152-53.

91. *Id.* at 167-70 (Stewart, J., concurring).

92. *Id.* at 143-48 (majority opinion).

93. *Id.* at 148-52.

94. *Id.* at 134-50.

very well, but the argument would have been stronger if Blackmun could have undermined the tradition's force by discrediting its roots – for instance, if he had shown that anti-abortion laws were connected with the subordinate position of women⁹⁵ or that their primary support rested on narrowly sectarian views rather than a broad public consensus.

The idea that the Constitution requires the government to have more than the slightest of conceivable rational bases before it dictates who to marry or whether to have children should not be particularly alarming. Current public values would find government regulation of contraception intolerable. For this reason, *Griswold v. Connecticut's*⁹⁶ protection of contraception seems to have been readily accepted by lawyers and the public, regardless of whatever theoretical problems it raises. In *Roe*, Blackmun provides the beginning of a plausible argument for including abortion within the same constitutional category as contraception, notwithstanding the seemingly strong contrary weight of tradition. But the argument is in great need of further development.

If the Court were an administrative agency, it would have presented enough of an argument in support of its identification of a protected right to avoid outright reversal as arbitrary and capricious. It did consider relevant factors such as earlier privacy rulings, and it gave a general indication of how these rulings beared on the abortion issue. Still, there were significant gaps in the argument. A reviewing court would probably not be satisfied with a similarly sketchy argument by an administrative agency. Thus, if the Court were an administration agency, it's ruling would probably have been remanded for a fuller explanation of the agency's reasoning.⁹⁷

C. Assessing the Court's Balancing of Conflicting Interests

The Court acknowledged the State's "important and legitimate interest in protecting the potentiality of human life," along with its interest in protecting maternal health.⁹⁸ With respect to the health justification, the Court allowed the State to impose more burdensome regulations after the first trimester, when abortion becomes riskier than full-term pregnancy.⁹⁹ It also allowed the State to require the abortion to be performed by a physician even in the first trimester.¹⁰⁰

95. See Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

96. 381 U.S. 479 (1965).

97. Justice Blackmun's law clerk urged that he provide a fuller explanation. See GREENHOUSE, *supra* note 55, at 90. I have not found any information concerning the reasons for Justice Blackmun's failure to heed this suggestion.

98. *Roe*, 410 U.S. at 162-63.

99. *Id.* at 163.

100. *Id.*

The more troublesome issue for the Court was the State's interest in limiting abortion to preserve potential human life. On this basis, the Court allowed abortions to be limited to those needed to protect the mother's life or health after the second trimester. It concluded that the State's interest became compelling in the third trimester "because the fetus then presumably has the capability of meaningful life outside the mother's womb."¹⁰¹ In effect, *Doe v. Bolton* provides another safeguard by allowing the state to limit earlier abortions to those that are "necessary" in some sense, rather than allowing the physician to perform an abortion whenever the patient requests one and the medical risks are minimal.¹⁰² The court provided no evidence, however, that doctors would in fact exercise a meaningful check on the abortion decision.¹⁰³

To some extent, any effort to accommodate conflicting interests will involve drawing somewhat arbitrary lines, as the Justices seem to have realized at the time.¹⁰⁴ But the trimester system seems more arbitrary than most, with only a single sentence in the opinion to justify it.¹⁰⁵ There was certainly noth-

101. *Id.* at 163-64.

102. The latter is presumably the current test used for cosmetic surgery, rather than any requirement that a physician find that a nose job or breast enhancement is medically necessary.

103. Whether doctors *should* do so is clearly another question, but the Court clearly thought they would. If doctors did so, they might provide a significant protection against unnecessary intrusions on the state's interest in protecting potential life. In effect, abortions would be limited to the "medically necessary," with doctors acting as agents of the state to enforce the limitation. The Court might well have benefited from further fact-finding on this issue, based on practices in states that had liberalized their abortion laws. Justice Blackmun, at least, seemed to have a somewhat unrealistic understanding of modern medical practice, referring to the physician as serving the woman "essentially as the family physician so esteemed in memory." SCHWARTZ, *supra* note 55, at 135.

104. See Bob Woodward, *The Abortion Papers*, WASH. POST, Jan. 22, 1989, at D1.

105. A fuller discussion, for example, might have included the following issues:

1. To what extent would responsible exercise of professional judgment by physicians under a rule like Georgia's protect the state's interest in potential life during the first two trimesters? Should the state be allowed to use procedural safeguards less onerous than Georgia's?
2. Are there other stages in embryonic development (for example, development of the nervous system) that would suggest some intermediate level of protection earlier than the final trimester?
3. To what extent would restrictions after the first trimester actually impact the availability of abortions? Notably, this factor involved a number of circumstances; for example, today the availability of self-testing kits makes early detection of pregnancy much more likely.
4. Should the Court allow states to pursue various other options until sufficient evidence was available about their impact on women seeking abortions?

ing inevitable about this choice. As we now know, the Justices had considered drawing the line after the first trimester, but the majority decided not to, in part because women might not see physicians until near the end of the first trimester.¹⁰⁶ To the end, Justice Douglas preferred the first-trimester dividing line.¹⁰⁷

It seems inconceivable that an administrative agency, dealing with such questions as air pollution regulation, telecommunication, or even standards for workplace toilets, would get away with such causal resolution of an important issue. It is little wonder that this aspect of the decision was soon eroded¹⁰⁸ and ultimately rejected.¹⁰⁹ It simply failed to cross the threshold of reasoned decisionmaking. Early in the consideration of *Doe*, Justice Douglas observed that “[w]e don’t know how this statute operates.”¹¹⁰ The Court still did not have the information it needed to interpret the statute a year later, but proceeded anyway and announced its decision.¹¹¹

Justice Stewart privately faulted the Blackmun opinion for being “quite so inflexibly ‘legislative’” in establishing the trimester system.¹¹² A more flexible approach, such as the “undue burden” test later adopted in *Casey*, would have given the Court the opportunity to learn the facts it needed to reach a sound accommodation between women’s rights and the countervailing state interest.

V. CONCLUSION

What does it take to make a constitutional ruling defensible, even if nevertheless debatable? I have suggested, based on an analogy with administrative law, that the ruling must rest on a reasoned application of the relevant factors – those factors being precedent, history, and public values in the constitutional law context. It is unrealistic to expect judges to produce perfectly crafted opinions, and some cases do not require a full consideration of each of these factors. Still, in hard cases, a responsible Court should provide a coherent, believable claim in these terms. This does not guarantee the correctness of the decision, but does make the decision something other than an exercise of raw judicial power. In other words, whether or not we agree with the result, we must agree that the Justices have done their job.

106. See GREENHOUSE, *supra* note 55, at 97.

107. *Id.*

108. See Daniel Farber and John Nowak, *Beyond the Roe Debate: Judicial Experience with the 1980’s “Reasonableness” Test*, 76 VA. L. REV. 519 (1990).

109. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (replacing the trimester system with an “undue burden” test).

110. SCHWARTZ, *supra* note 55, at 85. The first draft of Blackmun’s opinion remanded for further information about how the statute impacted poor and minority women, a concern that was absent from the final opinion. See *id.* at 101-02.

111. See *Doe v. Bolton*, 410 U.S. 179 (1973).

112. See *id.* at 150.

Roe v. Wade is only a partial success under this standard. Its argument for recognizing a fundamental right works in the right direction but was badly in need of elaboration. More seriously, the Court made almost no effort to justify the trimester system. That failing was all the more serious because it was gratuitous. All the Court needed to do in the cases before it was (a) to rule the procedural safeguards excessive and overly intrusive in the Georgia case, (b) uphold Georgia's requirement that the physician certify medical necessity, and (c) affirm the lower court's declaratory judgment against Texas's sweeping abortion ban because it prohibited medically necessary abortions. The rest could have been left to the states and the lower courts in the first instance, allowing a much better developed factual record and far more complete analysis of the various options.¹¹³

Given the stark emotions raised by the abortion issue, it is not clear whether this course would have done the Court much good politically. Still, giving the states more flexibility and making the role of medical necessity as a restriction clearer might have ignited less of a firestorm.¹¹⁴ In any event, a decision along those lines would have had a better claim to represent reason rather than fiat. Of course, hindsight is always easy, and we have now had many more years to consider the constitutional dimensions of the abortion issue. The point is not to blame Justice Blackmun and his colleagues for issuing an imperfect opinion thirty-some years ago. Rather, it is to urge the Court to do better in the future.

113. Perhaps the Court was trying to give more guidance to legislatures about how to update their abortion laws. But it is hard to see what providing a detailed legislative roadmap was more urgent than in other important constitutional cases such as *Brown*.

114. An opinion along these lines would, however, have received a less favorable response from feminists seeking unrestricted reproductive autonomy for women.