The Story of "the Court": A Narrative Analysis of *Planned Parenthood v. Casey*

by NICHOLAS SHORT *

To some degree, we are all storytellers, and we tell stories for a great variety of purposes: to animate speeches, to justify our conduct, and even to explain our opinions and views. These stories, or narratives, do a lot of work in human communication, and understanding them is essential to understanding the people that use them and the message they are attempting to send.

Because of the prevalence of narratives in everyday life, and their explanatory power, it is perhaps not surprising to find narratives being used even in more staunchly "academic" or "critical" contexts, such as works of history, or Supreme Court opinions. Some may view this connection skeptically: after all, writers of fiction tell stories, but writers of history tell history, and Justices of the Court write arguments and opinions. But narratives can be historical, and even fictional narratives can be ideological and can be argumentative, at least in the sense of being political.

While the terms "history" and "argument" allow us to see those texts as more objective, more rooted in "truth," more "real" than a dime-store novel, histories and arguments often rely on stories, or narratives, and these narratives can be analyzed using the same tools commonly used in literary theory to analyze fictional narratives. Such analysis is structural in the sense that it focuses on the interrelationship of certain narrative elements to interpret meaning.

In the context of a legal opinion, this structural analysis of a narrative can, at the very least, complement more traditional legal analysis, and might even draw attention to issues normally missed by strict adherence to the latter approach.

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* J.D. Candidate 2007, University of California, Hastings College of the Law; B.A., Astrophysics, B.A., History, 2002, University of California at Berkeley. I would like to thank Professor David Hollinger for playing a guitar that gently weeps.

Section IIIB of the U.S. Supreme Court opinion in *Planned Parenthood v. Casey*[1] provides an example of the use of historical narrative in a judicial opinion. Section 1 of this paper will describe and analyze Section IIIB of the *Casey* opinion, which presents a narrative characterization of the *Brown* and *West Coast* decisions and their precedents. The main purpose of this section is to describe and summarize the major pieces of the *Casey* narrative. The secondary purpose is to perform a traditional legal analysis of the citations in the opinion, to question whether the text accurately represents the proposition it is cited for, and where it does, to provide a broader context for the proposition.

Section 2 of this paper will analyze the *Casey* narrative using the literary theory of fictional narratives, and will attempt to interpret the meaning of the narrative, not as a judicial opinion, per se, but as a story about a special protagonist: "the Court." To avoid the criticism that the analysis does not use a formal methodology rooted in narrative analysis,[2] I've used Gerard Genette's theory of narrative[3] as a theoretical framework from which I approach some specific issues of mood, voice, and order. The analysis in this Section is entirely literary.

Section 3 will return to the realm of more traditional legal analysis in order to situate the narrative within the context of the *Casey* opinion's stare decisis analysis. Using Frederick Schauer's theory of precedent for comparison,[4] I will attempt to determine what kind of argument from precedent the *Casey* narrative advances and will attempt to connect, where possible, the legal criticism of this portion of the opinion with the literary criticism of Section 2.

I. The *Casey* Narrative

In *Casey*, the U.S. Supreme Court re-affirmed the basic holding of *Roe v. Wade*[5] after considering, among other things, "the rule of

1. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

2. For an example of such criticism, see Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 741-41 (1997) (criticizing a collection of analyses of legal narratives for not addressing methodological issues or discussing techniques specific to narrative analysis).

3. GERARD GENETTE, NARRATIVE DISCOURSE: AN ESSAY IN METHOD (1980).

4. Frederick Schauer, Precedent, 39 STAN. L. REV. 571 (1987).

5. Roe v. Wade, 410 U.S. 113 (1973).

stare decisis."[6] In doing so, the Court did more than just balance the "prudential and pragmatic considerations" that customarily inform the reexamination of a prior holding in "less significant" cases.[7] Motivated by the "sustained and widespread debate" about the *Roe* decision, the Court went on to compare that precedent to two decisional lines of "comparable dimension"[8]: those of *Lochner v. New York*[9] and *Plessy v. Ferguson.*[10]

A. *Lochner, Adkins,* and *West Coast Hotel*

While the Court clearly considers this comparison of cases to be part of its stare decisis analysis, the passage looks and reads more like historical narrative than constitutional deliberation. The opinion first sets the stage by describing the cases following *Lochner*, in general terms, as imposing "substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation."[11] The opinion then raises, as a more specific example of this decisional line, *Adkins v. Children's Hospital of District of Columbia*[12] and *West Coast Hotel v. Parrish,*[13] the case that overruled *Adkins* 14 years later.[14]

The *Casey* opinion then cites *West Coast* for the proposition that, during the period of time between those decision, "the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."[15] The passage cited in *West Coast* echoes some, but not all, of this language. The opinion argues that "recent economic experience" offers an "additional and compelling consideration" for overruling *Adkins*, and that the Court "may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression."[16] But those statements

6. Casey, 505 U.S. at 845-846.
7. *Id.* at 854.
8. *Id.* at 861-870.
9. Lochner v. New York, 198 U.S. 45 (1905).
10. Plessy v. Ferguson, 163 U.S. 537 (1896).
11. Casey, 505 U.S. at 861.
12. Adkins v. Children's Hospital of District of Columbia, 261 U.S. 525 (1923).
13. West Coast Hotel v. Parrish, 300 U.S. 379 (1937).
14. Casey, 505 U.S. at 861.
15. *Id.* at 861-62.
16. West Coast, 300 U.S. at 399.

were made in the context of an argument that, in a welfare state such as the New Deal society of 1937 America, "the taxpayers were called upon to pay" the wages lost by impoverished workers in the absence of minimum wage regulations.[17] That argument suggests that, as a matter of fairness consistent with American values, the public should not be asked to subsidize "unconscionable employers."[18] But the argument does not suggest that *Adkins* rested on "false factual assumptions" about unregulated economies in general.

The narrative continues by referring to *Adkins* not as a case that resolved a specific issue, but as a case that resolved a "social controversy."[19] However, as the story goes, the period of time between *Adkins* and *West Coast* had proved the factual premises in *Adkins* untrue, and "history's demonstration of their untruth not only justified but required the choice of a new constitutional principle."[20] Thus, the Casey opinion seems to be drawing two distinctions. First, the "controversy" in *West Coast* seems to be in the question, and not the decision, as *Adkins* is also portrayed as being controversial. Thus, this characterization of these cases suggests that the Court is dealing with, instead of generating, controversy.[21]

Second, the Court is drawing a distinction, which will be repeated, between being justified and being required to reexamine and overrule a prior opinion. This distinction has some basis in the text of the *West Coast* opinion where Justice Hughes wrote, after considering several factors that warranted reexamination[22], that these factors made it "not only appropriate" but "imperative" to give the case "fresh consideration."[23] This distinction, adopted in *Casey*, portrays the Court as acting in these specific situations out of obligation under the circumstances. The *Casey* opinion portrays these specific decisions to overrule not as "justified," or within the

17. *Id.*

18. *Id.*

19. Casey, 505 U.S. at 862.

20. *Id.*

21. Concern about generating, instead of dealing with, controversy is a subtext of Section IIIC which is concerned with the Court's legitimacy in the eyes of the public. See *Id.* at 864-69.

22. The factors were "[t]he importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered." West Coast, 300 U.S. at 390.

23. *Id.*

realm of permissible judicial behavior, but as "required," or consistent with and mandated by judicial duty.

B. *Plessy* and *Brown*

The opinion then tells the story of the Court's struggle with segregation and equal protection through the cases of *Plessy v. Ferguson* and *Brown v. Board of Education*.[24] As the *Casey* opinion tells it, the holding in *Plessy*, "that legislatively mandated racial segregation in public transportation works no denial of equal protection,"[25] was motivated by the Court's understanding that segregation does not stamp "the colored race with a badge of inferiority."[26] If segregation did so, it was "solely because the colored race chooses to put that construction upon it."[27] The opinion quotes the *Plessy* opinion directly for each of these propositions, and then questions whether the Justices in fact believed this interpretation,[28] citing Justice Harlan's famous dissent. The opinion later echoes this skepticism about the Court's underlying motives by alluding to both *Adkins* and *Plessy* as being based on "claimed justifications"[29] instead of legitimate belief, as if the arguments of those days are too far fetched to believe that they were genuine.

The statements quoted from *Plessy* were made in the context of two arguments. First, the *Plessy* Court argued that if blacks had controlled the state legislature and had passed these same segregation laws, those laws would not stamp whites with a badge of inferiority.[30] Second, the *Plessy* Court argued that the Equal Protection Clause could only remedy civil and political, but not social, discrimination, and that segregation of transportation was a type of social discrimination which simply reflected the community's general sentiment.[31] The portions of Harlan's dissent cited to argue that the majority misjudged the central question, since the law infringes on the liberty of black and white citizens alike should they choose to inhabit the same train car.[32] The dissent then argues that allowing such

24. Brown v. Board of Education, 347 U.S. 483 (1954).
25. Casey, 505 U.S. at 862.
26. Plessy, 163 U.S. at 551 (cited at Casey, 505 U.S. at 862).
27. Plessy, 163 U.S. at 551 (cited at Casey, 505 U.S. at 862).
28. Casey, 505 U.S. at 862.
29. *Id.* at 863.
30. Plessy, 163 U.S. at 551.
31. *Id.*
32. *Id.* at 557 (Harlan, J., dissenting).

legislation is a slippery slope, since the state can then legislate over many other areas of "social" accommodations leading to truly absurd results.[33]

According to the *Casey* opinion, the Court, in *Brown*, repudiated the understanding that formed the basis of the majority's argument in *Plessy* by addressing the "facts of life" in 1954, when it became clear that "legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal."[34] But it was not just the court's changed understanding that justified the decision to overrule, since the ruling was sought on the basis of "[s]ociety's understanding of the facts."[35] Thus, the "*Plessy* Court's explanation", or reasoning, was so contrary to the "facts apparent to the Court in 1954," and apparent to society at large, that reexamination as in *West Coast* was not only justified, but required.[36]

C. Synthesis

The unifying theme of both stories, according to the opinion, is the Court's acceptance of changed facts, and changed understandings of facts. The *Brown* and *West Coast* decisions did not embody the "victories of one doctrinal school over another by dint of numbers," but showed the Court applying "constitutional principle to facts as they had not been seen by the Court before."[37] Additionally, in both cases, society at large perceived these changes in facts, creating a condition that did not justify, but required, a change in the law.[38] Both cases are interpreted then as the Court catching up with the rest of the country.[39] But in contrast, the Court could not overrule *Roe* in *Casey* because "neither the factual underpinnings of *Roe's* central holding" nor the Court's understanding of those facts had changed.[40] Thus, a decision overruling *Roe* would not reflect the Court catching

33. *Id.*

34. Casey, 505 U.S. at 863.

35. *Id.*

36. *Id.*

37. *Id.* at 864.

38. *Id.*

39. The opinion also characterizes the prior decisions as "comprehensible" and "defensible," but these statements are geared towards the public, and the public's acceptance of the judicial decisions, and hence they are more relevant to Section IIIC, which is concerned with the Court's legitimacy, but which is not the subject of this paper. See *Id.* at 863-64.

40. *Id.* at 864.

up with the rest of the country, but would reflect the individual Justices' "present doctrinal dispositions to come out differently from the Court of 1973."[41]

II. Analysis: Literary Theory

Another way of analyzing the story of Court history told in the *Casey* opinion is to approach it as a narrative, using the tools of fictional narrative analysis. Looking at the passage this way reveals a story in which the protagonist, "the Court,"[42] dominates the plot through acts of speech, in the form of published opinions. The Court acts, in the narrative, in various settings but always in the context of scrutiny, either by commentators[43] or the more demanding attention of the American public, who implicitly desire the Court to act in conformity with their understanding of the nation in which they live.[44] Analyzing this narrative with the tools of literary theory reveals some of the structural elements of this story. The meaning of the passage is tied to these structural elements, and a literary analysis reveals these interconnections in ways that complement more traditional legal criticism, while also providing a fresh (and perhaps more fun) way of looking at judicial writing.

Using Gerard Genette's text on narrative theory,[45] I will analyze, below, certain aspects of the *Casey* narrative associated with the topics of mood, voice, and order. By way of background, Genette's theory uses a specific definition of narrative,[46] and distinguishes between three "aspects of narrative reality": the story, the narrative, and the narration.[47] Narrative, in Genette's work, "refer[s] to the narrative statement, the oral or written discourse that undertakes to tell an event or a series of events."[48] Narrative specifically refers to "the discourse or narrative text itself" and is distinguished from both

41. *Id.*

42. More specific problems with determining the identity of the narrative's protagonist, and the narrator, are addressed below in the section on "Voice."

43. See Casey, 505 U.S. at 863 (introducing a law review article about *Brown* with "as one commentator observed").

44. See *Id.* (mentioning "Society's understanding of the facts" and "facts that the country could understand").

45. GENETTE, *supra* note 3.

46. *Id.* at 25-26.

47. *Id.* at 27.

48. *Id.* at 25.

the events it recounts (or the underlying story), and the "producing narrative action" (or the act of narrating).[49]

Also, as a preliminary matter, the grammar of the text creates an initial problem with interpreting "the Court" as the protagonist, since the actual opinions seem to conduct most of the action. For example, focusing on the first part of the narrative alone, which deals with the "cases identified with *Lochner v. New York*,"[50] the reader finds these opinions doing a variety of acts, as they impose limitations, adopt theories, exemplify prior decisions or overrule prior decisions and signal their demise, protect interpretations, and announce new interpretations.[51] However, a statement of the form "*Lochner* adopted . . . "can be interpreted as equivalent to a statement of the form "the Court, in *Lochner*, adopted." The following analysis assumes identity between such statements, so that the narrative's protagonist is "the Court" and not the opinions themselves.

A. Mood: Distance

Under Genette's theory, mood describes a way of regulating narrative information, and has two chief modalities: distance and perspective.[52] A narrative regulates information by creating distance when the narrative includes or excludes details from the underlying story.[53] In contrast, a narrative regulates information through perspective by adopting the point of view of a participant in the story, thereby limiting the information available to that participant's knowledge.[54] Here, I will address the use of distance in the *Casey* narrative, and will address narrative perspective after analyzing "voice" below.

In the *Casey* narrative, most of the acts or events that constitute the plot of our story are acts of speech such as judicial opinions, law review articles, and books.[55] Where the narrated acts are speech acts, we have a narrative of words (as opposed to a narrative of events)

49. *Id.* at 27.

50. Casey, 505 U.S. at 861.

51. *Id.* at 861-62.

52. GENETTE, *supra* note 3, at 162.

53. *Id.*

54. *Id.*

55. Other non-speech acts, such as the arrival of "the Depression," seem more geared toward setting the scene or context in which the Court acts, though the heavily edited representation of the Depression as harbinger of a lesson about contractual freedom also creates distance from the underlying story of that complex event. Casey, 505 U.S. at 861-62.

under Genette's framework.[56] Genette divides narratives of words into three subcategories of increasing mimesis[57] (or imitation) and decreasing distance: narrated speech, transposed speech, and reported speech.[58]

These categories, which apply to fictional narratives, have ready analogies to legal writing in judicial opinions, especially where that writing takes up a narrative form. The third category of reported speech is the most mimetic in that it most closely imitates the original speech act, and thus seems closest to it.[59] In the context of a Supreme Court opinion, reported speech might look something like an extended quote from a prior majority opinion, perhaps followed by an extended quote from the dissent on the same point, thus reproducing (though still narrating through reorganization) the original "dialogue." In contrast, the first category, narrated speech, is generally the least mimetic, the most reduced, and subsequently the most distant from the original speech act.[60] One example in the context of a judicial opinion might be where an opinion announces a paraphrased version of a prior holding that retains little to none of the actual language of that holding. Transposed speech exists somewhere between these extremes, seeming more mimetic than narrated speech, but where "the narrator's presence is still too perceptible in the very syntax of the sentence for the speech to impose itself with the documentary autonomy of a quotation."[61]

Generally, the Casey narrative regulates information by creating distance between the narrative and the prior speech acts that form the basis of the narrative. The Casey narrative utilizes direct quotation of prior speech acts in only four instances. The first direct quotation is the closest example of pure reported speech in the narrative. Here, the narrator reproduces the words of Justice Jackson from his book *The Struggle for Judicial Supremacy*[62] after stating "Justice Jackson wrote." The narrator sets the scene for the quote with some background information (Justice Jackson wrote the words before he

56. GENETTE, *supra* note 3, at 164-175.

57. In narrative discourse of fiction, mimesis is a term used to describe pure imitation of the story that forms the basis of the narrative. See *Id.* at 162-63.

58. *Id.* at 171-175.

59. *Id.* at 172-73.

60. *Id.* at 171.

61. *Id.*

62. Casey, 505 U.S. at 862.

joined the Supreme Court in 1937),[63] but this is not transposition, per se, and the form (Jackson said: "quote") strongly suggests narrated speech. Here, the narrator allows one of our characters, Justice Jackson, to speak in relatively unmodified form.

One other example of reported speech reveals an important aspect of our protagonist's character: the potential to act, or speak, as a matter of pretext. Later in the narrative, the narrator allows "the *Plessy* Court" to speak about "the underlying fallacy of the plaintiff's argument" in that case.[64] Here, the narrator does not say "the *Plessy* Court said," but "the *Plessy* Court considered,"[65] and "considered" is used in the sense of "to believe."[66] The narrator then immediately characterizes this belief as suspicious, labeling the statement as "the stated justification" regardless of "[w]hether, as a matter of historical fact, the Justices . . . believed this or not."[67]

Aside from these examples,[68] most of the speech in the Casey narrative is narrated or transposed speech. "The Court" generally adopts theories, imposes limitations, and protects interpretations, or overrules prior decisions, but mostly in the narrator's language. Assuming the reader is familiar with the cases cited or discussed, some of the language may seem similar to the actual language used in the prior speech act, but even where that is the case, the narrator's presence is still perceptible making the speech transposed but not reported. Thus, the use of narrated and transposed speech in *Casey* narrative creates distance, in the sense that "it says less, and in a more mediated way."[69]

B. Voice

Because our narrative is historical, it avoids much of the complexity present in some fictional narratives, which can use verb

63. *Id.*

64. *Id.*

65. *Id.*

66. In Genette's view, "the novelistic convention is that . . . [a character's] thoughts and feelings are no different from speech, except when the narrator undertakes to condense them into events and relate them as such." GENETTE, *supra* note 3, at 171. Since the narrator does no such thing in the *Casey* narrative, the Court's beliefs are equally part of the action in that they are no different from speech.

67. Casey, 505 U.S. at 862.

68. The two other examples of reported speech (or direct quotation) occur where the opinion quotes Black's law review article, and later in a parenthetical quotation following a citation to *Mitchell v. W.T. Grant Co.* Casey, 505 U.S. at 863 and 864.

69. GENETTE, *supra* note 3, at 163.

forms other than the past tense to create a variety of affects.[70] Under Genette's framework, the *Casey* narrative is a "subsequent narrative," using the past tense, and specifically indicating the temporal intervals between the time of narrating (June 29, 1992) and the prior speech acts, which are all given dates.[71] As the narrative proceeds, "the length of the story gradually lessens the interval separating it from the moment of narrating" suggesting a final convergence of story-time and narrating-time.[72] In addition, since "the narrator ["this Court"] is presented right away as a character in the story . . . final convergence is the rule."[73]

Furthermore, the short length of the narrative (six paragraphs) and the limited use of reported speech minimizes the effect of narratives within narratives, or "narrative levels," to use Genette's term.[74] The judicial opinions that form the basis of the *Casey* narrative also contain narratives themselves, and the reader catches a glimpse of one such sub-narrative when the quote from *Plessy* mentions "the plaintiff's argument."[75] These words remind the reader that *Plessy*, and the other cases by analogy, were not simply holdings, but holdings based on disputes involving people that had stories of their own. But for the most part, these other narratives are washed out by the use of reduction and narrated speech, or to briefly revert to the language of legal analysis, the discussion of holdings and interpretations of ideas, but not of "the facts of the case" or the stories that motivated those holdings and interpretations.[76]

Thus, issues of voice essentially boil down to the last of Genette's three elements, that of "person."[77] Under Genette's framework, the fundamental distinction of "person" is whether the narrator is present or absent in the story the narrator tells.[78] If the narrator is in fact present in the narrative (as a character), then we can also distinguish

70. See *Id.* at 217 (describing prior/predictive, simultaneous, and interpolated narrative moments).

71. *Id.* at 220-21.

72. *Id.* at 221.

73. *Id.*

74. *Id.* at 215.

75. Casey, 505 U.S. at 862.

76. In formal terms, this means that the Casey narrative is only an extradiegetic narrative, and that there are no intradiegetic or metadiegetic narratives. See GENETTE, *supra* note 3, at 228-29.

77. See *Id.* at 215. (analyzing voice in terms of three elements: time of narrative, narrative level, and "person.")

78. *Id.* at 244-45.

between cases where "the narrator is the hero of his narrative," what Genette calls autodiegetic, and where "he plays only a secondary role, which almost always turns out to be a role as observer and witness."[79]

A determination of narrative voice thus depends on a determination of the narrator's identity, and the identity of the protagonist. Up to now, I have assumed that the narrative's protagonist is "the Court," though various pieces of the text complicate that assumption in two ways. First, at any specific time, the Court, at various moments in the narrative, seems to be both a unitary institutional actor and a collection of non-united individuals. Second, "the Court" seems to change in time, with previous courts being distinctly different from later courts.[80]

For example, the narrator suggests early in the narrative that our presumptively unitary actor, "the Court," is actually composed of individual actors, or Justices, when the narrator mentions Justice Holmes' dissent in *Lochner*,[81] which characterizes the majority opinion as "adopting . . . the theory of laissez-faire."[82] However, in the very next sentence, the narrator tells us that in *Adkins*, "this Court held it to be an infringement of constitutionally protect liberty of contract to require the employer of adult women to satisfy minimum wage standards."[83] The language "this Court" suggests not only a unitary institutional actor instead of individual actors (or an interpretation compatible with the Court as being both), but also identity between the Court and the narrator: it is not just "the" Court that announced the holding, but "this" Court, i.e. the same Court that is presently speaking.

The problem of determining the identity of our protagonist at any given time (institution or individuals) is exacerbated by differences between "Courts" (plural) of different times. The narrator suggests this distinction when referring to "the *Plessy* Court."[84] As mentioned above, it is useful to think of a sentence of the form "*Plessy* adopted . . ." as equivalent to saying "the Court, in *Plessy*, adopted . . ." since this avoids the problem of having opinions

79. *Id.* at 245.

80. I read temporal changes broadly to be inclusive of, but not exclusive to, changes in the individuals that sit on the Court.

81. Another example occurs later, in the discussion of *Plessy*, when the narrator mentions "the Justices in the *Plessy* majority" and references Justice Harlan's dissenting opinion. Casey, 505 U.S. at 862.

82. *Id.* at 861.

83. *Id.*

84. *Id.* at 862.

be individual actors themselves. However, the latter is not equivalent to saying "the *Plessy* Court adopted" as grammatically, *Plessy* modifies "the Court" and suggests a distinction between that Court and others.

These issues also complicate determination of our narrator's identity. Later in the narrative and closer to the point of final convergence (where the story and the narrative meet in time), the narrator says:

> While we think *Plessy* was wrong the day it was decided . . . we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.[85]

Here, the narrator distinguishes between "the *Plessy* Court" and "the Court in 1954" (instead of "the *Brown* Court), again suggesting that "the *Plessy* Court" is somehow different, not only from the Court of 1954, but from the narrator as well. The narrator also uses the editorial plural, to use Genette's term,[86] to refer to itself (in the form of "we"), which suggests multiple narrators. Later, the narrative voice switches back from the editorial plural ("our understanding") to "the Court."[87]

However, for the most part the narrative adheres to the use of "the Court" to describe the protagonist, and the moments of identity between the narrator and the protagonist are stronger than the deviations. Thus, the Casey narrative is essentially autodiegetic in that the narrator, "the Court," is also our protagonist or central character. Temporal changes can be partly explained by viewing the narrative as semi-autobiographical. In such a narrative, while the narrator is the same "person" as the central character, the narrator is also a bit older and a bit wiser, and is authorized to treat the protagonist "with a sort of condescending or ironic superiority."[88] The *Casey* narrative lends itself naturally to this description of growth or maturity, with the forced distinction of "the *Plessy* Court" similar

85. *Id.* at 863.

86. See GENETTE, *supra* note 3, at 244.

87. Casey, 505 U.S. at 864 ("Because neither the factual underpinnings of *Roe's* central holding nor our understanding of it has changed . . . the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.").

88. GENETTE, *supra* note 3, at 252.

to someone describing a part of their life that they would rather forget.[89]

Explaining the tension between individual and institutional representation of our protagonist/narrator is more difficult. One could stretch the analogy of "the Court" to a growing person by suggesting that the variations among Justices at any one specific time are like variations among personalities or "sides" of the individual. However, this would leave our hero looking somewhat schizophrenic, always debating with itself, and frequently speaking in dialogue (in the form of majority and dissenting opinions). Another way to reconcile the differences is to assume that "the Court" is always "the majority" with dissenting (or even concurring) individuals somehow momentarily not a part of "the Court," though they might be at some later time. The *Casey* narrative lends itself more to this description, if only because the narrative uses "The *Plessy* Court" as parallel to "the Justices in the *Plessy* majority."[90] While this interpretation is most consistent with the text, it has the drawback that the Court's identity is tied to its acts of speech. Changes in time of the majority's composition do not necessarily create problems in an auto-biographical narrative,[91] but the Court does not seem to have a fixed identity between acts of speech. Put another way, it is not clear who the Court is between speech acts, and hence between the formation of majorities.

C. Mood: Perspective

Under Genette's framework, narrative perspective is "the second mode of regulating information [in the narrative], arising from the choice (or not) of a restrictive 'point-of-view.'"[92] Genette distinguishes this element of mood from the "person" element of voice by characterizing the former as asking "who is the character whose point of view orients the narrative perspective" and the latter as asking "who is the narrator."[93] Genette also groups, narrative

89. As another example of the narrator's state of greater maturity, the narrator characterizes the Court of the *Lochner* and *Adkins* era as having "lack of prescience" and "misperception." Casey, 505 U.S. at 862.

90. *Id.* at 863.

91. Such differences in composition are washed out by the fact that, whatever the composition, its components speak united in the form of, or on behalf of, "the Court."

92. GENETTE, *supra* note 3, at 185-86.

93. *Id.* at 186.

perspectives, or focalizations, into three categories.[94] The first category is the nonfocalized narrative, "where the narrator knows more than the character, or more exactly *says* more than any of the characters knows [sic]."[95] The second category is internal focalization, where "the narrator says only what a given character knows."[96] And the third category is external focalization, where "the narrator says less than the character knows."[97]

Assuming identity between the narrator and the protagonist, and a semi-autobiographical form, the *Casey* narrative employs a nonfocalized perspective. The older and wiser Court that tells the story seems to know more than the Court in its more previous stages, as the narrator speaks with the benefit of hindsight. Thus, borrowing from Genette's analysis of Proust,[98] "[t]he narrator almost always 'knows' more than the hero, even if he himself is the hero."[99]

However, while a nonfocalized perspective may be the natural choice for telling a historical or autobiographical narrative, it is not the only choice. While external focalization might sound odd in a Supreme Court opinion,[100] internal focalization might be appropriate in some circumstances, such as where the narrator chooses to show the reader what "the Court" saw, or believed, or held, at a specific time. An internal focalization in such a narrative (which has parallels in legal and historical argument) would sacrifice the kind of teleologic or interpretive approach used in *Casey* in order to show the Court dealing with the problems of its day, according to, and in the context of, what the Court "knew" then, and regardless of what the Court "knows" now.

D. Order

In the same way that Genette distinguishes between the narrative and the underlying story, his narrative theory also attributes a time to

94. *Id.* at 188-91.

95. *Id.* at 189.

96. *Id.*

97. *Id.* According to Genette, this third form was popularized by "Dashiell Hammett's novels, in which the hero performs in front of us without our ever being allowed to know his thought or feelings." *Id.* at 190.

98. MARCEL PROUST, REMEMBRANCE OF THINGS PAST (Vintage Books 1982).

99. GENETTE, *supra* note 3, at 194.

100. Imagine a judicial telling of Court history that shows the Court acting in seemingly incoherent ways, without the benefit of either the Court's own perspective, or the perspective of a more knowledgeable character (such as our narrator, the older and wiser Court).

each (creating "story-time" and "narrative-time") and then looks for "connections between the temporal *order* of succession of the events in the story and the pseudo-temporal order of their arrangement in the narrative."[101] An analysis of order in the *Casey* narrative reveals the presence of a subordinate narrative with a separate story-line. The narrative also makes dramatic use of another temporal effect, that of ellipses, in the telling in both the first and the subordinate narratives. The use of these devices is somewhat typical,[102] and while they shed some light on the narrative's structure, they do not necessarily provide any deep insight to the narrative's meaning. However, they are of some interest if only because they reflect the literary equivalent of problems, in legal analysis, associated with the selection and ordering of chronological texts.

The Casey narrative employs, in the language of legal analysis, a thematic rather than a chronological presentation, leading to the presence of what Genette calls an anachrony.[103] Focusing on paragraphs 2-4, there are seven central speech acts (five Supreme Court opinions and two outside commentaries) which occur in the order of: *Lochner*, *Adkins*, *West Coast*, Justice Jackson's book, *Plessy*, *Brown*, Black's article.[104] We can represent these narrative events with the letters A through G. The corresponding years for those events, which are provided in the narrative, are: 1905, 1923, 1937, 1941, 1896, 1954, 1960.[105] Assuming the order of the underlying story is chronological, then the narrative events occur in the order 2, 3, 4, 5, 1, 6, 7, so our combined narrative-story order is A2, B3, C4, D5, E1, F6, G7.

The only odd-duck in this ordering is *Plessy* (E1), which constitutes a type of anachrony called analepsis, or an "evocation after the fact of an event that took place earlier than the point in the story where we are at any given moment."[106] At the point in the narrative corresponding to Justice Jackson's opinion about the New Deal Court (D5), we are in the year 1941, and the narrator harkens back to 1896 to tell us about *Plessy*, before moving forward with

101. GENETTE, *supra* note 3, at 35.

102. See *Id.* at 36 (describing anachrony, such as beginning *in media res*, as "one of the traditional resources of literary narration").

103. Genette defines anachrony as "all forms of discordance between the two temporal orders of story and narrative. *Id.* at 40.

104. Casey, 505 U.S. at 861-63.

105. *Id.*

106. GENETTE, *supra* note 3, at 40.

Brown in 1954. If the narrative revolving around the *Lochner* "line of cases"[107] is the "first narrative," the subordinate narrative told in the *Plessy* analepsis is a "mixed analepsis, whose reach goes back to a point earlier and whose extent arrives at a point later than the beginning of the first narrative."[108] The analepsis is also complete since it not only rejoins the first narrative where it left off (1941) but surpasses the first narrative and proceeds 13 years into the future with the *Brown* decision (1954).[109] In fact, the narrative does not need to address the problem, perhaps more common in fictional narratives, of joining the analepsis with the first narrative since it simply skips over this entire time period and advances to a point far beyond where the narrator left off.

The lack of any attempt to join the narratives also suggests that the analepsis is also "heterodiegetic" in that it deals "with a story line... different from the content... of the first narrative."[110] Outside of the overlap in time, where the first narrative actually fills a temporal gap left by the subordinate narrative, the protagonist seems to be doing something distinctly different from before. To analogize to some hypothetical epic, its as if our hero starts a battle that would last 58 years, leaves after 9 years to start and pursue another different battle that takes 32 years to finish, and then returns to the first battle, which then takes another 17 years to finish.

The drama of this hypothetical epic is also severely condensed, as the narrator only shows the protagonist acting at the initiation and denouement of each battle. This use of space, both implicitly and explicit—as when the narrator explicitly indicates the gap by using a transition such as "[f]ourteen years later"[111]—is what Genette describes as ellipsis,[112] and its extensive[113] use adds to the reader's perception, created in part by the ordering of events, that this abbreviated story covers large periods of time with little attention to details. In short, the Casey *narrative* uses a kind of "bookend" narration that omits everything between the beginning and the end of

107. Casey, 505 U.S. at 861.

108. GENETTE, *supra* note 3, at 49.

109. *Id.* at 62.

110. *Id.* at 50.

111. Casey, 505 U.S. at 861.

112. According to Genette, ellipsis is as a "leap forward without any return, [and] is obviously not an anachrony but a simple acceleration of the narrative." GENETTE, *supra* note 3, at 43.

113. Extensive in the sense of being used in both the first and subordinate narratives, and covering large time periods in each instance.

a story line, between *Adkins* and *West Coast*, and between *Plessy* and *Brown*, and thus shows the protagonist only acting in decisive moments.

E. Summary

Much of the literary analysis of the *Casey* narrative has analogues to questions raised in more traditional legal analysis. To say that the narrative creates distance from the underlying story—in the sense of saying "less, and in a more mediated way"[114]—through use of narrated and transposed speech is also to comment on the extent to which an author has remained true to the original language of a text (functioning as evidence) or has added her own gloss. Similarly, the use of ellipsis to omit large periods of time suggests, in parallel, the omission of potentially relevant details (which may be difficult to deal with) in favor of a broader narrative that reflects the author's interpretation of the events.

Furthermore, to say that the narrative is autobiographical and nonfocalized is also to comment on the fairness, or accuracy, of interpreting Supreme Court opinions of the past with the language and ideas of the present. To notice heterodiegetic analepsis is to question the validity of a thematic, textbook presentation of cases which ignores the potential influence of doctrinal developments in areas outside of the "chapter heading" and to question, more broadly, the way judges or historians order events that occurred chronologically, but connect in more complex, anti-chronological ways. And last, to question the identity of "the Court" as a protagonist, and as a narrator, is to raise similar legal questions about the degree to which the Supreme Court is simply an exercise in building consensus amongst individual judges with their own political and ideological influences, or whether the Court represents something more fixed, less dynamic, and less subject to external influence.

That is not to say that the different forms of analysis raise the same questions, but simply to say there are analogies between the two approaches. And where a judicial opinion narrates court history in a similar fashion, the two analyses may be complementary to each other, in the sense that the literary approach provides another perspective (and for most legal types, a novel perspective) from which to observe somewhat familiar problems.

114. GENETTE, *supra* note 3, at 163.

III. Stare Decisis

By discussing *Brown* and *West Coast* in the midst of an analysis about *Roe*'s power as precedent, the *Casey* opinion suggests that these cases are, in some abstract sense, precedent for the decision. However, it is not clear, at first blush, what cases dealing with minimum wage laws for women and segregated educational institutions have to do with a case about abortion.

That is not to say that these cases aren't often mentioned in the same breath. In the opening to his renowned article about *Lochner*, Cass Sunstein proclaimed that "[c]onstitutional law tends to define itself through reaction to great cases"[115] before mentioning *Brown*, *Roe*, and *Lochner* as examples of such cases. Those same three cases makeup three of the five subjects in a book entitled "Great Cases in Constitutional Law."[116] Similarly, the Court in *Casey* links *Roe* with *Brown* and *West Coast* on the basis of their controversial nature, describing them together as cases of "comparable dimension that have... taken on the impress of the controversies addressed."[117] Thus, these cases are connected by the fact that many people know about them and may struggle to deal with them, but such a connection does not explain their utility in a stare decisis analysis on the issue of abortion.

One thing *Brown* and *West Coast* have in common, apart from their controversial nature and their status as part of the U.S. Supreme Court's "greatest hits" catalog, is that they overruled prior decisions of equal controversy. This is the central commonality the Court is addressing in *Casey* in order to determine whether the Court should follow suit and overrule *Roe*, but it is surprising, nevertheless, that the Court engaged in such a discussion in the first place. After all, there is no similar discussion in either *West Coast* or *Brown*. In fact, neither of those cases really make much of precedent or stare decisis at all, at least when compared to the *Casey* decision.[118]

115. Cass R. Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873, 873 (1987).

116. GREAT CASES IN CONSTITUTIONAL LAW (Robert P. George ed., Princeton University Press 2000).

117. Casey, 505 U.S. at 861.

118. See West Coast Hotel, 300 U.S. at 389-90 (listing factors that require reexamination of *Adkins*). To the extent the *Brown* opinion dealt with precedent, it did so in the more traditional fashion of stating the case and providing a distinction. See Brown, 347 U.S. at 491 (distinguishing *Plessy* on the ground that it involved public transportation and not education).

Thus, the *Casey* opinion is distinct from these cases not only because it uses a narrative in addition to an analytical presentation of prior court decisions, but also because this narrative is based on cases that, under a traditional stare decisis analysis, are completely irrelevant. According to Frederick Schauer's theory of precedent, "reasoning from precedent . . . presupposes an ability to identify the relevant precedent" and thus depends on an organizing theory, or rules of relevance.[119] If that's the case, then the Court, in *Casey*, adopts an extremely broad rule that makes a case relevant not on the basis of its specific facts alone, but also on the basis of broader contextual facts: specifically, the fact of whether the decision-maker of a prior time was faced with a controversial precedent and a plea to overrule in contravention of the rule of stare decisis. The remainder of this paper will address issues created by this type of reasoning, using Schauer's theory of precedent as a basis for comparison.

A. Correctness of Result

One essential characteristic of the *Casey* Court's view of stare decisis is the focus on a prior decision's reasoning, and the current decision-maker's perception of the prior decision's correctness. A theory of stare decisis need not have these characteristics. For example, under Schauer's theory, "a pure argument from precedent . . . depends only on the *results* of those [prior] decisions, and not on the validity of the reasons supporting those results."[120] An appeal to precedent, then, is an appeal to invoke the *holding* of a prior case and not the reasoning, and such an appeal necessarily ignores the present decision-maker's view about the correctness of that reasoning: "[o]nly if a rule makes relevant the result of a previous decision regardless of a decisionmaker's current belief about the correctness of the decision do we have the kind of argument from precedent routinely made in the law and elsewhere."[121] As a result, precedent can have no "weight" since "precedent is always followed or distinguished" and "[w]e never face a situation where a precedent presumptively ought to be followed, but some special overriding condition in this case leads us not to follow it."[122]

The *Casey* Court's approach differs from Schauer's theory in that the *Casey* Court acknowledges a third option, where precedent is not

119. Schauer, *supra* note 4, at 576-78.

120. *Id.* at 576.

121. *Id.*

122. *Id.* at 594

always followed or distinguished, but can also be overruled. In such cases, the opposing party's response to the invocation of relevant precedent is not that the current scenario is somehow distinguishable, but that the prior decision is no longer valid. In *Casey*, the Court is principally concerned with such cases, and plainly recognizes the importance of a decision's "correctness" in conducting a stare decisis analysis in this context. The opinion cites *Mitchell v. W.T. Grant Co.*[123] for the proposition, "repeated" in Supreme Court case law, that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[124] Thus, while a belief that a prior decision is wrong is not dispositive, under this theory, it is relevant.

However, the parenthetical quote from that *Mitchell* citation qualifies the Court's definition of a "wrong" result: "[a] basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government."[125] A "wrong" result, then, is not a result based on faulty reasoning, but a result immediately influenced by politics and personal belief. A wrong result is, simply, a result that changes with Court membership. In such cases, the Court reexamines prior case law solely on the basis of "a present doctrinal disposition to come out differently."[126] This really gets at the heart of the plurality's theory of stare decisis: to justify overruling a prior decision, *something* must change other than the people voting. The difficulty lies in articulating the nature of that special something.

The Court's definition of wrong as politically motivated, or reflecting present doctrinal disposition, also relates to the literary discussion of our protagonist's identity. The *Casey* narrative used "the Court" to suggest something permanent and fixed about the protagonist, that while the Court could go through "phases" of misperception or lack of prescience, the Court of the *Adkins* and *Plessy* eras was still, somehow, the same Court narrating in the *Casey* opinion. Variations from use of "the Court"—such as the presence of individual Justices dissenting with the Court / the majority, and labels used to distinguish between Courts of different time periods (as in "the *Plessy* Court")—undermined the reader's perception of the

123. Mitchell v. W.T. Grant. Co., 416 U.S. 600, 636 (cited at Casey, 505 U.S. at 864).

124. Casey, 505 U.S. at 864.

125. Mitchell, 416 U.S. at 636 (cited at Casey, 505 U.S. at 864).

126. Casey, 505 U.S. at 864.

protagonist as having a fixed identity. Thus the literary analysis seems to get at a related question: what is it that "the Court" does that is fixed, and not subject to the vascillations of individuals or time?

B. Constituional Change and Living Constitutionalism

The "correctness" of a prior opinion occurs in one more place in Section IIIB of *Casey*, when the Court states: "we think *Plessy* was wrong the day it was decided."[127] Based on the Court's subsequent description of wrong as politically motivated, this statement may mean that *Plessy* was wrong not for bad reasoning, but because that decision shows Supreme Court Justices succumbing to the external political pressures of their times, or to their own "unjustified" beliefs. The decision may be wrong not because of its premises or conclusions, but because the judges were exhibiting bad behavior, behavior that undermines the traditional notion of the Court as an institution insulated from the vascillations of politics by lifetime tenure and a sworn commitment to follow precedent.

Professor Jack Balkin has proposed an alternative interpretation of this statement: that it reflects an expression of our "ethos or national character."[128] According to Balkin, *Plessy* "follows fairly naturally from the Supreme Court's 1883 decision in Pace v. Alabama, which upheld provisions of a state code that punished interracial cohabitation more severely than cohabitation between persons of the same race."[129] Michael Klarman has argued, along similar lines, that "*Plessy*-era race decisions were plausible interpretations of conventional legal sources" and that the decisions can be criticized, "but not on the ground that they butchered clearly established law or inflicted racially regressive results on a nation otherwise inclined to favor racial equality."[130] If, as these arguments suggest, the *Plessy* Court applied precedent in a fairly straightforward manner and did not succumb to external political pressures, then the *Casey* Court's attempt to characterize *Plessy* as wrong, in its day, must have a different motivation. According to Balkin, "we say that a case like *Plessy* was wrong the day it was decided in order to avoid

127. *Id.* at 863.

128. Jack M. Balkin, 85 B.U.L. REV. 677, 710 (2005).

129. *Id.* at 707.

130. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 9-10 (2004).

concluding that we are the type of people whose Constitution would say such a thing."[131]

But the statement is also important in the context of the *Casey* opinion because the plurality did not say the same thing about *Lochner*, which may suggest that the *Casey* Court thinks that case was rightly decided in its context. Should a theory that explains why the Supreme Court overrules a case differentiate between cases that were rightly and wrongly decided in their day? According to Balkin, the answer is 'yes', and has important ramifications for the argument made to justify overruling precedent.[132] In Balkin's view, decisions can be overruled, but to overrule a case that was initially decided correctly (in its context) implicates a different argumentative burden.[133] In such cases, "the burden is not simply to show why the usual norm of stare decisis does not apply . . . [but] to show how the meaning of the Constitution itself has changed in the interim."[134] In other words, Balkin argues:

one needs a theory of Living Constitutionalism, . . . a theory that argues that the best interpretation of the Constitution's meaning changes in accordance with changing circumstances and events, and that it is the duty of all actors, including judges, to change their interpretations of the Constitution to reflect these changing circumstances.[135]

Section IIIB of the *Casey* opinion provides some evidence that the plurality holds such a view, suggesting that the theory of precedent articulated in *Casey* may reflect a desire to meld more traditional theories of stare decisis with the idea of a living constitution. The Court emphasizes that *Brown* and *West Coast* overruled *Plessy* and *Adkins* because of changed facts, or changed understandings of facts.[136] The Court also states that "[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations" and that the decisions to overrule these cases sprang from the "Court's constitutional duty."[137]

If the language of changed circumstances does not, by itself, indicate the influence of living constitutionalism on the Court's

131. Balkin, *supra* note 128, at 710.

132. *Id.* at 697-99.

133. *Id.* at 697-98.

134. *Id.* at 698

135. *Id.*

136. Casey, 505 U.S. at 863.

137. *Id.* at 864.

opinion, the language of duty tips the scale. When we think of judicial duties, the one that most immediately springs to mind is the duty to follow precedent that judges commonly recite in Senate confirmation hearings, not the duty to overrule cases when circumstances have sufficiently changed. This idea, that judges are not only empowered to overrule prior decisions but have a constitutionally imposed obligation to do so under certain circumstances, is strongly suggestive of a worldview of living constitutionalism, and is a key component of the Court's somewhat progressive theory of precedent articulated in this case.

Thus, the *Casey* opinion strives to articulate a theory of stare decisis that explains not only the cases where the Court decided wrongly in its day, but also those cases where the Court decided rightly in its day, and yet *something* fundamental still has changed and makes that decision presently wrong now. In this context, that something is not a change or deviation from the Court's fixed role, but a broader change in the world, or audience, to which the Court announces its decisions. The deference to the correctness of prior decisions in their context, advocated by Balkin and Klarman, is somewhat analogous to a literary argument that a nonfocalized narrative treats "the Court" of previous times somewhat judgmentally and condescendingly. Such arguments might advocate the equivalent of internal focalization in fictional narratives, where it seems more fair to look at the Court's acts of speech through the eyes of the Court at that time, knowing what the Court knew then, and disregarding what the Court knows, or believes, now.

C. Facts and Values

Another distinct characteristic of the *Casey* Court's approach to stare decisis lies in its uniquely broad definition of the relevant "facts." On a basic level, stare decisis is an argumentative device that seeks to create consistency in outcome between specific fact patterns. Schauer describes the "bare skeleton of an appeal to precedent" as: "[t]he previous treatment of occurrence *X* in manner *Y* constitutes, *solely because of its historical pedigree,* a reason for treating *X* in manner *Y* if and when *X* again occurs."[138] When we discuss the relevant facts in an appeal to precedent, we are normally talking about the specific facts surrounding "occurrence *X*," and when we compare current fact scenarios to prior judgments, we base that

138. Schauer, *supra* note 4, at 571.

comparison, by necessity, on the facts as selected and presented in that prior opinion.[139]

The *Casey* opinion reconciles cases which overrule precedent, such as *West Coast* and *Brown*, with the principle of stare decisis largely by invoking an expansive definition of the word "facts." As described above, one of the narrative's principal themes is that Supreme Court Justices have certain judicial obligations in the face of changed facts. According to the opinion, cases like *Lochner* and *Adkins* rested on "fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."[140] In cases like *West Coast Hotel*, the Court recognized that "the facts of economic life were different from those previously assumed."[141] And in *Brown*, the Court addressed the "facts of life" which indicated that segregation created inequality.[142]

But while a stare decisis argument typically focuses on "the facts of occurrence X," the plurality in *Casey* reads "facts" more broadly as "the facts of life," encompassing what might just as fairly be described as values. For example, a false "factual assumption" about an unregulated economy's ability to protect the poor might equally be characterized as an individual value judgment that the poor should protect themselves, or that government welfare, and not regulation of individual employment contracts, should guarantee a minimum standard of living.

Much of the language in both *West Coast* and *Brown* suggests that those Courts were not solely motivated by changed facts, in the narrow sense of that word. Justice Hughes opinion, in *West Coast*, speaks generally about liberty before focusing on the idea of liberty of contract.[143] He describes constitutional liberties as limited, and then defines liberty as "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[144] Employers, and especially those who practice the "sweating system," are portrayed as "evil" (a word used five more times in the opinion), "unscrupulous

139. Unless the current decision-maker took part in the prior decision (horizontal stare decisis, close in time), remembers the decision, and has a different perception of the facts than that presented by the majority opinion.

140. Casey, 505 U.S. at 861-62.

141. *Id.* at 862.

142. *Id.* at 863.

143. West Coast, 300 U.S. at 391.

144. *Id.*

and overreaching," and "unconscionable."[145] Their female employees, on the other hand, are portrayed in terms of class and victimization (no doubt, in some part, because of the gender bias evident elsewhere in the opinion):

> The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances.[146]

And in one strikingly bald assertion of opinion, Justice Hughes states "[t]he bare cost of living must be met."[147] Without engaging in a metaphysical debate about whether these statements represent facts, factual presumptions, or values, these statements, at the very least, indicate that much more than changed facts motivate the holding in *West Coast.*

A similar case can be made in *Brown*, which is based on two conclusions: that public education is of such importance that it "is a right which must be made available to all on equal terms," and that racial segregation, even where tangible factors are equal, generates "a feeling of inferiority" that irreparably affects the "hearts and minds" of children.[148] Chief Justice Warren cites no authority for the first proposition,[149] and for the second proposition, he cites a host of then-contemporary works of psychology and social science.[150] The *Casey* plurality might portray the first argument as based on common knowledge about the benefits of a public education, but one might equally characterize the argument as based on American cultural values about education, generally. A similar case could be made for the second argument, as it seems somewhat counterintuitive to characterize a conclusion about people's feelings as fact, in the narrow sense of the word.

Thus, the *West Coast* and *Brown* decisions were not solely motivated by changes in "the facts of the case" (the narrow sense of the word), but the *Casey* opinion overcomes this difficulty by interpreting "facts" much more broadly. That the word "facts" is doing some of the work of values is evident in the Court's

145. *Id.* at 398-99.
146. *Id.* at 398.
147. *Id.* at 399.
148. Brown, 347 U.S. at 493-94.
149. *Id.* at 493.
150. *Id.* at 494 n.11.

characterization of facts as widely understood. At several points, the Court indicates that the commonality, and popularity, of knowledge is a key characteristic of the type of "facts" which the plurality believe warrant the obligation to overrule a prior decision. On this point, the *Casey* Court may be taking a cue from the Court in *West Coast*, which argued that "it is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land."[151] In comparison, the *Casey* Court speaks of lessons "that seemed unmistakable to most people," of "[s]ociety's understanding of the facts," and of "facts that the country could understand".[152] In support of their interpretation of the *West Coast* decision, the *Casey* plurality cites Justice Jackson's book, The Struggle for Judicial Supremacy, for the proposition that "'the older world of *laissez faire* was recognized everywhere outside the Court to be dead.'"[153] To support their interpretation of *Brown*, the plurality cites a law review article for the proposition that the question in *Brown* "'has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.'"[154]

The *Casey* Court's dissolution of the division between facts and values is not, of itself, problematic, except for the rhetorical effect. The choice of describing these shifts as changes of facts instead of values is a choice that favors an "objective" over a subjective characterization of judicial decision-making. This choice reflects the continuing tension between traditional principles of stare decisis and the idea of a living constitution prevalent in the *Casey* opinion, and similarly, in literary terms, the tension between representing the Court's speech acts as chaotic expressions of individual opinion or as more united expressions of a single actor.

D. Doctrine and Ideology

Another notable aspect of the *Casey* approach to stare decisis is its focus on the specific decision to overrule, and the omission of any consideration of the decisions made in the interim. In literary terms, the narrator's use of ellipses omits large periods leaving the reader curious as to the Court's actions during this time, and the potential

151. West Coast, 300 U.S. at 399.

152. Casey, 505 U.S. at 861-63.

153. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 85 (1941) (cited in Casey, 505 U.S. at 862).

154. Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 YALE L.J. 421, 427 (cited at Casey, 505 U.S. at 863)

relationship of such omitted actions to the narrative. The result of this approach is that the narrative ignores the potential effect of the development of judicial ideologies or doctrines, and Barry Cushman's analysis of the New Deal Court[155] is one example of an argument that reveals this affect. Barry Cushman has argued that the series of cases between *Lochner* and *West Coast Hotel*[156] shows the Court struggling to deal with three differing lines of economic due process doctrine: the regulation of prices, wages, and hours of employment.[157] Cushman looks within these lines for judicial development of doctrinal principles, including: the principle of neutrality, the public / private distinction, constitutional takings, liberty of contract, federalism, the level of scrutiny of judicial review, and notions of categorical police power.[158]

I do not wish to comment substantively on Cushman's analysis, here, except to note that his argument stands for the proposition that the omitted cases may reveal the development of different ideological approaches, or doctrinal schools, within the Court. This would undermine the *Casey* Court's assertion that cases such as *West Coast* do not represent the victory "of one doctrinal school over another by dint of numbers."[159] But it may also indicate, more generally, that narratives of Supreme Court history are structurally predisposed to minimizing the development of ideological schools where those narratives make extensive use of ellipsis to omit intervening acts.

E. Conclusion

A narrative analysis of the *Casey* narrative reveals certain structural characteristics that control that passage's meaning. Such an analysis may also reveal more general problems endemic to any narrative that takes, as its subject, the story of "the Court," and while a literary analysis does not raise the same questions as more ordinary legal analysis, it raises related, or analogous questions, and can thus provide a fresh perspective on those questions.

155. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

156. Twenty-two such cases are cited in footnote two of the *West Coast* decision. West Coast, 300 U.S. at 393 n.2.

157. CUSHMAN, *supra* note 155, Ch. 3-5.

158. *Id.*

159. Casey, 505 U.S. at 864.