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The Truth About Owen Fiss

ROBERT A. BURT*

Owen Fiss has a passion for truth. This embrace has given moral fervor and power to his character and his work. At the same time, a puzzle accompanies this commitment – a puzzle that is both intellectual and personal. Intellectually, how does Professor Fiss sidestep the assaults of skepticism, relativism, post-modernism – and not only the ideological isms of our secular world which have cast doubt over authoritative truth claims, but also the corroborating historical experience of the social disasters accompanying authoritarian truth claims? Personally – and I say this from extensive and repeated experience – the puzzle is to understand how Owen combines his attentiveness to others' needs and perspectives with the forcefulness of his moral vision, his clear and even adamant conviction about right conduct and belief. How can it be that he is such a good friend, sounding board and guide at the same time that he remains so resolute, so adamant, in his rectitude? It is in this sense that I intend to explore the "truth about Owen" – how, that is, can he wrap the robes of Truth around himself without succumbing to moralizing authoritarianism?

In final analysis, I think Owen avoids this trap in a way that is dependent on an intertwining of his intellectual commitments and his personal character. I draw this conclusion from the way I have come to see Owen, based on our close companionship in both intellectual and personal terms during the past thirty-five years. But I also know Owen well enough to know that he may very well tell me – maybe even that he's highly likely to tell me – that I've got it wrong.

Commitment to the idea of discoverable truth is at the core of Owen's vision of law and of the proper judicial role in legal interpretation. His conception has an unembarrassed forthrightness. "The task of the judge," Owen proclaimed in his 1979 Harvard Law Review *Foreword*, "is to give meaning to constitutional values . . . . He searches for what is true, right, or just."[1] This search, as Owen sees it, is not unbounded. As he put it in his 1982 essay on "objectivity and interpretation," this search for truth is constrained by two related sources: by "disciplining rules" which provide standards for assessing the correctness of truth claims and by an "interpretive community which recog-

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1. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979).

nizes these rules as authoritative."[2]

These constraints do not mechanically determine interpretive outcomes; as Owen portrays it, there is ample room for disagreement in the search for truth. But Owen sees two radically different perspectives from which this disagreement can occur: the internal and the external perspectives. "Legal interpretation" takes place only within an internal perspective. An external critic is, as Owen puts it, "free to insist" on alternative criteria ("moral, religious or political") for evaluating legal interpretations; but this insistence puts this critic in a posture of disobedience. And for Owen, this posture has considerable difficulties. He cannot deny the moral salience of the dissenter in American history or the ways in which those who have seen themselves as external critics have, over time, exercised an evolutionary or even revolutionary impact on our law. Nonetheless, he insists,

> [a]n exercise of the freedom to deny the law, and to insist that [one's] moral, religious or political views take precedence, requires the critic to dispute the authority of the Constitution and the community that it defines, and that is a task not lightly engaged. The authority of the law is bounded, true, but. . . in America those bounds are almost without limits. The commitment to the rule of law is nearly universal.[3]

This claim for "near-universality" is not simply descriptive for Owen; it is normative, and powerfully so. Notwithstanding that the history of American law has retrospectively rewarded some external dissenters with honored status, most notably the Abolitionists who provoked the Civil War and the Founding Fathers who provoked our Revolutionary War, Owen sees considerable moral dangers in this externalized posture. By placing themselves outside the bounds of authoritatively recognized law, these critics – these "renegades," as Owen less charitably described them[4] – run a substantial risk of abandoning all of the civilizing constraints of law. They risk falling away from the pursuit of intersubjectively identifiable truth toward accepting undisciplined subjectivity, from commitment to the rule of law toward embracing "nihilism,"[5] from justifying the use of power by some transcendent principle toward claiming simply that "might makes right."

Thus, Owen scorns those contemporary critics who assert that the Supreme Court's decision in *Bush v. Gore* "put the authority of law in

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2. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982).
3. *Id.* at 750.
4. *Id.* at 752.
5. *Id.* at 762.

question and caused a crisis of legitimacy."[6] The case was wrongly decided, Owen argues, but the Court's error can be identified based on conventional standards, on the "disciplining rules" of legal interpretation. It may be, he concedes, that the majority's disregard for these conventional standards was so patent as to call into question their good faith. But even if this were so, this would only undermine those Justices' own claims for legitimate authority; it would not "undermine the authority of the law" because, he says, "law belongs not to any judge or even the Supreme Court, but to history or society in general."[7] The idea of law, its pursuit of "public values through a process of reasoned elaboration known as adjudication," remains unblemished, in Owen's conception, notwithstanding the fallibility, the errors, of those who, at any given moment, are charged with safeguarding that idea.[8]

If Owen is correct – and I think he is – that the external perspective easily slides into excessive subjectivity, to an exaltation of particularist preferences over communally shared values, there is nonetheless a parallel problem with the internal perspective. The *a priori* commitment to the legitimacy of law as such, which is demanded by this perspective, easily slides into a claim for deference to the socially designated embodiments of the law. Owen tries to soften this claim, especially in his writings about First Amendment protections for dissent that are woven into the fabric of our constitutional regime and are thus available to legitimate an internally critical posture. But even so, Owen's conception of discoverable truth cannot avoid demands for at least presumptive deference to those whose claims to speak that truth are wrapped in the robes of prior social recognition.

Owen explicitly struggles to avoid the implication of excessive deference to constituted authority – and especially to judicial authority – that might appear to follow from his conception of truth. Thus he states, in his article on objectivity and interpretation,

> Any interpretation of a court, certainly that of the highest court, is prima facie authoritative. On the other hand, [nothing] can assure that this presumption will withstand a decision that many, operating from either the internal or external perspective, perceive to be fundamentally mistaken, an egregious error. In such a situation, the judge may be unable to ground his claim to obedience on a theory of virtue, but may have to assert the authoritativeness that proceeds from institutional power alone.[9]

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6. OWEN M. FISS, *The Fallibility of Reason, in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 85 (Bruce Ackerman ed., 2002).
7. *Id. at 95.*
8. *Id.*
9. Fiss, *supra* note 2, at 757.

And here, I would say, is the rub: the ease with which judges confuse their readily accessible command over the instruments of institutional power and their belief in their own virtue with a grand overarching "theory of virtue."

Owen confronts this problem with admirable frankness in his Holmes Devise History of the Fuller Court.[10] For most of the past century, the external critics of law have invoked the work of the Fuller Court generally, and *Lochner v. New York*[11] specifically, as their prime exhibit that law at its core is nothing but disguised self-interest and raw deployment of power. Owen takes on these critics by providing an internal account of *Lochner* which both justifies and criticizes it with reference to a theory of virtue which portrays the way in which both its proponents and its critics are justified in seeing themselves as engaged in a truth-seeking rather than a power-seeking enterprise. Owen sees the majority Justices in *Lochner* as committed to an ideal of Liberty that was plausibly deduced from constitutionally enshrined American values. From this premise, Owen concludes that *Lochner*-ism, the logical extensions of the Liberty ideal that pervaded the work of the Fuller Court, deserves respect as a good faith pursuit of truth.[12] Owen thus separates himself from the conventional critics of *Lochner* – both in its time and ours – who claim that it represents nothing but politics, nothing but the Justices using their institutional authority to protect the self-serving interests of their economic and social class-mates, the capitalist entrepreneurs.

Nonetheless, Owen claims that the *Lochner* Justices were mistaken – and their mistake, the un-truth at the core of their constitutional vision, was in preferring the ideal of Liberty over the ideal of Equality. At the very end of his historical account, Owen applies this same criticism to the predominant rulings of the Rehnquist Court, but this coda seems more biting and less tolerant of this contemporary un-truth than Owen's critique of the Fuller Court's error.[13] It is as if the Fuller Court's mistaken preference for Liberty might be excusable because of their foreshortened historical experience, but the Rehnquist Court's reiteration of this error is inexcusable because the current Justices choose to ignore the revealed truth that had not been vouchsafed to their benighted predecessors. The revealed truth, the clinching argument in the Fiss pantheon for the preferred status of Equality, is the Supreme Court's intervening deci-

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10. OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 157-65 (1993).

11. 198 U.S. 45 (1905).

12. FISS, *supra* note 10, at 157-65.

13. *Id.* at 394 ("We are now witnessing an eerie revival of many of the tenets of the contractarian tradition.").

sion in *Brown v. Board of Education.*[14]

Owen is quite explicit about this exalted significance of *Brown.* The final sentence of his Holmes Devise volume asserts that *Brown* stands not as the Rehnquist Court sees it, "not as a negative example but as the embodiment of all that the law might be."[15] Three pages earlier, Owen described *Brown* as the ruling "that has inspired my generation and has defined the parameters of this volume."[16] In Owen's terms, the primacy of the Equality ideal "justif[ied] the sacrifice of many individual liberties, some connected to the market and some, like the freedom of association, that were not."[17] This "shift from liberty to equality" was not a changing fashion or a reconfiguration of domestic power politics, but arose from a deeper understanding of the truth about social relationships than the individualist, contractarian conception underlying the Liberty ideal. The Equality ideal embodied in *Brown* "entailed a reconception of personhood [by which individuals] were no longer treated by the state as isolated entities but as socially embedded, and it was recognized that their status is vitally dependent on the status of the group with which they are identified."[18]

In this social understanding of personhood, this more profound truth about individuals' self-constitution in social relationships, I believe there is a tension in Owen's conception of truth that he does not adequately acknowledge. The tension appears in the presumptively preferred role he assigns to judges as the adjudicators of truth; for this role appears to require that they stand outside of social relationships. It is as if they were the sovereign individuals conceived through the lens of Liberty – the socially isolated interpreters, enforcers and beneficiaries of the social contract that binds the rest of us "socially embedded" persons.

Owen does not entirely ignore this problem. At the end of his 1979 Harvard *Foreword,* he portrays this problem as a conflict between the norm of judicial independence and the imperative for judicial effectiveness in reshaping conventional social practices. This is a "dilemma," Owen concluded, that cannot be resolved but must be "live[d] with."[19] But I see this conflict between the judge as socially independent "adjudicator of truth" and socially constrained "practical implementer" of those ideal truths as reflecting a more pervasive dilemma in Owen's very conception of truth.

By acknowledging this dilemma only as a conflict between "ideals"

14. 347 U.S. 483 (1954).
15. Fiss, *supra* note 10, at 395.
16. *Id.* at 392.
17. *Id.* at 393.
18. *Id.* at 393.
19. Fiss, *supra* note 1, at 58.

and "practical implementation," Owen awards the honorific status of "truth" to one side of the conflict. This hierarchic positioning makes it easier for Owen to endorse forcible intervention by third-party adjudicators, on the ground that truth is a self-evidently higher value to protect than practical but unprincipled resistance to truth. But I believe that this dilemma is better understood as a conflict within the ideals themselves. With this understanding, forcible third-party interventions become much more difficult (though not impossible) to justify. I agree with Owen that recognition either of the practical dilemma that he acknowledges or the principled dilemma that I see provokes the temptation "to turn back in despair [and] renounce the adjudicative enterprise altogether, or escape to formalism" but that "these alternatives must be resisted at all costs" and we must instead learn "to live with the dilemma."[20] But I believe that Owen's account of his conception of "truth" too readily obscures the true dimensions of the dilemma and teaches us not to live with it but to wish it away, to forcibly deny it.

The true measure of the dilemma, as I see it, is this: For coherent moral evaluation of others' conduct and our own we must rely on some version of the individualist conception of the self, capable of standing outside social relations. We must see ourselves as incarnations of Liberty while at the same time, we do not fool ourselves or others about the co-existing truth that we are socially embedded, mutually interdependent and, in this context, best understood as embodiments of Equality. But if these two understandings of ourselves as avatars of Liberty and Equality are co-existing, on what basis do we choose between them when they are in diametric opposition?

This diametric opposition appears even if we try to restrict our vision to one or the other of these prized values. Even if we insist that Liberty is the primary value in social relations, coherent vindication of that value immediately stumbles with the recognition that one person's claim to liberty is virtually always vulnerable to a plausible competing claim that someone else is thereby constrained in the exercise of his liberty. Moreover, forcible protection of one person's liberty claim against another's makes this dilemma quite stark, since the force in itself patently deprives one claimant of liberty on behalf of another. If Equality is our primary value, the same kind of dilemma readily appears: Claims for equal share of resources (including the resource of social respect) virtually always can be understood as disputes about the proper measure of comparison; and forced resolution makes this dilemma quite stark by visibly subordinating one claimant to the other.

Abstention by third-party adjudicators to avoid forcible subordina-

20. *Id.* at 57-58.

tion of one party to the other is not, however, a coherent resolution of this underlying problem. The disputing parties have come to the adjudicator precisely because one party regards itself as wrongly and forcibly subordinated by the other. The special function – the "trick," if I may call it that – for adjudication is to intervene in this subordinating relationship and transform it without falling into the trap of simply trading one kind of forcible subordination for another. Awarding the honorific status of "truth" to judicial interventions does not avoid this trap, and judges are prone to fall into this trap precisely because our cultural norms make this special honorific of "truth-speaking" so readily available to them.

In avoiding this trap – in pursuing the goal of a transformed relationship between parties who are locked in a relationship of domination and subordination – the Equality principle is preferable to the Liberty principle. In this sense, I believe that Owen's criticism of *Lochner* and of the renewed priority currently given to Liberty by the Rehnquist Court is correct. And I agree with Owen that, in our entire constitutional history, the exemplary instance of adjudication that demonstrates the preferability of the Equality principle is the Supreme Court's decision in *Brown v. Board of Education.*[21]

It is plausible to characterize the dispute over racial segregation in *Brown* in the terms of both Liberty and Equality. Herbert Wechsler's famous criticism of *Brown* as unprincipled – as not resting on suitably "neutral" principles of law – was based on his depiction of Liberty as the core principle at stake. Wechsler could not see how the white Southerners' claim for liberty in choosing their own associates was successfully rebutted.[22] Wechsler ignored, however, the ways in which the whites' Liberty claim was experienced as a forcible constraint by black Southerners – as an inhibition on their liberty. Blacks could, that is, plausibly invoke the old adage that the whites' liberty stops where white meets black nose. But then, of course, whites could rejoin that enlisting judicial force on behalf of black claims is surely a fist pounding on their noses.

Recasting the dispute in terms of the Equality principle does not dissolve the dilemma. But the Equality principle displays this dilemma with greater clarity than the Liberty principle; and, even more importantly, the Equality principle points the way toward resolution of this dilemma in a way that the Liberty principle does not and cannot.

The substantive problem in vindicating either principle is essen-

21. 347 U.S. 483 (1954).

22. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

tially the same. The core substantive problem is finding a common metric in disputes where one party alleges that the other wrongly deprives her of Equality or deprives him of Liberty. These conflicts cannot be coherently resolved unless the disputing parties or a third-party judge can identify an encompassing metric for evaluating the claims in comparable terms. It is logically possible for the third-party judge to rely on a metric that only one disputant puts forward, or even to rely on a metric than none of the disputants acknowledges. Third-party judges typically insist that they are not resolving disputes on the basis of their personal or idiosyncratic predilections but are instead deriving their conclusions from widely shared, historically rooted cultural values. These protestations are not empty rhetoric. The plausibility of these judicial protestations are crucial elements in establishing the legitimacy of adjudication.

Judges may insist, or more to the point, a five-person majority of the Supreme Court may insist, that their perspective is the true measure of Equality or Liberty as Owen's conception invites them to do. But if considerable numbers of contemporary disputants claim otherwise and if, moreover, long-established social practices support this claim (perhaps even buttressed by past decisions of Supreme Court majorities), it is exceedingly difficult for contemporary judges to make a plausible contrary case. This was *Brown*'s problem in confronting the long-entrenched race segregation practices supported by the Court's own prior approval in *Plessy v. Ferguson*.[23] Its stunning success in overcoming this problem is the reason that *Brown* can stand as the "the embodiment of all that law might be"[24]– as Owen's lodestar and mine.

Brown succeeded, however, not because the Justices identified the single correct definition of Equality in the dispute but, as I see it, because the Justices identified with a clarity that no other institution had accomplished or even tried to accomplish that the Equality principle was violated by racial segregation because of the indignities experienced by blacks subject to that regime. The Court did not, and in principle could not, devise an alternative social arrangement that would respect blacks' claims to Equality without traversing whites' claims to Equality. The *Brown* Court did capitalize, however, on a process implication of the Equality principle that would not have been so readily available if they had cast the dispute as a dilemma in the vindication of the Liberty principle.[25]

The process implication is that the comparative calculus for reaching a substantive judgment of equal treatment requires continuous social

23. 163 U.S. 537 (1896).

24. Fiss, *supra* note 10, at 395.

25. *See generally* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 271-310 (1992).

interaction among the disputants. In process terms, the Equality principle visibly depends on and visibly depicts the deep truth about social relationships that Owen identified, the truth that we are all necessarily, inevitably socially embedded beings. Even when we claim Liberty from one another, the coherence of that claim depends on socially constructed meanings that emerge from our communal interactions. But the Liberty principle too readily lends itself to the fiction that each of us stands apart from all others, that social interactions are not required – are, indeed, anathema – in giving substantive content to Liberty. Equality, however, demands continuous comparison and social interaction.

In *Brown*, the Supreme Court forced the disputing parties, first, into public acknowledgment that a dispute existed between them about the justice of existing social arrangements – a public acknowledgment that other national or state institutions were not willing or able to provide; and second, the Court forced the parties into continuous subsequent interactions, in forums where they were more equal to one another (and more at liberty to speak on their own behalf) than in any alternative available national or state institution. From this forced recognition and mutual engagement, a transformation of their relationship – a transformation that more closely approximated a mutually agreed conception of Equality – emerged.

The Justices who decided *Brown* were quite self-conscious about launching an interactive process rather than imposing a univocal substantive resolution. That was the essence of *Brown II* and its opaque formula of "all deliberate speed."[26] It may be that the Justices were too timid in this second step, and that their transformative goal might have been better accomplished if they had held themselves closer to the oracular status of "truth-speaker" that Owen's conception of adjudication implies. But whether they explicitly legitimated delayed enforcement or demanded immediate compliance, the inevitable fact was that after the Supreme Court's initial ruling, a prolonged process of interaction, much of it presided over by lower court judges, would follow in order to give specific content to the Equality norm. This is a strength, not a weakness – and it is a special strength in the implementation of the Equality principle as compared to the Liberty principle.

The significance of the deliberative process precipitated by *Brown* was first brought home to me with my own experience in 1955, in the immediate aftermath of the Supreme Court's decision. Though I did not clearly understand this at the time, it was through process more than substance that *Brown* had its most powerful impact on my life. I have come to believe that my experience was not idiosyncratic but widely

26. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

shared, and that this shared experience explains the transformative impact of *Brown* and the reason why *Brown*, as Owen put it, "inspired [our] generation"[27]– and remains inspirational for us a half-century later.

When *Brown* was decided, I was fifteen years old – a tenth grade student at Montgomery Blair High School in Silver Spring, Maryland, a suburb of Washington, D.C. *Brown* seemed self-evidently correct to me when it was decided, but its impact on me did not come from the substance of the ruling. The impact came four months after the decision, at the beginning of the new school year when I entered the eleventh grade and found that, in addition to the 700 returning white students from my tenth grade class at Montgomery Blair, about thirty black students suddenly appeared. Where had these new black classmates come from? I knew that my tenth grade class was all-white, but I had assumed this was because there were no blacks in the entire suburban community where I lived. My assumption was, however, mistaken.

These new black classmates in fact lived less than a mile from the junior high school I had previously attended; indeed, they lived closer to that school than I did. Their homes were about a mile down an unpaved road leading away from the back of my junior high school, in a cluster of about twenty small wooden buildings – shacks, really – unconnected to the surrounding city's water pipes, sewers, paving or street lighting. This property had originally been deeded to freed slaves during the Civil War, when the location was on the remote outskirts of Washington D.C. . I had never seen these homes – I never even knew they existed until *Brown v. Board of Education* forced my new classmates from in these houses into my attention.

My suburban county did not resist *Brown*'s mandate. Montgomery County, Maryland – like many other Border State jurisdictions – promptly dismantled our segregated school system, and that was the reason that my new black classmates so quickly appeared. The force of *Brown,* as I experienced it, was not the deployment of legal coercion as conventionally understood. It was a moral force. *Brown* shattered my own moral complacency. I had been attending a *de jure* racially segregated school without realizing it. I knew about race segregation in the South, I believed it was a moral evil, and I was comfortable, a bit smug even, in the belief that only "redneck Southerners" were implicated in this offensive practice. *Brown* suddenly shocked me into seeing that I was directly implicated in this offense and that some personal reparative action was necessary if I were to recapture, if I were to deserve, my own prior sense of innocence.

27. Fiss, *supra* note 10, at 392.

I was not alone in reacting to *Brown* with a sense of previously unsuspected guilt and shame. I believe that congressional enactment of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing title of the Civil Rights Act of 1968 was a reflection of the same self-discovery across the nation that I had experienced in 1955 – a shattering of moral complacency, a surprised and ashamed recognition of participation in wrongdoing.[28] *Brown* inspired this widespread national recognition and commitment to reparations. This, as I see it, was its triumph, its "embodiment of all that the law might be."[29]

This national recognition has not proved easy to sustain, not only for the status of African-Americans, but also for a wide range of social relationships between complacent majorities and previously scorned minorities. I agree with Owen that the most visible indicator of the waning of that commitment has been the shift in our publicly expressed values from a preference for Equality to a preferred status for Liberty –the romance with the marketplace and its private pursuit of self-regarding goals that increasingly dominate American public policy not only in judicial decisions but in our national life generally.

In judicial decisions, I believe that this shift has been more consequential and more devastating in its process than in its substantive implications. The pursuit of Equality demands acknowledged social engagement and thereby establishes a basis for engaging in moral persuasion, though it obviously does not guarantee that persuasion will occur. The Liberty norm, by contrast, does not require such engagement; its underlying logic rests on a normative preference for social disengagement and thus more readily lends itself to socially isolated, mutually uncomprehending moralistic pronouncements. In recent years, preference for the Liberty principle has led the Court to resurrect the *Lochner* era enterprise of constructing rigid doctrinal boundaries around national legislative authority in favor of state autonomy. Especially in its recent decisions eviscerating section 5 of the Fourteenth Amendment and restricting congressional authority to give content to the Equality norm,[30] the Court is effectively shutting off public deliberation in a nationally inclusive forum where the greatest diversity of perspectives

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28. Robert A. Burt, *Liberals' Labors Lost*, LEGAL AFF., Jan.-Feb. 2003, at 55.

29. Fiss, *supra* note 10, at 395.

30. *See* United States v. Morrison, 529 U.S. 598 (2000) (invalidating civil remedy provision in Violence against Women Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (invalidating application to states of Age Discrimination in Employment Act); Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (invalidating application to states of Americans with Disabilities Act). *See also* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. J. 1 (2003).

and interests are present, and favoring instead more socially isolated islands of authority.

The Court's retreat from socially engaged deliberative processes did not, however, suddenly appear in its recent federalism decisions. The first signs of this contemporary retreat can be seen in *Roe v. Wade*,[31] a decision that marked the beginning of the end of the Warren Court era. In substantive terms, of course, *Roe* rested on the Liberty norm, but this preference was not substantively inevitable. The Equality principle, in response the oppressed status of women, was available to justify striking down restrictive abortion laws and has been favored by many subsequent commentators as a firmer substantive justification for the ruling.[32] In process terms, however, the *Roe* Court's reliance on the Liberty norm rather than Equality is especially interesting and revelatory. Unlike the Court in *Brown*, the *Roe* Court did not see itself as precipitating or even as engaged in a socially interactive moral dialogue. Unlike the Court in *Brown*, the *Roe* Court acted precipitously and unexpectedly. *Roe* was only the second ruling about the subject matter of abortion in the Court's history, and the first had been decided just two years earlier, upholding the District of Columbia's abortion restrictions with only one dissent.[33] Unlike the Court in *Brown*, the *Roe* Court gave no significance to the visible transformations then taking place in public forums regarding abortion and the status of women generally. In 1972, just one year before *Roe* was decided, Congress approved and submitted to the states for ratification the Equal Rights Amendment regarding sex discrimination.[34] In 1970, four state legislatures had repealed all restrictions on first-trimester abortions, and during the preceding five years, some one-third of state legislatures had substantially liberalized their abortion laws, virtually endorsing abortion on demand.[35]

These contemporaneous events suggest the social isolation in the Justices' conception of their constitutional truth-seeking role in deciding *Roe*. But there is even more powerful evidence of this social isolation and its distorting impact in the *Roe* opinion itself. The Court's opinion makes clear that the Justices misunderstood the fundamental moral issue at stake in the abortion debate. Both immediately before and in the long sequence of conflicts following the *Roe* decision, the debate between

31. 410 U.S. 113 (1973).

32. *See, e.g.*, Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985), Sylvia Law, *Rethinking Sex and the Constitution*, 135 U. PA. L. REV. 955 (1984).

33. United States v. Vuitch, 402 U.S. 62 (1971).

34. H.R. J. Res. 208, 92d Cong. (1972).

35. *See* BURT, *supra* note 24, at 347-49.

proponents and opponents of freely available abortion has pitted the woman's right to control her own body against the fetus's right to state protection, notwithstanding the pregnant woman's claim. But the *Roe* Justices misunderstood these basic terms of the debate.

Though the Court's opinion made passing mention of the woman's privacy claim, the heart of the ruling, as the Court explicitly and repeatedly portrayed it, was to uphold physicians' rights to practice medicine as they saw fit without state interference. Thus Justice Blackmun concluded his opinion for the Court, "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."[36] The Court's obtuseness extended even to its gendered presentation of the issue; thus Blackmun proclaimed that "the attending physician, in consultation with his patient, is free to determine . . . that, in his medical judgment, the patient's pregnancy should be terminated."[37] Today, when *Roe* has been inscribed on so many banners celebrating the rights of women, it is almost painful to read these words revealing that the Court's primary concern was with male physicians' demand for unregulated freedom to terminate their (female) patients' pregnancies. As feminist critics of male-centered bastions of social authority have put it, the Justices "just didn't get it."

In all of his extensive writing, Owen has never discussed *Roe v. Wade* at any length. He has written about feminism and the demands of the Equality norm.[38] Perhaps his long silence about *Roe* arose from his substantive disagreement with the Court's preference for Liberty over Equality. But I think there is another reason for Owen's silence about *Roe*. Whether he likes it or not, whether he acknowledges it or not, I believe that *Roe* is a considerable embarrassment for Owen's conception of the "truth-proclaiming" role of the judge. I believe that *Roe* dramatically reveals the weakness in Owen's conception – its proneness to socially remote, self-absorbed, high-handed moral pronouncements. *Roe* reveals that his conception, even in the supposed service of the Equality ideal, lends itself too readily to a disregard for that ideal in its inattention to moral persuasion and the processes of deliberation among acknowledged equals which stand at the heart of such persuasion.

Owen might say that the *Roe* opinion, if not its substantive result, was a mistake in the same sense that he has depicted *Lochner* and *Bush v. Gore* as mistakes – errors of specific implementation; that is, deci-

36. *Roe,* 410 U.S. at 166.

37. *Id.* at 163.

38. Thus in his article *Freedom and Feminism,* 80 GEO. L. J. 2041 (1992), Owen identified conflicting conceptions of "freedom" that are implicated by feminist claims for restrictive antipornography laws without even mentioning *Roe v. Wade* and the connections between "freedom" and feminism implicit in the abortion dispute.

sions which do not impeach his general conception of judges' truth-proclaiming role. But I believe that Owen's general conception, in its focus on substance more than on process, inclines judges to these kinds of mistakes by inviting them to see themselves as standing both outside and above the messy conflicts of self-interested disputants. This socially isolated self-conception ignores the deeper truth embedded in the Equality principle, as Owen himself has described it, that we are not "isolated entities" but are "socially embedded" and "vitally dependent" on one another for our very conception of ourselves as persons.

Owen himself does not fall into the trap of socially isolated, authoritarian moralizing. Based on my long and affectionate friendship with him, I believe this achievement arises from his innate character, from his deep respect for and loving attentiveness to other people. His personal character, joined with his intellectual commitment to equality, makes Owen a wonderful and entirely reliable friend. But his personal virtues do not easily translate into institutional practice. This friend of Owen Fiss does not find reliable comfort in his instructions to our judges for their official pursuit of constitutional truth.