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ARTICLES

A Kinder and Gentler Supreme Court?

By ARTHUR J. GOLDBERG*

The 1988 Term of Supreme Court ended with a bang—in this instance a rather muted one.

Pro-life advocates, opposed to abortion, had hoped for an outright decision in *Webster v. Reproductive Health Services*¹ overruling *Roe v. Wade*², the pro-abortion decision. Overruling was not to be, however, due largely to a rather ambivalent opinion of Justice O'Connor who, although agreeing in substance with the pro-life members of the Court, opined that the guillotine on *Roe v. Wade* should be delayed until a future day.³ Abortion advocates thus had to settle for the erosion by a closely divided Court of the *Roe* decision.

Justice Scalia, who wrote an opinion calling for the relegation of *Roe v. Wade* to the ash heap of judicial history, was, as a result, irate with Justice O'Connor.⁴ In his opinion, Scalia excoriated O'Connor several times by name, in a manner virtually unprecedented in Supreme Court protocol, for refusing to join in overruling *Roe v. Wade*.⁵

What effect this dressing down will have on Justice O'Connor in the three abortion decisions to be argued in the 1989 Term remains to be seen. If Justice Scalia seeks O'Connor's concurring vote, which he needs, the counsel of wisdom would have been to refrain from attempting to pressure O'Connor. She is a strong minded Justice, as all Justices should be, and allergic to pressure from a fellow Justice, particularly one junior

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1. 109 S. Ct. 3040 (1989).

2. 410 U.S. 113 (1973).

3. *Webster*, 109 S. Ct. at 3058-64 (O'Connor, J., concurring in part and concurring in the judgment).

4. *Id.* at 3064-67 (Scalia, J., concurring in part and concurring in the judgment).

5. See, e.g., *id.* at 3064 ("Justice O'Connor's assertion . . . that a "fundamental rule of judicial restraint" requires us to avoid reconsidering *Roe*, cannot be taken seriously.").

to her in appointment and service. To use a hackneyed phrase, Scalia may have engaged in overkill.

With respect to the abortion issue, my views are a matter of record. In my concurring opinion in *Griswold v. Connecticut*, I tried to make clear that the free choice of women to practice birth control is a fundamental right protected by the Constitution.⁶ It is difficult to comprehend how *Roe v. Wade* logically can be overruled without imperiling *Griswold*. Abortion is, like birth control, in my view, a fundamental right of women safeguarded from governmental attack by the Fifth, Ninth, and Fourteenth Amendments to the Constitution. In the oral argument before the *Webster* Court, the government's special counsel, former Solicitor General Fried, was hard put to explain why overruling *Roe v. Wade* would not jeopardize *Griswold*. But, since birth control is so widely practiced, it is almost certain that *Griswold* will not be overruled. The Supreme Court, after all, does not always function in an ivory tower. It may not always follow election returns, but some of the times it does.

Obscured by the *Webster* abortion decision are two important capital cases wrongly decided by the Court: *Penry v. Lynaugh*⁷ and *Stanford v. Kentucky*.⁸

My views about the constitutionality of the death penalty are also well known. Early during my tenure on the Supreme Court, I wrote a memorandum to the Conference arguing that capital punishment is in violation of the Eighth Amendment's ban on cruel and unusual punishment. My view did not prevail. Nevertheless, in *Rudolph v. Alabama*,⁹ as a fall back position, I wrote a dissent to the denial of certiorari, contending that the death penalty, in any event, should not be imposed when the crime does not involve the taking of a life.¹⁰ I again did not at that time prevail, but years later the Court adopted my dissent.¹¹

The Court, in *Penry v. Lynaugh*, by a five-to-four vote, sustained the capital punishment of a mentally retarded defendant, with the mental capacity of a six to ten year old child and evidence of brain damage.¹² In *Stanford v. Kentucky*, a similar majority upheld the death penalty in the case of a juvenile sixteen years old.¹³

Both of these cases shock the conscience.

6. *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring).

7. 109 S. Ct. 2934 (1989).

8. 109 S. Ct. 2969 (1989).

9. 375 U.S. 889 (1963).

10. *Id.* at 889-91 (Goldberg, J., dissenting).

11. *See, e.g., Furman v. Georgia*, 408 U.S. 238 (1972).

12. *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989).

13. *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989).

The rationale of the Court majority in both cases is best stated in the opinion of Justice Scalia who announced the judgment of the Court in *Stanford*, the juvenile case. In *Stanford*, Scalia surprisingly adopted as the standard for invoking the Eighth Amendment ban on cruel and unusual punishment the language of Chief Justice Warren in *Trop v. Dulles*.¹⁴ In that case Chief Justice Warren stated that a criminal sanction is measured by whether the propriety of the punishment is contrary to the "evolving standards of decency that mark the progress of a maturing society."¹⁵

It is of interest that Justice Scalia, prior to the *Stanford* decision, appearing before the Senate Judiciary Committee, supported the "original intent" concept of the Constitution, dear to the then Attorney General Edwin Meese.¹⁶ Justice Scalia, in *Stanford*, however, apparently accepted a contrary evolutionary concept of the Constitution first enunciated by the greatest of Chief Justices, John Marshall, in *Marbury v. Madison*.¹⁷ Justice Scalia stated: "Thus petitioners are left to argue that their punishment is contrary to the 'evolving standards of decency that mark the progress of a maturing society.'¹⁸ They are correct in asserting that this Court has 'not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.'¹⁹

Confirmation by the Senate, like time, obviously works changes in a Justice's philosophy.

Applying the *Trop* standard, Justice Scalia nevertheless concluded that the death penalty is warranted in both cases.²⁰ How does Justice Scalia justify this result? His rationale is that the *Trop* standard is met by the fact that a slender majority of states (twenty-seven) that permit capital punishment do not expressly exempt juveniles and the mentally retarded.²¹ Justice Scalia rejected the argument that although these states permit imposition of the death penalty on juveniles or the mentally re-

14. See *id.* at 2974, citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

15. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

16. *Nomination of Judge Antonin Scalia: Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 2d Sess. 99-1064 (1986).

17. 5 U.S. (1 Cranch) 137 (1803).

18. *Stanford*, 109 S. Ct. at 2974, quoting *Trop*, 356 U.S. at 101 (1958) (plurality opinion).

19. *Stanford*, 109 S. Ct. at 2974, quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

20. See *Penry v. Lynaugh*, 109 S. Ct. 2934, 2963-69 (1989) (Scalia, J., concurring in part and dissenting in part); *Stanford*, 109 S. Ct. at 2972-82.

21. See *Penry*, 109 S. Ct. at 2964, 2953-55 (Scalia, J., concurring in part and dissenting in part); *Stanford*, 109 S. Ct. at 2974-77.

tarded, they in actuality virtually never do so.²²

There are other basic flaws in Justice Scalia's opinion. The Justice summarily dismisses recent polls which indicate that while a majority of the American people now apparently support the death penalty, they oppose the death penalty for juveniles and the mentally retarded.²³

I am unaware of any Supreme Court decision squarely supporting the Justice's reasoning that laws enacted by state legislative bodies authorizing imposition of the death penalty are dispositive, notwithstanding that such laws are rarely applied to juveniles and the mentally retarded and that public opinion polls are otherwise.

State legislatures are political bodies and their members are rarely profiles in courage. Legislators vote for the death penalty at large, believing its imposition is popular with their constituents. They know full well, however, that governors almost always commute death sentences of juveniles and the mentally retarded. They also are aware that prosecutors in such cases do not, by and large, ask for the death penalty. And they also know that juries are allergic to sending juveniles and the mentally retarded to the electric chair.

Finally, Justice Scalia, in *Stanford*, would apply the *Trop* test using as a measuring rod only our own country.²⁴ In doing so, it seems to me that Justice Scalia is wide of the mark. If, as John Donne has said, "no man is an island, entire of itself; every man is a piece of the continent, a part of the main . . .,"²⁵ then decency and a maturing society, in our global world, cannot be construed in such xenophobic terms.

It is an uncontroverted fact, as Justice Brennan, in his dissenting opinion in *Stanford* correctly pointed out, that in the world community the imposition of the death penalty on juveniles or the mentally retarded is regarded to be contrary to the standard of decency that marks the progress of maturing societies.²⁶

It is of interest that, in the three abortion and death penalty cases discussed, the Justices who are pro-life in the abortion case are anti-life in the capital punishment case.²⁷ This is indeed a puzzlement.

22. See *Stanford*, 109 S. Ct. at 2977.

23. *Id.* at 2979.

24. *Stanford*, 109 S. Ct. at 2975 n.1 ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant.") *Id.* (emphasis in original).

25. J. DONNE, DEVOTIONS UPON EMERGENT OCCASIONS, MEDITATION 17 (1624).

26. *Stanford*, 109 S. Ct. at 2985-86 (Brennan, J., dissenting).

27. See *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989); *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989); *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989).

We in the United States are celebrating the bicentennial of our Bill of Rights. Our country takes the view in diplomatic treaties and agreements, as evidenced by the United Nations Charter, the Universal Declaration of Human Rights, and the Helsinki Accords, that respect for human rights is not an internal matter, but is a proper concern of the international community. Surely the imposition of the death penalty is a supreme matter of human rights.

President Bush, to universal acclaim, stated in his inaugural address that in his administration he will strive to make our nation a kinder and gentler nation.²⁸ How are we to reconcile this humane concept with the barbaric practice of institutionally taking the lives of juveniles and the mentally retarded by our society, a society that purports to be decent, mature, and civilized and is a leader in the continuing effort to protect human rights in the world community?

28. Inaugural Address, 25 WEEKLY COMP. PRES. DOC. 99 (Jan. 20, 1989).

