Ignorance is Bliss at the New York Times

by Lev Tsitrin

Bret Stephens, the *New York Times*' court conservative and a brilliant, cogent opinion writer reacted to the bombshell leak of the upcoming Supreme Court decision that will repeal *Roe v. Wade* with a deliberately paradoxical argument, well-captured in the title of his piece: *"Overturning Roe Is a Radical, Not Conservative, Choice."*

Part of his argument is built on what, to him, is conservatism: "above all, the conviction that abrupt and profound changes to established laws and common expectations are utterly destructive to respect for the law and the institutions established to uphold it – especially when those changes are instigated from above, with neither democratic consent nor broad consensus." But is that so? Not all abrupt change is bad: a change from the generations-old Communism to

freedom in Eastern Europe was radical, but welcome. Mr. Stephens writes as if *Roe v Wade* itself was not an "abrupt and profound change," and as if the possibility of overturning it was unexpectedly cataclysmic. Not really: it is no secret that many equate abortion with murder, and that *Roe v Wade* was scheduled to be re-examined by the court – and therefore, overturning it was an option. What is so "abrupt" about it?

Mr. Stephens' other gripe is, that the leaked decision does not take politics into consideration – as if the court is not supposed to be apolitical. He predicts "the entrenchment of pro-choice majorities in blue states and the likely consolidation of pro-choice majorities in many purple states, driven by voters newly anxious over their reproductive rights" – so, he thinks, judges should have taken politics into account, after all.

But the truly astonishing part of Mr. Stephens' argument is his appeal to the judicial procedure, which he does with the help of Alexander Hamilton: ""To avoid an arbitrary discretion in the courts," Alexander Hamilton wrote in Federalist No. 78, "it is indispensable that they" – the judges – "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Hamilton understood then what many of today's originalists ignore, which is that the core purpose of the courts isn't to engage in (unavoidably selective) textual exegetics to arrive at preferred conclusions. It's to *avoid an arbitrary discretion*."

Much water have flown under the bridge since Alexander Hamilton's time; what Mr. Stephens is not aware of, is that "the core purpose of the courts" of not being arbitrary has long ago been rendered unenforceable, and therefore, obsolete – in *Pierson v. Ray* which gave judges the right to act from the bench "maliciously and corruptly" if they so desire in order to decide cases the way they want to, not the way they have to. Judging is arbitrary by design, "strict rules and

precedents" Mr. Stephens invokes simply do not exist. Mr. Stephens, I regret to say, simply does not know what he is talking about. His ignorance is rooted in a simple fact that the mainstream press (his own *New York Times* including) refuses to cover judicial fraud – but is the willfulness of that ignorance an excuse?

Perfectly valid logic leads to a completely wrong conclusion when that logic is applied to the wrong factual premise. Mr. Stephen's premises are wrong – so his provocative insights, this time around, land with a thud.

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