Unexpected changes in the makeup of the Supreme Court can and have resulted in dramatic transformations in the Nation’s posture on paramount issues.

“You could almost say that the Brown v. Board of Education decision was providential, an act of God,” writes Harvard Professor Charles J. Ogletree, Jr.¹

In 1953, a year before Brown was decided, the Court “appeared bitterly divided on the question of the legality of school segregation,”² and even Thurgood Marshall, then the lead attorney for the NAACP, was concerned that some of the civil rights cases were being brought “prematurely.”³

The Supreme Court was presumably prepared to reaffirm the “awful doctrine of Plessy v. Ferguson, which since 1896 had held that laws separating the races did not contradict the Constitution’s promise of equality.”⁴

Then, on September 8th, 1953, everything changed.

“Suddenly and unexpectedly,”⁵ the U.S. Supreme Court’s then Chief Justice, Frederick M. Vinson, died of a heart attack in his home.

Justice Felix Frankfurter, who had been at odds with Vinson on the “separate but equal” doctrine, when he first heard of the news, remarked that “This is the first indication I have had that there is a God.”⁶

It was only three months later when the newly confirmed Chief Justice Earl Warren in a conference with the other judges observed that he could not “escape the feeling that the Court has finally arrived at the place where we must determine whether segregation is allowable in public schools.”⁷

“The more I read and hear and think, the more I come to conclude that the basis of the principle of segregation and separate but equal rests upon the basic premise that the Negro race is inferior. . . I don’t see how we can continue in this day and age to set one group apart from the rest and say that they are not entitled to exactly the same treatment as all others.”⁸

Justice Warren went on to engineer with “considerable political skill and determination”⁹ a unanimous verdict against school segregation in what is perhaps the most famous Supreme Court case to date.

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⁴ Ogletree.
⁵ Larson.
⁶ Id.
⁸ Id.
Today, in the aftermath of Justice Anthony Kennedy’s announcement that he will be retiring this Summer, there looms a similarly monumental battle in the form of revisiting the abortion laws set forth in *Roe v. Wade* and its progeny.

Justice Kennedy has long been considered the Supreme Court’s swing vote, and his departure along with the expected shift in the Court’s makeup is likely to mean another opportunity to revisit and potentially overturn what remains of *Roe*.

*Roe* has already been substantially overturned in the venerable *Planned Parenthood of Se. Pennsylvania v. Casey*, yet the plurality retained what it perceived to be *Roe’s* “essential holding” in that a woman has a right to choose an abortion before fetal viability. While that opinion warned that a “terrible price would be paid for overruling” this holding, former Chief Justice Rehnquist in his dissent points out that the same type of thing “could have been said about this Court’s erroneous decisions that the Constitution allowed ‘separate but equal’ treatment of minorities.”

Interestingly, the *Casey* opinion even references *Brown* and said that a terrible price would have been paid “if the Court had not overruled as it did” in order to support its position that *Roe* must be given “rare precedential force to counter the inevitable efforts to overturn it.”

Justice Rehnquist spotted the irony in this position as it appeared to him and other Justices to be “very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose not to adhere to erroneous constitutional precedent.”

“Adherence to *Roe,*” he said, “would seem to resemble more closely adherence to *Plessy.*”

What’s even more ironic is the *Casey* court’s intention for the decision to serve “as a warning to all who have tried to turn this Court into yet another political branch,” while the thrust of the decision involves drawing an admittedly arbitrary line of viability that is more consistent with the type that “legislatures may draw.”

Justice Scalia in his dissent was concerned that “by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish,” and acts as an “Imperial Judiciary.”

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12 Id. at 846.

13 Id. at 957.

14 Id. at 864.

15 Id.

16 Id. at 958.

17 Id. at 870.

18 Id. at 1002, 1000.
“As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here” Scalia added, “the public pretty much left us alone.”19

The Supreme Court can once again be left alone if it simply divorces the inherently political and arbitrary line of “viability” from the legal determination of what constitutes an “undue burden” on a woman’s right to choose an abortion.

Then, as Justice Stevens suggested in his concurrence, “both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion.”20

Justice Stevens urged that even a non-severe burden should be able to be held to be undue “because it lacks legitimate, rational justification,” but so too could a more severe burden be considered entirely due because it has such a justification.

As Justice Scalia pointed out, no such opportunity to present a compelling justification is right now being afforded to the people.

But that could change.

While many will be quick to suggest that any change in the law would be “based upon a ground no firmer than a change in our membership” which would invite “the popular misconception that this institution is little different from the two political branches of the Government,”21 we should keep in mind Thurgood Marshall’s rather blunt legal philosophy: “You do what you think is right and let the law catch up.”22

19 Id. at 1000.
20 Id. at 996.
21 Id. at 864.