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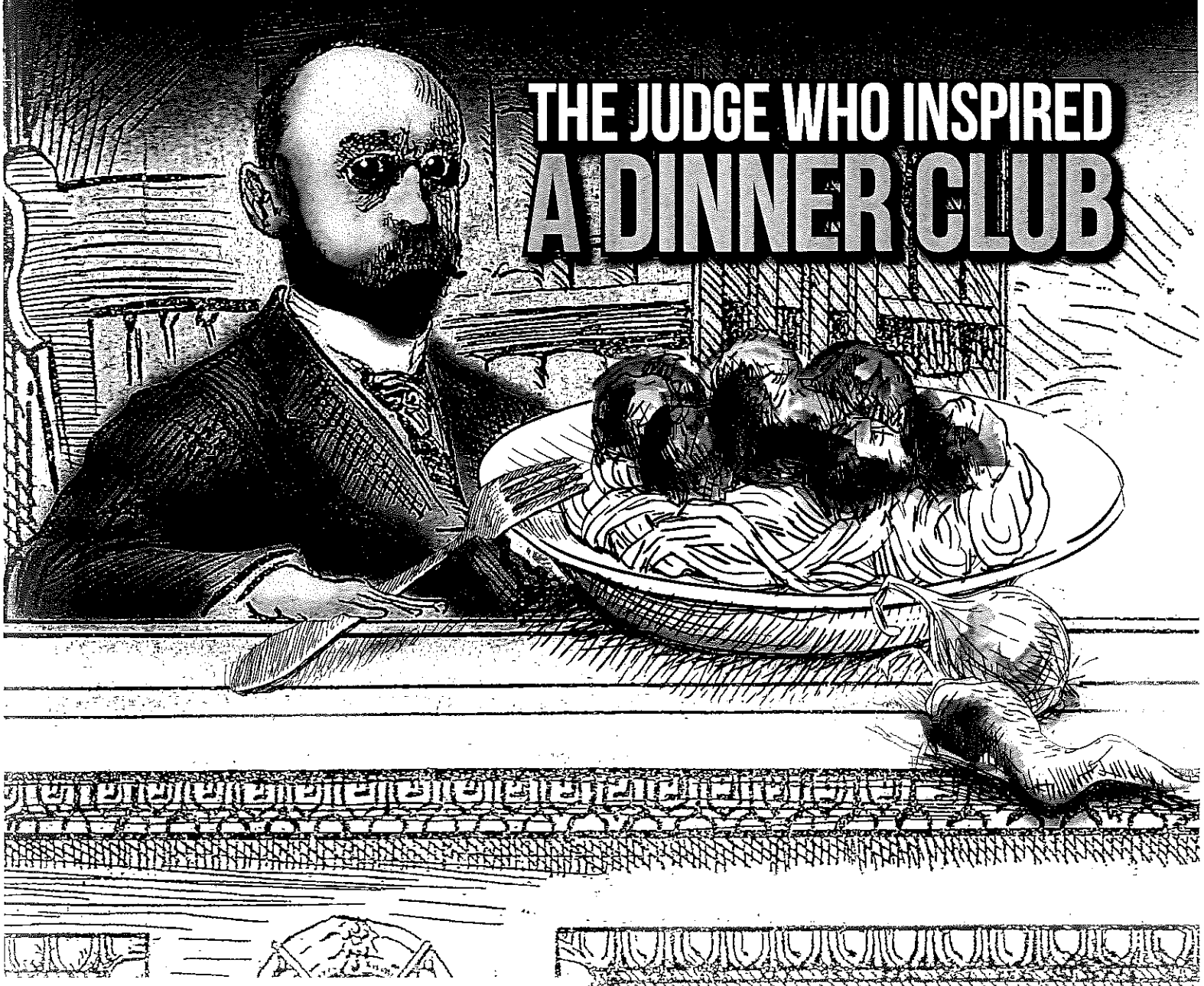


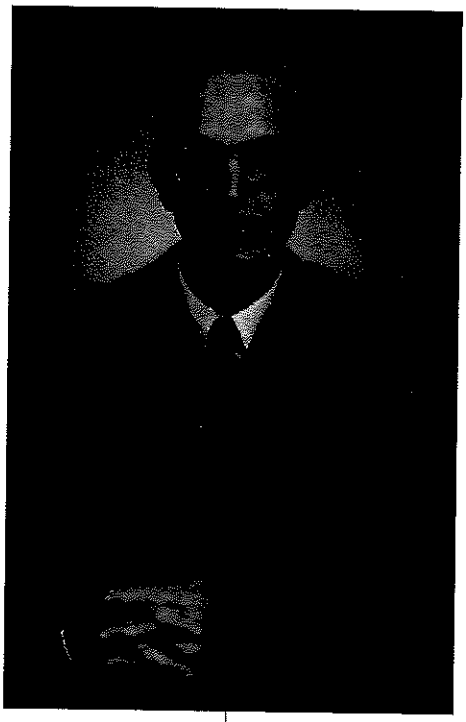
THE JUDGE WHO INSPIRED A DINNER CLUB

NO REST FOR REST HOME LITIGATION

My Father at the Center of the Abortion Debate: *"Upholding the Law Even When It Gives Rise to Bitter Dispute"*

By **Daniel B. Huyett, Esquire**

[Editor's note: As the debate over abortion continues during this national election cycle, we remember the role a Berks County lawyer—and later federal judge—had in this controversy. This is the story of that man, Judge Daniel H. Huyett, 3rd, and his contribution to the ever-evolving law on a state's power to regulate a woman's right to an abortion.]



It was January 21, 1992, and the United States Supreme Court had just announced that it would hear the case of *Planned Parenthood v. Casey*. I immediately called my father, Daniel H. Huyett, 3rd, a federal judge in the Eastern District of Pennsylvania, and said, "Dad, the Supreme Court has decided to hear your case. Let's go hear the oral argument in April."

I could feel his hesitation over the phone. Those who knew my father knew what he was thinking: "Is this appropriate for the trial judge who decided *Casey*?" So I said, "Why don't you call Judge Becker and see what he thinks?" Judge Edward Becker, an appellate judge on the Third Circuit, was one of my father's closest friends. Not only did Judge Becker think seeing the *Casey* argument was in order; he made special arrangements for our visit to the Supreme Court.

We had no idea at that time that the Supreme Court's decision in *Casey* would become the most significant case on abortion since its 1973 blockbuster decision in *Roe v. Wade* and, in some ways, would eclipse *Roe*. But we knew that the oral argument before the Court was sure to be historic. As the political commentator and author Jeffrey Toobin observed in his book, *The Nine: Inside the Secret World of the Supreme Court*, "There were two kinds of cases before the Supreme Court. There were abortion cases—and there were all the others."

Roe and Its Aftermath, 1973-1986

My father, a lifelong Republican, was appointed to the federal bench in 1970 by Richard Nixon. Just over two years later, the Supreme Court decided *Roe* and established abortion as a fundamental constitutional right. Any law that infringes such a right must pass the most rigorous form of judicial review known as "strict scrutiny," which is satisfied only if the state proves that it passed the law to further a *compelling* governmental interest. In *Roe*, the Court decided that, while a state has legitimate interests in protecting both the health of the mother and the potential life of the baby, these interests become compelling only after a certain time during the pregnancy, such that the government can constitutionally legislate the matter. In the first trimester, according to the Court, the state's interests are not yet compelling, and so the state cannot ban or even regulate abortion during the first trimester. But, in the second trimester, the state's interest in protecting the health of the mother becomes compelling, and the government can thus regulate (but not ban) abortion during the second trimester. And, the Court continued, in the third trimester—i.e., the point of "fetal viability"—the state's interest in protecting the potential life of the baby becomes compelling, and the government can therefore regulate and ban abortion. According to Jeffrey Toobin, *Roe* was "the abortion rights decision that still defines judicial liberalism."

My father's role in abortion jurisprudence began in 1982, almost ten years after *Roe*, with *Thornburgh v. American College of Obstetricians*. That year, the Pennsylvania legislature passed the Pennsylvania Abortion Control Act of 1982, which restricted abortion in several ways. The Act imposed a 24-hour waiting period between the time a woman seeking an abortion is provided certain information about the abortion and the time the abortion is performed. It also required, among other things, that this information be disclosed to the woman by the doctor and not by an agent, and that a minor must obtain consent from a parent or a judge before undergoing an abortion. The American College of Obstetricians, represented by Kathryn Kolbert, a 1997 Temple University School of Law graduate, filed a challenge in federal court to the constitutionality of these regulations. The

case was assigned to my father and marked the beginning of his journey into the controversial and ever-changing jurisprudence governing a state's attempts to regulate abortion.

In December 1982, applying *Roe*, my father upheld as constitutional all of Pennsylvania's regulations except for the 24-hour waiting requirement. He determined that the 24-hour waiting requirement, which applied regardless of the trimester involved, was unconstitutional for two reasons. First, the state lacked any interest during the first trimester that would justify this burden on abortion. Second, the requirement did not further the state's compelling interest in the second trimester of protecting the mother's health. In fact, he found it contravened this interest because the risks associated with an abortion increase with the passage of time. As for the remaining regulations, he concluded they did not impose an undue burden on a woman's fundamental right to an abortion so as to violate *Roe*. Not surprisingly, the American College of Obstetricians appealed this decision to the United States Court of Appeals for the Third Circuit.

While *Thornburgh* was pending in the Third Circuit, the Supreme Court in 1983 decided *Akron v. Akron Center for Reproductive Health* and held as unconstitutional several abortion regulations that were similar to Pennsylvania's. Relying on *Akron*, which was unavailable to my father at the time he decided *Thornburgh*, the Third Circuit reversed his *Thornburgh* decision, holding that all of the abortion regulations at issue were unconstitutional.

The Supreme Court accepted Pennsylvania's appeal of the Third Circuit's *Thornburgh* decision, and heard argument in November 1985. In a 5-to-4 decision, the Court affirmed the Third Circuit's decision that Pennsylvania's regulations on abortion were unconstitutional. Justice Harry Blackmun (the author of the *Roe* decision), writing for the majority, declared: "The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."

Among the dissenters in *Thornburgh* was Justice Sandra Day O'Connor, who recently had been appointed to the Supreme Court by Ronald Reagan and who would later help write the decision in *Planned Parenthood v. Casey*. She argued that the Court should discard *Roe's* strict scrutiny standard that was based on the trimesters of a woman's pregnancy. Reaffirming a position she had first articulated in her dissent in *Akron*, she advocated for a less rigid standard that would allow a state to regulate abortion, regardless of the trimester involved, so long as the regulation did not "unduly burden" a woman's right to an abortion. Under this standard, she said she would have affirmed my father's decision in *Thornburgh*.

Casey Begins Journey to High Court

In 1988 and 1989, the Pennsylvania legislature amended the Abortion Control Act, adding regulations on abortion, including many that mirrored the ones held unconstitutional by the Court in *Thornburgh*. Governor Robert P. Casey signed the law. (Casey, a devout Catholic, was a well-known leader of the pro-life wing of the Democratic Party.)

A group of abortion clinics and doctors soon attacked the constitutionality of these regulations, and filed a case called *Planned Parenthood v. Casey*. The cast was familiar: Kathryn Kolbert represented the plaintiffs against the Commonwealth of Pennsylvania, and my father presided over the case.

By the time *Casey* was filed, the Supreme Court's landmark decision in *Roe*, which established abortion as a fundamental right, had weathered much scrutiny and criticism, but remained the law. As a result, any law that infringed on abortion was seemingly still subject to strict scrutiny within *Roe's* trimester framework. Significantly, the Court had adhered to this rigorous standard of review in *Thornburgh*, the case in which it invalidated Pennsylvania's 1982 abortion regulations.

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Nevertheless, the Commonwealth argued that my father should apply a less rigorous standard. He refused to do so, given the state of the law at that time. He thus applied *Roe* and *Thornburgh*, and held as unconstitutional all but one of Pennsylvania's abortion regulations, deciding most of them were "nothing more than a reenactment of provisions of the Act found unconstitutional by the Third Circuit and United States Supreme Court not long ago in *Thornburgh*." To be sure, he recognized "the difficult and controversial issue of the permissible degree of governmental regulation of a woman's abortion decision," writing, "Without question, the issue of abortion has generated much debate and controversy over the past several years. And, undoubtedly, it will likely engender continued debate and controversy over the next several years—perhaps decades." But he acknowledged his limited role in the battle, explaining, "My function is not to debate the philosophical and moral dilemmas raised by [a woman's decision to end her pregnancy]. Instead," quoting Justice Blackmun in *Thornburgh*, "my function is to 'uphold the law even when its content gives rise to bitter dispute.' "

The appeal of his *Casey* decision to the Third Circuit was assigned to a three-judge panel that included Judge (now Justice) Samuel Alito. In 1991, the Third Circuit, in an 85-page opinion, adopted a different—and, as it turns out, a prescient—approach to the standard of review to apply to abortion regulations. It rejected the 18-year-old strict scrutiny standard, first established in *Roe* in 1972, and embraced the more forgiving "undue burden" standard that Justice O'Connor had long been advocating, starting with her 1983 dissent in *Akron*. According to Justice O'Connor—and now the Third Circuit in *Casey*—an abortion regulation should be upheld so long as it does not impose an undue burden on a woman's right to an abortion. Changing the rules of review, the Third Circuit reversed my father's decision and held Pennsylvania's regulations, with one exception, constitutional. Judge Alito concurred.

By the time the *Casey* case reached the Supreme Court in 1992, eight of the nine justices were Republican appointees. George H.W. Bush was President, and he had appointed Kenneth Starr as his Solicitor General. There was a clear difference between the national Republican and Democratic parties on the abortion controversy, except, of course, for the rare Democrat, like Governor Casey, who opposed abortion. (Casey was later denied a speaking role at the 1992 Democratic Nation Convention because of his views on abortion.) *Casey's* argument before the Supreme Court was sure to be an historic event. As Jeffrey Toobin observed, "Abortion was (and remains) the centra legal issue before the Court. It defined the judicial philosophies of the justices. It dominated the nomination and confirmation process. It nearly delineated the difference between the national Democratic and Republican parties. And, in 1992, the issue—an the Court—appeared to be at a turning point."

Casey Argument Before the High Court

This was the setting in April 1992 as my father and I drove to Washington, D.C. to hear the Supreme Court arguments in *Casey*. By this time, my father was getting around mostly in a wheelchair, and so I drove his car, and along the way we picked up my brother-in-law, a Washington lawyer. Although Judge Becker had made previous arrangements for our arrival, the Supreme Court was still a very private institution. As we approached the parking garage underneath the Supreme Court, it struck me that we had no documentation to show to verify our arrangements. But this was before 9/11, and security was not what it is today. As I pulled up to the guard's shack at the top of the ramp to the underground garage, I lowered my window and said, "Judge Huyett." Without hesitation, the guard motioned us down the ramp to the underground garage, saying, "Of course."

We drove into the garage under one of our country's most important institutions, parked, and headed to the private elevator pushing my father in his wheelchair. As we rolled my father off the elevator, our group almost ran over Governor Casey. We then found ourselves in the lawyers' holding room just to the side of the justices' bench. Off to the side, we saw Pennsylvania Attorney General Ernest Preate, readying himself for his argument.

We wheeled my father into the courtroom, past a number of rows to a spot off to the side reserved for the handicapped. Then the Supreme Court Clerk called the court to order, and the nine—some would say most important people in the country—took their seats. The Chief Justice, who had succeeded Warren Burger, was William Rehnquist, a leading conservative justice. The justices took their seats in order of seniority, and I recall seeing Justice Blackmun, the author of *Roe*, taking his seat aside the Chief. The lawyers then entered, took their seats at counsel table, and faced the justices on the bench, who loomed over them like nine towering mountains.

Representing the Commonwealth of Pennsylvania and arguing the constitutionality of Pennsylvania's abortion restrictions was Attorney General Preate. Representing the petitioners, who sought to reverse the Third Circuit's decision and convince the Supreme Court to find Pennsylvania's restrictions unconstitutional, was Kathryn Kolbert. Kenneth Starr, the United States Solicitor General, later appointed independent counsel to investigate President Clinton, was there to advocate the administration's position to reverse *Roe*.

The Court called on Ms. Kolbert to present the petitioners' argument. She began: "Mr. Chief Justice, and may it please the Court: Whether our Constitution endows government with

the power to force a woman to continue or to end a pregnancy against her will is the central question in this case." Then, to everyone's surprise, she argued for almost eight minutes without any questions from the justices, advocating the "fundamental right" standard of review, relied on by the Court in *Thornburgh* when it found Pennsylvania's restrictions unconstitutional. According to Jeffrey Toobin, "A murmur began in the audience, a very knowledgeable group, especially in a big case like this one. Why weren't they asking any questions? Why were they paralyzed?" The first question was from Justice O'Connor, who asked Ms. Kolbert to address Pennsylvania's restrictions specifically. When Ms. Kolbert sidestepped her question, Justice Anthony Kennedy asked it again.

Twenty minutes later, Attorney General Preate took the podium to argue the constitutionality of Pennsylvania's regulations on abortion. Not two minutes into his argument, Justice Blackmun interrupted, asking him, "Have you read *Roe*?" Undeterred, General Preate continued with his argument, urging that the undue burden test should be applied, and that all of the Commonwealth of Pennsylvania's restrictions should be deemed constitutional. Next, Solicitor General Starr argued. He advocated the administration's position that the state has a compelling interest in an unborn fetus, and asked the Court to overturn *Roe*. The oral argument, start to finish, lasted nearly sixty-two minutes—before the Chief Justice thanked the lawyers and closed the matter with the customary phrase: "The case is submitted."

Casey Decision

On June 29, 1992, the Court announced its decision in *Casey*. In a plurality opinion, Justices O'Connor, Kennedy, and David Souter, writing jointly, first rejected the calls to overrule *Roe*. "Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages [citing *Roe*] that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, asks us to overrule *Roe*."

But the plurality was not prepared to do that. Rather, they wrote, "[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed." That essential holding, they continued, comprised three parts: (1) that a woman has a right to choose an abortion before viability without undue interference from the state; (2) that the state may restrict abortion after fetal viability if the law contains exceptions for pregnancies that endanger a woman's life or her health; and (3) that the state has legitimate interests from the outset in protecting the health of the woman and the life of the fetus that may become a child.

The plurality, however, did overrule *Roe's* approach to considering the constitutionality of regulations on abortion. Instead of drawing lines for permissible regulation of abortion at the trimesters of a pregnancy, they drew one line at fetal viability, a line that could now be drawn earlier than the third trimester given scientific advancements. The plurality also replaced the strict scrutiny standard with the "undue burden" standard, the standard not available to my father when he decided *Casey*. Before viability, they wrote, a state may regulate abortion so long as the regulation does not impose an undue burden on the woman's right to an abortion, defined as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Regarding matters after viability, they reaffirmed *Roe's* holding that the state may regulate or even ban abortion except where necessary to preserve the life or health of the mother. This decision also essentially gutted *Thornburgh*, in which the Court had applied *Roe's* strict scrutiny standard to invalidate Pennsylvania's 1982 regulations on abortion and reverse my father's decision.

Applying the undue burden standard, the plurality determined that all but one of Pennsylvania's restrictions on abortion were constitutional, affirming the Third Circuit's decision and, in effect, rejecting my father's decision.

Casey's Legacy

Today, *Casey* remains the Supreme Court's view on how to determine whether a state's restrictions on abortion are constitutional. This past June, in *Whole Woman's Health v. Hellerstedt*, the Court relied extensively on *Casey* and held that the two major provisions of the Texas Abortion Control Act were unconstitutional. Writing for a 5-to-4 majority, Justice Stephen Breyer spent the first paragraph discussing how *Casey's* holding applied to the Texas statute.

My father, who died in 1998, would have been proud to see the enduring influence of *Casey*, a case that had started in his courtroom, where litigants fine-tuned and sharpened their arguments, preparing their roles for a long march to the Supreme Court. My father wouldn't have cared that the Supreme Court ultimately came out on the opposite side of his decision in *Casey*. He always knew that, when considering any issue, especially one as politically charged and divisive as abortion, his only role as a district court judge was to apply the existing law and to leave the rest to the Supreme Court. "For now, at least," wrote my father in the first sentence of his Conclusion paragraph in *Casey*, "the law of abortion remains undisturbed, because only the United States Supreme Court has the power to change it." ■

Daniel B. Huyett is co-chair of Stevens & Lee's litigation department. Mr. Huyett notes that he had substantial help with this article from his son, D. Patrick Huyett, Esquire, a lawyer in Philadelphia who just finished clerking for Judge Marjorie Rendell, and Mark Franek, Esquire, of Stevens & Lee.