

Spring 3-1-2014

How *Roe v. Wade* Was Written

David J. Garrow

University of Pittsburgh School of Law

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>

 Part of the [Constitutional Law Commons](#), [Judges Commons](#), and the [Legal History Commons](#)

Recommended Citation

David J. Garrow, *How Roe v. Wade Was Written*, 71 Wash. & Lee L. Rev. 893 (2014),
<https://scholarlycommons.law.wlu.edu/wlulr/vol71/iss2/9>

This Session 1 is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

How *Roe v. Wade* Was Written

David J. Garrow*

Let me begin with one sentence that Justice Harry A. Blackmun uttered in 1987: “*Roe* against *Wade*¹ was not such a revolutionary opinion at the time” that it was handed down in January 1973,² and in that statement Justice Blackmun was indisputably correct.

In the beginning, of course, there was *Griswold v. Connecticut*³ in 1965, and it is always essential to remind people that *Griswold* was not a “test case,” as Judge Robert H. Bork labeled it during his 1987 testimony to the Judiciary Committee of the United States Senate following his nomination to the High Court,⁴ but that *Griswold* was in fact, as any competent student of constitutional law should know, an appeal of two trial court criminal convictions, of Estelle Griswold, the executive director of Connecticut Planned Parenthood, and Dr. C. Lee Buxton, chairman of the Department of Obstetrics and Gynecology at Yale University’s Medical School and a volunteer physician for Planned Parenthood.⁵

Griswold and Buxton had been convicted of aiding and abetting married female patients of Planned Parenthood’s New Haven clinic in their use of contraceptive devices for the purpose

* Research Professor of History & Law, University of Pittsburgh School of Law. I would like to thank my assistant Patty Blake for her help in preparing this manuscript, which builds off of remarks delivered at Stanford Constitutional Law Center’s Symposium on “Roe at 40” on March 7, 2013, as well as at Washington & Lee University School of Law’s similarly titled Symposium on November 7, 2013.

1. 410 U.S. 113 (1973).
2. *Bill Moyers: In Search of the Constitution: Mr. Justice Blackmun* (PBS television broadcast Apr. 26, 1987) (interviewing Justice Blackmun).
3. 381 U.S. 479 (1965).
4. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 116 (1987).
5. *Griswold*, 381 U.S. at 480.

of preventing conception.⁶ Their bench trial convictions had been affirmed first by a unanimous intermediate state appellate court⁷ and then by a unanimous Connecticut Supreme Court.⁸ Thus what confronted the Justices of the U.S. Supreme Court in December 1964 when they unanimously agreed to hear the *Griswold* appeal⁹ was a constitutional challenge to a long-standing state statute criminalizing the use of contraceptive articles,¹⁰ a statute which twice before had been brought before the High Court without resulting in a decision on the merits.¹¹

Griswold was before the High Court in the October Term of 1964 not just because *Tileston v. Ullman*¹² had been ineptly litigated by “white shoe” counsel whose imprecise complaint doomed their case,¹³ or because the Warren Court itself, and especially Justice William J. Brennan Jr., just four years earlier had refused to find any true case and controversy in *Poe v. Ullman*,¹⁴ but far more fundamentally because for over forty years Roman Catholic political influence in Connecticut had blocked any legislative repeal of the law criminalizing any use of contraception, which part-time legislator and circus impresario

6. *Id.*; see also DAVID J. GARROW, LIBERTY AND SEXUALITY 203–13 (rev. ed. 1998) (providing additional details on the factual lead-up to *Griswold*).

7. See *State v. Griswold*, 200 A.2d 479, 480 (Conn. 1964) (detailing the procedural history of the case).

8. *Id.* at 479.

9. Supreme Court Docket Sheet, Justice Tom C. Clark Papers, Box C81 (1964) (on file with University of Texas Law Library); Supreme Court Docket Sheet (1964) (on file with Library of Congress, Warren Box 379); see also GARROW, *supra* note 6, at 229 (citing to the docket sheet).

10. CONN. GEN. STAT. ANN. § 54-196 (repealed 1969).

11. See *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (dismissing the declaratory judgment claims for failure to allege a case or controversy); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (dismissing a physician’s appeal from a denial of declaratory judgment for lack of standing).

12. 318 U.S. 44 (1943).

13. See *id.* at 46 (dismissing the physician’s appeal because he asserted a denial of only his patients’ constitutional rights, not his own); see also GARROW, *supra* note 6, at 94–95, 102–05 (explaining how the appeal cited only a deprivation of “life” under the Fourteenth Amendment, which *Tileston* lacked standing to raise).

14. See *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (concluding that there was no Article III case or controversy after evaluating the “appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought”).

P.T. Barnum had brought to enactment in 1879.¹⁵ Ironically, *Griswold* created constitutional protection for reproductive choices only because Roman Catholic political actors had prevented any legislative resolution of a controversy that had appeared before Connecticut's state legislature every two years, without exception, from 1923 through 1963.¹⁶

Once *Griswold* bestowed constitutional protection upon a right to privacy regarding contraceptive use, the doctrinal door was thereby opened for young academics and litigators who would take that initially modest doctrinal innovation and expand it beyond application to simply contraceptive choice. The most important and most remarkable aspect of the story of the creation of the very idea of a *right* to abortion is how something that almost literally had *never*, prior to 1963, ever been publicly suggested by anyone anywhere in America,¹⁷ then, after *Griswold*, developed and spread so rapidly that by late 1969 and early 1970 multiple such federal constitutional claims were being filed independently of each other in district courts across the country.¹⁸

Across the years 1967, 1968, and 1969, a nationwide set of young lawyers became convinced that *Griswold's* constitutional privacy analysis, whether best captured by Justice William O. Douglas's penumbras and emanations majority opinion,¹⁹ Justice

15. See GARROW, *supra* note 6, at 15–16 (providing a detailed history of the enactment and attempted repeal of Connecticut's 1879 contraception prohibition).

16. See *id.* at 15–217 *passim* (describing the history of the Connecticut contraception prohibition).

17. See *id.* at 272–74 (reviewing the early history of public support for the legalization of abortion to conclude that, with few exceptions, “open discussion of whether abortion should to some greater degree be legalized simply did not take place”); see also *id.* at 293 (attributing the first public argument for an unconditioned right to obtain an abortion to University of California at Santa Barbara biologist Garrett Hardin in October 1963).

18. See, e.g., *Steinberg v. Brown*, 321 F. Supp. 741, 742–43 (N.D. Ohio 1970) (noting that this constitutional challenge to an Ohio abortion law under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments was “another in a series of cases which have been and are being filed in various courts throughout the United States attacking the constitutionality of state statutes forbidding abortions”).

19. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and

Arthur Goldberg's invocation of the long-ignored Ninth Amendment,²⁰ or Justice John M. Harlan's unapologetic embrace of Fourteenth Amendment substantive due process liberty,²¹ should protect a woman's desire to abort a pregnancy as well as for marital contraception. As of 1966 and 1967, almost the entire population of activists and legislators who were working to liberalize the criminal statutes that disallowed almost any legal abortion in every single state had as their state-by-state goals the passage of reform legislation that would allow some individual women with specific medical reasons for wanting an abortion to apply and win approval from some hospital-based committee of doctors.²²

This push for what was called "abortion law reform" registered its first surprising successes in Colorado, North Carolina, and then California in the spring of 1967,²³ but within hardly twelve months' time the realization began to dawn on almost all of those reform proponents that the number of pregnant women wanting abortions who actually qualified for them under these new statutes was exceedingly modest, and that the vast majority of women hoping to end pregnancies did not have particular therapeutic or health reasons for doing so.²⁴ Thus, with a speed that in retrospect is incredibly striking, virtually the entire community of therapeutic reform advocates

substance.”).

20. *See id.* at 499 (Goldberg, J., concurring) (“In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right ‘retained by the people’ within the meaning of the Ninth Amendment.”).

21. *See id.* at 500 (Harlan, J., concurring in the judgment) (“In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values ‘implicit in the concept of ordered liberty.’”).

22. *See* GARROW, *supra* note 6, at 304–34 (describing public abortion activism from 1966 to 1967, which “remained fairly within a legislative context and reflected largely a reform orientation”).

23. *See id.* at 323–25, 327–32 (describing early abortion reform bills passed in Colorado, North Carolina, and California, which allowed abortion under a limited set of circumstances).

24. *See, e.g., The Desperate Dilemma of Abortion*, TIME, Oct. 13, 1967, at 33 (“The key question is whether limited legislation is any solution. In fact, the new laws merely codify what hospitals are already doing.”); *see also* GARROW, *supra* note 6, at 341–42, 351, 360, 374–76 (providing examples of public discontent with the modest impact of legislative reform).

shifted to support of abortion law *repeal*, that is the legalization of abortion irrespective of the reasons why a pregnant woman wanted to obtain one.²⁵ Rather than viewing abortion from a fundamentally medical perspective, where women had to invoke some health rationale and then win multiple doctors' blessings in order to get an abortion, now the proponents of change were acknowledging that what was fundamentally at issue was women's claim that the abortion decision should be their own, and not the product of a medical authorization process.²⁶

This evolution brought the proponents of state-by-state legislative change to the same stance and worldview that a few young lawyers had begun striving to articulate in constitutional rights terms from 1967–68 onward. The most important, original, and influential of these lawyers was Roy Lucas, who graduated from NYU Law School in 1967 and spent the ensuing academic year teaching at the University of Alabama Law School before returning to New York in the summer of 1968,²⁷ just as the *North Carolina Law Review* was publishing his seminal article detailing how state anti-abortion laws were highly susceptible to constitutional attack in federal court lawsuits based upon *Griswold's* precedent.²⁸

Lucas and other strategists spent the latter half of 1968 and the first nine months of 1969 slowly preparing to file the very first such test case, and on the last day of September *Hall v. Lefkowitz*²⁹—the named defendant being New York State's

25. See GARROW, *supra* note 6, at 335–88 (providing a comprehensive history of the shift from activism aimed at legislative reform to abortion prohibition repeal).

26. See *id.* at 376 (documenting the emergence of public recognition of a woman's right to abortion).

27. See *id.* at 335–39 (describing the origin of Roy Lucas's interest in advocating for a right to obtain an abortion and the initial impact of his academic work); Ian Urbina, *Roy Lucas, 61, Legal Theorist Who Helped Shape Roe Suit*, N.Y. TIMES, Nov. 7, 2003, at C10 (recounting Lucas's life and role in developing the right to obtain an abortion).

28. See Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730, 731 (1968) (“This article, however, examines the possibility of federal constitutional bases for invalidating state abortion restrictions.”).

29. 305 F. Supp. 1030 (S.D.N.Y. 1969). The case was consolidated with three other cases and referred to a three-judge panel in *Hall v. Lefkowitz*. *Id.* at 1031.

Attorney General—was filed in the U.S. District Court for the Southern District of New York.³⁰ Dr. Robert E. Hall and the other three named plaintiffs were all extremely prominent obstetrician-gynecologists with medical school professorships, and throughout the loosely coordinated network of attorneys interested in constitutional challenges to state abortion statutes, the belief was that there were no possible plaintiffs who could more impress federal judges than high-status doctors.³¹ Lucas intended for similar if not identical federal cases to be filed in other states, including Texas, where his intended lead plaintiff was prominent Fort Worth obstetrician-gynecologist, Dr. Hugh W. Savage,³² but come the spring of 1970 Lucas's carefully laid plans were upended on multiple fronts by unexpected events.

In early March, a young lawyer in Dallas, Linda Coffee, who had been in repeated contact with abortion repeal supporters both there and in Austin, but not with Lucas or any other out-of-state attorneys, filed a pseudonymous abortion rights case in federal court there against the local district attorney³³: *Roe v. Wade*.³⁴ Far more importantly, certainly in the eyes of contemporary observers, on April 9 the New York State Assembly, with no votes to spare, passed a bill legalizing abortion until the twenty-fourth week of pregnancy.³⁵ The far-off state of Hawaii had surprisingly passed a repeal bill, but including a residency requirement, weeks earlier,³⁶ yet the New York law, scheduled to take effect on July 1, included no such restriction,

30. *Id.* at 1030–31 (listing defendants).

31. *See* GARROW, *supra* note 6, at 378–80 (describing the strategic choice of plaintiff, forum, and timing in Lucas's New York challenge).

32. *See id.* at 381, 383–88 (describing potential lawsuits to challenge abortion laws in Texas, Colorado, North Carolina, Washington, and Iowa).

33. *See id.* at 389–407 (describing the factual circumstance that led to Linda Coffee's involvement in and filing of *Roe* and *Doe* in federal court in Texas).

34. 314 F. Supp. 1217 (N.D. Tex. 1970).

35. Act of Apr. 11, 1970, ch. 127, 1970 N.Y. Laws 852 (codified as amended at N.Y. PENAL LAW § 125.05(3) (McKinney 2013)); *see also* GARROW, *supra* note 6, at 421–22 (describing the dramatic passage of New York's repeal bill in the state assembly).

36. Act of Mar. 11, 1970, ch. 1, sec. 2, 1970 Haw. Sess. Laws 1 (codified as amended at HAW. REV. STAT. § 453-16 (West 2013)); *see also* GARROW, *supra* note 6, at 412–14 (describing the impetus for and passage of Hawaii's repeal bill).

thus soon making a legal abortion available to any woman with the wherewithal to travel to New York.³⁷ But a major casualty of that landmark new statute was Lucas's carefully designed initial test case, which was mooted by the legislature's action,³⁸ and two major byproducts ensued once the New York statute did take effect in mid-summer. One, among proponents, was a major, economy-minded push to launch specialized clinics where abortions could be performed at vastly lower cost than what hospitals would charge;³⁹ the second, among opponents, was the belated realization that far more energetic political activity would be necessary on behalf of the right-to-life cause if the emerging trend toward abortion law repeal was to be staunched or pushed

37. See GARROW, *supra* note 6, at 421 ("Repeal proponents . . . quickly began to warn that New York, and especially New York City, might be all but inundated by a nationwide flood of women seeking to terminate unwanted pregnancies . . .").

38. *Id.* at 421. Although Lucas and others had no way of knowing so at the time, in historical retrospect the derailing of *Hall* as the first federal court case testing his constitutional argument was actually a positive development. See A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1035, 1038–42 (2006) (concluding from his draft opinion that Judge Friendly would not have found New York's abortion laws unconstitutional).

39. This choice would have enormous and, at the time, largely unappreciated consequences for the provision of abortion services across all future decades: the concentration of abortion performance in "free-standing" clinics, unattached to any hospitals or comprehensive care networks, would in future years isolate many abortion providers from the wider medical profession and render them oftentimes lonely and sometimes besieged figures. See GARROW, *supra* note 6, at 456–57 (describing the risks of "free-standing" abortion clinics). In 1970, only Dr. Robert E. Hall had the foresight and perspicacity to warn how momentous these consequences would be. See *id.* at 456–57, 483 (summarizing some of Hall's public arguments for performing abortions in hospitals); David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 839 (1999) [hereinafter Garrow, *Abortion Before and After*] ("Hall argued, pro-choice forces were in essence declaring that organized medicine, which had become an important participant in abortion liberalization efforts, no longer had to hold itself responsible for helping to provide actual abortion services."); Symposium, *Pregnancy Termination: The Impact of New Laws*, 6 J. REPROD. MED. 274, 293–94 (1971) (recording Dr. Hall's argument that abortions should be performed in hospitals to avoid substandard procedures); Robert E. Hall, *Realities of Abortion*, N.Y. TIMES, Feb. 13, 1971, at 27 (arguing the safety and health advantages of requiring abortions to be performed in hospitals); LORI FREEDMAN, WILLING AND UNABLE: DOCTORS' CONSTRAINTS IN ABORTION CARE vii (2010) (noting how "abortion care is marginalized in American medicine").

back.⁴⁰ New York's enactment of repeal was far and away the single most important pre-1973 abortion-related event because it was New York's legalization that spurred the mobilization of anti-abortion activism well prior to January of 1973.⁴¹ Come November 1970, Washington State by popular vote became the fourth state to legalize abortion,⁴² but from that point in time onward, across all of calendar 1971 and all of calendar 1972, anti-abortion forces, rather than pro-repeal forces, were consistently in the political driver's seat as the blowback against New York's legalization generated a nationwide anti-abortion political upsurge.⁴³ Once anyone immerses themselves in the contemporary political record of that 1971–1972 time period, one inescapably sees the political landscape turning very much against abortion legalization, notwithstanding how Roy Lucas and several dozen other generally young attorneys, sometimes coordinated and sometimes not, were filing more than two dozen state-by-state constitutional challenges to existing anti-abortion statutes.⁴⁴

The first abortion case to come before the U.S. Supreme Court was *United States v. Vuitch*,⁴⁵ in which the justices heard two full hours of argument in January 1971.⁴⁶ *Vuitch* had seen a

40. See Garrow, *Abortion Before and After*, *supra* note 39, at 840–41 (arguing that state legislative repeal efforts, not the breadth of *Roe v. Wade*, initially motivated mobilization of right to life activists). Effective July 29, Alaska became the third state to legalize abortion. GARROW, *supra* note 6, at 431–32.

41. See Garrow, *Abortion Before and After*, *supra* note 39, at 840 (“[Before *Roe* and *Doe*] the most important development which took place subsequent to the New York victory was the mobilization of a significant right to life movement.”).

42. WASH. REV. CODE ANN. § 9.02.060–.090 (repealed 1991); see also GARROW, *supra* note 6, at 466 (describing Washington's popular vote legalization of abortion as “perhaps [national activists'] most politically important victory so far”).

43. See Garrow, *Abortion Before and After*, *supra* note 39, at 841 (“Thus, by November 1972 . . . prospects for making any sort of non-judicial headway with abortion law liberalization looked very bleak indeed.”).

44. See *id.* (“During 1971 and 1972, pro-choice forces won *no* political victories, and New York activists were worried as to whether they could continue to protect their statute from legislative repeal after Nelson Rockefeller left the governorship.”).

45. 402 U.S. 62 (1971).

46. See GARROW, *supra* note 6, at 473–80 (providing a history of *Vuitch*).

prominent federal district judge dismiss a criminal prosecution of a doctor who performed abortions under the District of Columbia's unusually liberal anti-abortion law, which authorized abortions necessary to preserve a woman's health, on the grounds that that "health" standard was unconstitutionally vague.⁴⁷ After extended internal discussion, the Supreme Court reversed the lower court's vagueness ruling, but in so doing declared that the statute's promulgation of a "health" exception was not unconstitutionally vague so long as "health" was correctly understood to cover a pregnant woman's "psychological as well as physical well-being."⁴⁸ Repeal proponents quickly appreciated that that holding was actually a significant victory, rather than a defeat,⁴⁹ and several weeks after handing down *Vuitch* the Supreme Court agreed to hear two of several other abortion cases in which it had been deferring any action until *Vuitch* was decided.⁵⁰

One case in which the High Court already had declined to intervene was Minnesota's highly publicized criminal prosecution of a well-regarded St. Paul physician, Dr. Jane Hodgson, who in April 1970, with the support of other prominent local M.D.'s, had initiated a federal court suit seeking both declaratory and injunctive relief so that she could perform a hospital abortion on a young married patient, Nancy K. Widmyer, whose nine-week-old fetus had indisputably been exposed to rubella virus.⁵¹ The federal district judge before whom the matter came refused to issue any immediate order, and nine days later Dr. Hodgson performed the abortion.⁵² Three weeks later Hodgson was

47. *United States v. Vuitch*, 305 F. Supp. 1032, 1034 (D.D.C. 1969).

48. *Vuitch*, 402 U.S. at 72–73.

49. *See* GARROW, *supra* note 6, at 490–91 ("Indeed, it quite rapidly became clear that the decision would significantly increase rather than decrease abortion availability in the nation's capital.").

50. *See* *Roe v. Wade*, 410 U.S. 113, 166 (1973) (striking parts of the Texas abortion statute as unconstitutional); *Doe v. Bolton*, 410 U.S. 179, 201 (1973) (finding aspects of Georgia's abortion statute "violative of the Fourteenth Amendment"); *see also* GARROW, *supra* note 6, at 480, 491 (describing the Justices' decisions to delay consideration of these cases until after *Vuitch* was decided).

51. Marcia D. Greenberger & Rachel K. Laser, *Human Rights Hero: Jane Hodgson, M.D.*, 30 HUM. RTS. 2, Spring 2003, at 24, 24.

52. *Id.*

criminally indicted by the local district attorney, and both before, and again after those charges were filed, the federal court insisted that no “case or controversy” existed and refused to intervene.⁵³

Dr. Hodgson went to trial in November 1970, after both the Minnesota Supreme Court and the U.S. Supreme Court declined to halt her prosecution.⁵⁴ Hodgson had retained Roy Lucas to aid in her defense, but with both the attorney and the defendant hoping for a conviction rather than an acquittal, so that her case could proceed forward with the best possible set of facts for challenging anti-abortion laws, Dr. Hodgson’s non-jury trial featured Mrs. Widmyer and a Mayo Clinic physician as the primary defense witnesses.⁵⁵ The trial judge indeed found Hodgson guilty, and while briefing in her appeal to the Minnesota Supreme Court would not be complete until the summer of 1971, at least the two Minnesota natives on the U.S. Supreme Court, Chief Justice Warren E. Burger and junior Associate Justice Harry A. Blackmun, who once had worked at the Mayo Clinic and was well-acquainted with Hodgson’s top medical supporter, Dr. Joseph H. Pratt,⁵⁶ both indicated during the Court’s consideration of *Vuitch* that they knew very well that Hodgson’s criminal appeal was headed their way.⁵⁷

The two cases that the High Court in early May 1971 did, soon after *Vuitch*, agree to hear, *Roe v. Wade* from Texas and *Doe v. Bolton*⁵⁸ from Georgia, had both been filed in early 1970 and had then come before special three-judge district courts from

53. *Doe v. Randall*, 314 F. Supp. 32, 35–36 (D. Minn. 1970); see also GARROW, *supra* note 6, at 428–30 (providing a history of Hodgson’s involvement in the abortion reform movement and *Randall*).

54. GARROW, *supra* note 6, at 466–67.

55. See *id.* at 467–68 (describing that the case “could not be better,” as it posed abortion’s constitutional issues in the most compelling context”).

56. See *id.* at 474 (“A few abortion litigators had heard talk that Blackmun was a good friend of Mayo’s Dr. Joseph H. Pratt, Jane Hodgson’s most prominent Minnesota medical supporter, and even that Pratt had been Mrs. Blackmun’s doctor . . .”).

57. For Justice Blackmun’s references to *Randall*, see Oral Argument at 54:44, *United States v. Vuitch*, 402 U.S. 62 (No. 84), available at http://www.oyez.org/cases/1970-1979/1970/1970_84#argument. For discussion of Chief Justice Burger’s anticipation of *Randall*, see GARROW, *supra* note 6, at 479.

58. 410 U.S. 179 (1973).

which direct appeal to the Supreme Court was possible following the panels' denials of injunctive relief.⁵⁹ Both panels had nonetheless ruled *against* the existing Texas and Georgia abortion statutes,⁶⁰ and with a plethora of other abortion cases already docketed before the High Court—including ones from Louisiana, Missouri, and Illinois⁶¹—and others, like Jane Hodgson's, known to be looming, it was unsurprising that five Justices—Douglas, Harlan, Brennan, White, and Marshall—voted to accept both *Roe* and *Doe* for argument on the merits come October Term 1971.⁶²

It is often asserted, most notably by someone who is now herself a Supreme Court Justice, that the Justices should—and could—have avoided or at least postponed any consideration of *Roe* and *Doe*'s constitutional merits in 1971–72.⁶³ That assertion is often interwoven with the claim that such a delay would have allowed proliberalization forces to continue making progress politically state-by-state,⁶⁴ but, following Washington State's adoption of its repeal law thanks to a popular referendum vote in November 1970,⁶⁵ in no state whatsoever were any additional

59. *Roe v. Wade*, 410 U.S. 113, 120–22 (1973); *Doe*, 410 U.S. at 185–87.

60. *Roe v. Wade*, 314 F. Supp. 1217, 1225 (N.D. Tex. 1970); *Doe v. Bolton* 319 F. Supp. 1048, 1056 (N.D. Ga. 1970).

61. See *Rosen v. La. State Bd. of Med. Examiners*, 412 U.S. 902, 902 (1973) (vacating judgment and remanding “for further consideration in light of” the *Roe* and *Doe* decisions); *Rodgers v. Danforth*, 410 U.S. 949, 949 (1973) (same); *Hanrahan v. Doe*, 410 U.S. 950, 950 (1973) (same).

62. GARROW, *supra* note 6, at 491.

63. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985) (“The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.”).

64. See *id.* at 380–82 (arguing that the breadth of *Roe* provoked legislative backlash reversing a trend toward liberalization); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992) (“In 1973, when *Roe* issued, abortion law was in a state of change across the nation. As the Supreme Court itself noted, there was a marked trend in state legislatures ‘toward liberalization of abortion statutes.’”). But see David Garrow, *History Lesson for the Judge: What Clinton's Supreme Court Nominee Doesn't Know About Roe*, WASH. POST, June 20, 1993, at C3 (arguing that Justice Ginsburg misconstrued the political landscape prior to *Roe*); Garrow, *Abortion Before and After*, *supra* note 39, at 837, 840–41 (same).

65. GARROW, *supra* note 6, at 465–66.

repeal measures enacted during 1971 or 1972⁶⁶ and only Florida managed to approve even a reform bill.⁶⁷ What's more, in New York State, come May 1972, the state legislature voted to repeal the 1970 legalization statute, and only Governor Nelson Rockefeller's veto kept the 1970 law in place.⁶⁸ Later that year, efforts to duplicate Washington State's 1970 popular vote success went down to overwhelming defeats in both Michigan and North Dakota.⁶⁹

Four months after the Court announced that it would hear *Roe* and *Doe*, a six-day period in September 1971 witnessed the back-to-back resignations of aging Justices Hugo L. Black and John M. Harlan, suddenly reducing the Court to a seven- rather than nine-member bench.⁷⁰ By early December neither of their successors, Lewis F. Powell and William H. Rehnquist, had yet been seated, and without dissent the remaining justices denied Texas's request to postpone oral argument until a full Court was available and proceeded to hear argument in *Roe* and *Doe* on December 7.⁷¹

The Justices' private, post-argument conference discussion of the two cases revealed that a clear majority favored affirmance of the lower court's ruling in *Roe*, but no consensus whatsoever about how to resolve *Doe*,⁷² and Chief Justice Burger assigned responsibility for preparing opinions in both cases to the Court's junior Justice, Harry A. Blackmun.⁷³ Notwithstanding that assignment, both Justices William O. Douglas and William J. Brennan privately prepared, and shared with each other, initial

66. *Id.* at 483–85, 495–96, 506–07.

67. *Id.* at 538–39.

68. *Id.* at 545–47.

69. *Id.* at 562–63, 576–77 (noting that despite favorable polling, the Michigan referendum lost by a vote of 61 to 39 percent and the North Dakota referendum lost by a vote of 77 to 23 percent).

70. *Id.* at 507.

71. *Id.* at 521–27.

72. *See id.* at 528–32 (tallying votes of 5–2 to affirm the lower court in *Roe* but noting no consensus in *Doe*).

73. *See id.* at 533–34 (describing the circumstances of Justice Burger's assignment of the *Roe* and *Doe* opinions to Justice Blackmun); BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT 86 (1988) (“Despite the fact that he was not part of the majority, the Chief Justice assigned the opinions in the two abortion cases to Justice Blackmun.”).

drafts of potential opinions in *Doe*, and both Justices' writings, just like the seven Justices' conference discussion, left no doubt whatsoever that a decision on the merits regarding the *Griswold*-based challenge to the constitutionality of anti-abortion statutes was going to occur in at least one of the two cases.⁷⁴ Once Justices Powell and Rehnquist were sworn in and seated in early 1972, Blackmun himself nominated both *Roe* and *Doe* as candidates for possible reargument before a full, nine-member Court, though any decision on that question would await Blackmun's own drafting efforts.⁷⁵

Only in mid-May 1972 did Blackmun finally circulate an unusually brief, seventeen page draft of an opinion in *Roe v. Wade*,⁷⁶ and, to the disappointment and consternation of at least four of his colleagues, it proposed that the Court hold Texas's anti-abortion law unconstitutional solely on the grounds that its inclusion of only a maternal "life" exception was void for vagueness.⁷⁷ Justices Brennan and Douglas both voiced direct complaints,⁷⁸ and several days later Blackmun circulated a significantly more substantive draft opinion for *Doe v. Bolton*.⁷⁹ However, as the Justices proceeded to exchange views about that draft, Justice Byron R. White circulated a brief, three-page draft of a dissent from Blackmun's proposed *Roe* opinion, cogently highlighting how any holding that Texas's statute was unconstitutionally vague would necessarily override the Court's

74. See GARROW, *supra* note 6, at 534–37 (recounting the dialogue between Justices Douglas and Brennan regarding draft *Doe* opinions); SCHWARTZ, *supra* note 73, at 93–102 (reprinting Justice Douglas's first *Doe* draft).

75. Letter from Justice Blackmun to Chief Justice Burger (Jan. 18, 1972) (on file with the Library of Congress, Brennan Box 249); see also GARROW, *supra* note 6, at 537–38 (quoting Justice Blackmun's letter).

76. See SCHWARTZ, *supra* note 73, at 103–19 (reprinting the first *Roe* draft).

77. See GARROW, *supra* note 6, at 547–48 (describing Blackmun's *Roe* draft as being of "disappointing quality" that "immediately generated a good deal of additional woe in Douglas's chambers as well as those of Justice Marshall, Brennan, and Stewart"); SCHWARTZ, *supra* note 73, at 89–90 (labeling Justice Blackmun's vagueness analysis as "far from impressive").

78. See GARROW, *supra* note 6, at 549–50 (quoting the Brennan and Douglas memos).

79. See *id.* at 550–51 (describing Justice Blackmun's *Doe* draft as "a considerably more sophisticated and far-reaching piece of work than his *Roe* circulation"); SCHWARTZ, *supra* note 73, at 120–40 (reprinting Justice Blackmun's first *Doe* draft).

thirteen-month-old holding in *Vuitch*, for “[i]f a standard which refers to the ‘health’ of the mother . . . is not impermissibly vague, a statutory standard which focuses only on ‘saving the life’ of the mother would appear to be *a fortiori* acceptable.”⁸⁰

White’s action pushed Blackmun to return to the stance he had suggested four months earlier, namely that both *Roe* and *Doe* should be held over for reargument before all nine justices early in the following term.⁸¹ Such a move, Blackmun said, would also allow him, over the summer, to devote more study and work to the two opinions,⁸² and despite vocal objections from Justices Douglas, Brennan, and Stewart, all of whom worried that Blackmun might with time abandon their tentative majority’s stance on the constitutional merits, both Justices Powell and Rehnquist weighed in favoring reargument,⁸³ and in late June the Court so ordered, with only Douglas in public dissent.⁸⁴

By late in the summer of 1972, Blackmun’s two departing law clerks who had had responsibility for the *Roe* and *Doe* opinions, John T. Rich and George Frampton, were still strongly inclined to leave *Roe* as a void for vagueness holding and make *Doe* the more constitutionally significant decision.⁸⁵ Frampton

80. Draft Circulation in *Roe* from Justice White to the Justices of the Supreme Court (May 26, 1972) (on file with the Library of Congress, Brennan Box 282); see also GARROW, *supra* note 6, at 552 (quoting Justice White’s draft *Doe* dissent); SCHWARTZ, *supra* note 73, at 141–43 (reprinting the draft circulation).

81. See Memorandum to the Conference from Justice Blackmun to the Justices of the Supreme Court (May 31, 1972) (on file with the Library of Congress, Brennan Box 282) (“Although it would prove costly to me personally, in the light of energy and hours expended, I have now concluded, somewhat reluctantly, that reargument in *both* cases at an early date in the next term, would perhaps be advisable.”); GARROW, *supra* note 6, at 552–53 (quoting Justice Blackmun’s memo).

82. See Memorandum to the Conference from Justice Blackmun to the Justices of the Supreme Court (May 31, 1972) (on file with the Library of Congress, Brennan Box 282) (citing uncertainty about the detailed structure the abortion opinions should take as prompting Blackmun to “think about a summer’s delay”); GARROW, *supra* note 6, at 552–53 (quoting Justice Blackmun’s memo).

83. See GARROW, *supra* note 6, at 552–56 (documenting the intra-Court dynamics regarding the possibility of reargument).

84. See *Roe v. Wade*, 408 U.S. 919, 919 (1972) (granting reargument).

85. David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF., May–June 2005, at 26, 29 [hereinafter Garrow, *The Brains Behind Blackmun*].

told Blackmun the opinions should provide states with “a comprehensive prescription” for how to revise their abortion statutes, and he explained how in *Doe*

I have written in, essentially, a limitation of the [abortion] right depending on the time during pregnancy when the abortion is proposed to be performed I have chosen the point of [fetal] viability for this ‘turning point’ (when state interests become compelling) for several reasons: a) it seems to be the line of most significance to the medical profession . . . ; b) it has considerable analytic basis in terms of the state interest as I have articulated it [regarding the fetus].⁸⁶

Frampton also explained that “I have included a section designed to show in greater detail that neither the law nor any other discipline has really arrived at a consensus about the beginning of life.”⁸⁷ But Frampton apologized that with regard to constitutional privacy analysis, “I would have liked to do more here, but I really didn’t have time at the end” and that the deficiency was regrettable: “Since the opinion does use this right throughout, and since it is a new application of it, I think considerable explanation is required in addition to what the circulated draft contained—which was a little more than one sentence plus a string cite in [the] text” that dated from three months earlier.⁸⁸

In the weeks immediately preceding *Roe* and *Doe*’s scheduled rearguments on October 11, 1972, Justice Lewis F. Powell Jr. gave Blackmun’s earlier drafts his first careful reading.⁸⁹ Powell had no doubt that Texas’s anti-abortion law was “unduly restrictive of individual rights,” as he jotted in the margin of Blackmun’s *Roe* draft, but he also endorsed Byron White’s critique, noting “I agree that the Texas statute is not unconst. vague.”⁹⁰ At bottom, Powell wrote to himself, “Why not

86. *Id.* (quoting Letter from George T. Frampton to Justice Blackmun (Aug. 11, 1972) (on filed with the Library of Congress, Blackmun Papers, Box 152)).

87. *Id.*

88. *Id.*

89. David J. Garrow, *Revelations on the Road to Roe*, AM. LAW., May 2000, at 80, 80 [hereinafter Garrow, *Revelations*].

90. *Id.* at 81–82.

consolidate Texas + Ga. cases + rely on Ga. type analysis” to void both states’ statutes on constitutional privacy grounds.⁹¹

Several days later, Powell mentioned to his law clerk assigned to assist on *Roe* and *Doe*, Larry Hammond, that they should pay heed to a majority opinion that a three-judge court considering a challenge to Connecticut’s abortion statute had issued just two weeks earlier, on September 20, 1972.⁹² In that case, *Abele v. Markle*,⁹³ District Judge Jon O. Newman, writing for himself and Second Circuit Judge J. Edward Lumbard, had observed that in the context of an unwanted pregnancy, “the right to an abortion is of even greater concern to the woman than the right to use a contraceptive protected in *Griswold*” and thus voided the Connecticut law.⁹⁴ Newman went on to say that “a fetus is not a person within the meaning of the Fourteenth Amendment” and that “its capacity to become such a person does not mean that during gestation it is such a person.”⁹⁵

Hammond prepared a bench memo for Powell, reviewing Blackmun’s earlier drafts, revisiting *Griswold*, and summarizing Judge Newman’s analysis.⁹⁶ Given *Griswold*, “it would not be difficult for this Ct. to find a fundamental right of a woman to control the decision whether to go through the experience of pregnancy and assume the responsibilities that occur thereafter.”⁹⁷ Hammond recommended to Powell that “you might reason as Judge Newman does that the state interest becomes more dominant when the fetus is capable of independent existence (or becomes ‘viable’).”⁹⁸ Highlighting how Texas, like Connecticut, was defending its statute by contending that fetuses were constitutional “persons,” Hammond noted that “the crux of Judge Newman’s analysis is that the state may not bar abortifacient freedom altogether on the basis of a proposition that is subject to such a great public debate and affects individuals so

91. *Id.*

92. *Id.*

93. 351 F. Supp. 224 (D. Conn. 1972).

94. *Id.* at 227, 232.

95. *Id.* at 228–29.

96. Garrow, *Revelations*, *supra* note 89, at 82.

97. *Id.*

98. *Id.*

personally.”⁹⁹ Overall, Hammond observed, “I do believe that a well-reasoned opinion can be written reaching this result without placing the Ct. in the position of deciding as a super-legislature whether it will permit abortions at any specific point in time.”¹⁰⁰

During the two rearguments, Justice Potter Stewart readily interjected Newman’s name when one of the counsel, after mentioning the Connecticut decision, paused while trying to name its author.¹⁰¹ When the justices met in conference two days later, Stewart again referred by name to Newman before Blackmun explained that he still would like to make *Doe* the lead opinion on the Fourteenth Amendment privacy right issue and strike Texas’s statute on vagueness grounds while nonetheless leaving *Vuitch* undisturbed.¹⁰² But Lewis Powell, after indicating a belief that health factors, rather than economic considerations, ought to undergird abortion decisions, recommended, just as he had concluded when he first read Blackmun’s drafts, that the Texas statute too should be struck down on the basic constitutional question and that *Roe* should be the lead opinion.¹⁰³ Powell’s statement led Blackmun to say that he would be “willing to bypass vagueness” in *Roe* and decide both cases on the same basic constitutional grounds.¹⁰⁴ As the conference ended, it was clear to all the Justices that there were certainly six votes, and probably seven, depending upon Warren Burger, in support of Blackmun and Powell’s stance, with only Byron White and William Rehnquist in disagreement.¹⁰⁵

Following that conference, five weeks passed before Harry Blackmun circulated heavily revised opinions in both *Roe* and *Doe*, and altered one very significant particular from where George Frampton’s handiwork had left things three months

99. *Id.*

100. *Id.*

101. Oral Reargument at 8:45, *Roe v. Wade*, 410 U.S. 113 (No. 70-18), available at http://www.oyez.org/cases/1970-1979/1971/1971_70_18/reargument.

102. GARROW, *supra* note 6, at 574–75.

103. *Id.* at 575–76.

104. *Id.* at 576 (quoting Justice Brennan’s Conference Notes and Vote Tallies on *Roe* and *Doe* (Oct. 24, 1972) (on file with the Library of Congress, Brennan Docket Books, Boxes 418, 419)).

105. *Id.* at 573–76; Garrow, *Revelations*, *supra* note 89, at 82.

earlier.¹⁰⁶ In these revised drafts, as Blackmun told his colleagues in a cover memo, “I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.”¹⁰⁷ In his *Roe* draft, Blackmun stated that during the first trimester of pregnancy, a state “must do no more than to leave the abortion decision to the best medical judgment of the pregnant woman’s attending physician.”¹⁰⁸ However, “[f]or the stage subsequent to the first trimester, the State may, if it chooses, determine a point beyond which it restricts legal abortions to stated reasonable therapeutic categories that are articulated with sufficient clarity so that a physician is able to predict what conditions fall within the stated classifications.”¹⁰⁹

In the immediate wake of those two circulations, several extremely important developments rapidly took place. First off, the responses from Blackmun’s colleagues were positive and praiseful. William O. Douglas, previously the Justice most worried about Blackmun’s approach to the cases, complimented him on “an excellent job,”¹¹⁰ and Potter Stewart, who too had been concerned, applauded “an admirably thorough job.”¹¹¹ Perhaps most notably of all, even though Byron White and William Rehnquist were in disagreement with Blackmun, their comments on the opinions were gently, tentatively, and respectfully—rather than forcefully or angrily—expressed.

106. GARROW, *supra* note 6, at 576, 580 (summarizing Justice Blackmun’s draft opinions).

107. Cover Memorandum from Justice Blackmun to the Justices of the Supreme Court (Nov. 22, 1972) (on file with Library of Congress, Blackmun Box 151); *see also* GARROW, *supra* note 6, at 580 (quoting the cover memo).

108. Draft Circulation in *Roe* #2 from Justice Blackmun to the Justices of the Supreme Court (Nov. 21, 1972) (on file with the Library of Congress, Brennan Box 281); *see also* GARROW, *supra* note 6, at 580–81 (quoting the *Roe* draft).

109. Draft Circulation in *Roe* #2 from Justice Blackmun to the Justices of the Supreme Court (Nov. 21, 1972) (on file with the Library of Congress, Brennan Box 281); *see also* GARROW, *supra* note 6, at 581 (quoting the *Roe* draft); SCHWARTZ, *supra* note 73, at 149 (same).

110. GARROW, *supra* note 6, at 581 (quoting Memorandum from Justice Douglas to Justice Blackmun (Nov. 24, 1972) (on file with the Library of Congress, Brennan Box 282)).

111. *Id.* (quoting Memorandum from Justice Stewart to Justice Blackmun (Nov. 27, 1972) (on file with the Library of Congress, Brennan Box 282)).

Almost immediately after reading the drafts, Rehnquist wrote privately to Blackman to say that

although I am still in significant disagreement with parts of them, I have to take my hat off to you for marshaling as well as I think could be done the arguments on your side. I think I will probably still file a dissent, although more limited than I had contemplated after the conference discussion.¹¹²

White admitted that he had been “struggling with these cases” and would “probably end up concurring in part and dissenting in part,”¹¹³ which in turn led Rehnquist to add that “I am about where Byron said he was” and would also “probably concur in part and dissent in part.”¹¹⁴ In short, anyone anticipating, particularly in light of White’s and Rehnquist’s subsequent writings, both in *Roe* and *Doe* themselves and especially in subsequent abortion cases in later years, that there had been vigorous and vociferous objections within the Supreme Court during late 1972 to Blackmun’s extension of *Griswold*-style constitutional privacy analysis to the question of abortion would be entirely mistaken.

Indeed, what substantive objections other Justices—and clerks—did voice to Blackmun’s new drafts focused on the fact that in their view Blackmun’s choice of the end of the first trimester of pregnancy did not go far enough towards protecting a woman’s opportunity to obtain an abortion.¹¹⁵ On November 27, Lewis Powell’s clerk Larry Hammond gave the Justice a six-page memo critiquing Blackmun’s drafts.¹¹⁶ Hammond was happy that Blackmun “ha[d] embraced the straightforward constitutional

112. Garrow, *Revelations*, *supra* note 89, at 82. In response to Justice Rehnquist, Justice Blackmun privately reiterated that “I agree that after the first trimester a state is entitled to more latitude procedurally as well as substantively” in limiting women’s access to legal abortion. *Id.*

113. Letter from Justice White to Justice Blackmun (Dec. 1, 1972) (on file with the Library of Congress, Brennan Box 282); *see also* GARROW, *supra* note 6, at 581 (quoting Justice White’s letter).

114. Letter from Justice Rehnquist to Justice Blackmun (Dec. 4, 1972) (on file with the Library of Congress, Brennan Box 282); *see also* GARROW, *supra* note 6, at 581 (recounting the Justices’ reactions to the draft circulations).

115. *See* GARROW, *supra* note 6, at 581 (detailing the Justices’ correspondence regarding the point at which a state may appropriately regulate abortion).

116. Garrow, *Revelations*, *supra* note 89, at 82.

view taken by Judge Newman in the Connecticut case,” but was displeased by Blackmun’s focus on the end of the first trimester.¹¹⁷ “It is unnecessary to the result that we draw the line. If a line ultimately must be drawn, it seems that ‘viability’ provides a better point. This is where Judge Newman would have drawn the line.”¹¹⁸

Powell marked up Hammond’s memo, writing “Unnecessary to draw line—but may be desirable,” and noting a bold “yes” next to another Hammond sentence: “Most people would probably agree that the state has a much greater interest in protecting a viable entity than it does at some earlier time.”¹¹⁹ Powell then sent a private letter to Blackmun, saying that “I am enthusiastic about your abortion opinions. They reflect impressive scholarship and analysis,” but pointedly asking “whether you view your choice of ‘the first trimester’ as essential to your decision.”¹²⁰ Powell noted how Blackmun himself had termed that choice “arbitrary,” and then voiced his overarching thought: “I have wondered whether drawing the line at ‘viability’—if we conclude to designate a particular point of time—would not be more defensible in logic and biologically than perhaps any other single time.” Powell then proceeded to quote some of Newman’s Connecticut opinion language to Blackmun, observing that “I rather agree with the view that the interest of the state is clearly identifiable, in a manner which would be generally understood, when the fetus becomes viable. At any point in time prior thereto, it is more difficult to justify a cutoff date.”¹²¹

In Blackmun’s chambers, his new clerk handling *Roe* and *Doe*, Randall Bezanson, offered Blackmun some detailed thoughts about Powell’s comments:

Let’s assume that prior to the end of the first trimester no limitations could be placed on abortion, as your opinion now provides. And assume that after viability the state’s interest becomes sufficiently compelling to prevent abortions except in limited circumstances—preserving the life of the mother, or her health as narrowly defined in a statute. I am still of the

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

opinion that during the ‘interim’ period between the end of the first trimester and viability (about six months), the state might impose some greater restrictions relating to medical dangers posed by the operation, e.g., the operation would have to be performed in a hospital, as opposed to a clinic close to a hospital, and the like. One of the positive attributes of your approach, as I see it, is that it leaves the state free to place increasing restrictions on abortions over the period of gestation if those restrictions are narrowly tailored to state interests. Justice Powell’s suggestion seems to view the relevant state interests too narrowly, and disregards the state’s interest in assuring that the medical procedures employed will be safe. Your opinion, as I view it, rests on two state interest[s], which become compelling in varying degrees over time, and not simultaneously: the state’s interest in preserving the life of the fetus (here the most logical cutoff, as Justice Powell suggests, is viability), and the state’s interests in assuring that the abortion procedure is safe and adequately protects the health of the patient (it is this interest to which I think Justice Powell gives too little weight). The fetus is pretty large at 4 or 5 or 6 months, although it may not be ‘viable.’ I would imagine, and your opinion suggests to me, that the medical risks which attend abortion of a fetus increase as the size of the fetus increases. Thus the state’s interests may increase vis-à-vis this factor before ‘viability.’

While the first trimester is, as you admit, an arbitrary cutoff, I don’t think that it is all that arbitrary, and I would not want to prejudge a state’s interests during the ‘interim’ period between the end of the first trimester and viability at this time. I would stand by your original position, subject to minor change, and leave the question of what legitimate interests a state might have of requiring greater protection through higher medical standards to another case.¹²²

On December 4, 1972, Blackmun replied to Powell in a letter that directly echoed Bezanson’s views of the choices they faced:

I have no particular commitment to the point marking the end of the first trimester as contrasted with some other point, such as quickening or viability. I selected the earliest of the three because medical statistics and the statistical writings seemed to focus on it and to draw their contrasts between the first three months and the remainder of the pregnancy. In addition,

122. Garrow, *The Brains Behind Blackmun*, *supra* note 85, at 29–30 (quoting Memorandum from Randall P. Bezanson to Justice Blackmun (Nov. 29, 1972) (on file with the Library of Congress, Blackmun Papers, Box 151)).

I thought it might be easier for some of the justices than a designated later point. I could go along with viability if it could command a court. By that time the state's interest has grown large indeed. I suspect that my preference, however, is to stay with the end of the first trimester for the following reasons: (1) It is more likely to command a court. (2) A state is still free to make its decisions on the liberal side and fix a later point in the abortion statutes it enacts. (3) I may be wrong, but I have the impression that many physicians are concerned about facilities and, for example, the need of hospitalization, after the first trimester. I would like to leave the states free to draw their own medical conclusions with respect to the period after three months and until viability. The states' judgments of the health needs of the mother, I feel, ought, on balance, to be honored.¹²³

One week later, though, on December 11, Blackmun, without citing Powell by name, sent all of the justices a two page memo which in retrospect marks the fundamental turning point in making the holdings in *Roe v. Wade* and *Doe v. Bolton* what they in the end came to be:

One of the members of the Conference has asked whether my choice of the end of the first trimester, as the point beyond which a state may appropriately regulate abortion practices, is critical. He asks whether the point of viability might not be a better choice.

The inquiry is a valid one and deserves serious consideration. I selected the earlier point because I felt that it would be more easily accepted (by us as well as others) and because most medical statistics and statistical studies appear to me to be centered there. Viability, however, has its own strong points. It has logical and biological justifications. There is a practical aspect, too, for I am sure that there are many pregnant women, particularly younger girls, who may refuse to face the fact of pregnancy and who, for one reason or another, do not get around to medical consultation until the end of the first trimester is upon them, or, indeed, has passed.

I suspect that few could argue, or would argue, that a state's interest by the time of viability, when independent life is presumably possible, is not sufficiently developed to justify appropriate regulation. What we are talking about, therefore, is the interval from approximately 12 weeks to about 28 weeks.

123. Garrow, *Revelations*, *supra* note 89, at 83.

One argument for the earlier date is that the state may well be concerned about facilities and such things as the need of hospitalization from and after the first trimester. If the point of viability is selected, a decision of this kind is necessarily left to the attending physician.

I would be willing to recast the opinions at the later date, but I do not wish to do so if it would alienate any Justice who has expressed to me, either by writing or orally, that he is in general agreement, on the merits, with the circulated memorandum.

I might add that some of the district courts that have been confronted with the abortion issue have spoken in general, but not specific, terms of viability. See, for example, Judge Newman's observation in the last *Abele v. Markle* decision.

May I have your reactions to this suggestion?¹²⁴

The first Justice to respond, William O. Douglas, that very day, told Blackmun "I favor the first trimester, rather than viability,"¹²⁵ but the following day Thurgood Marshall's chambers sent to Blackmun a vitally significant letter written by clerk Mark Tushnet,¹²⁶ with only a single unimportant alteration in its text made by Marshall himself:

I am inclined to agree that drawing the line at viability accommodates the interests at stake better than drawing it at the end of the first trimester. Given the difficulties which many women may have in believing that they are pregnant and in deciding to seek an abortion, I fear that the earlier date

124. Memorandum to the Conference Regarding *Abortion Cases* from Justice Blackmun to the Justices of the Supreme Court (Dec. 11, 1972) (on file with the Library of Congress, Blackmun Box 151); see also GARROW, *supra* note 6, at 582–83 (quoting Justice Blackmun's memo).

125. Letter from Justice Douglas to Justice Blackmun (Dec. 11, 1972) (on file with the Library of Congress, Brennan Box 282); see also GARROW, *supra* note 6, at 583 (quoting Justice Douglas's letter).

126. On Tushnet's important role in *Roe*, and his subsequent reflections on that role, see Tushnet's contribution in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 86, 86–91 (Jack M. Balkin ed., 2005) [hereinafter WHAT ROE V. WADE SHOULD HAVE SAID]; David J. Garrow, *Roe v. Wade Revisited*, 9 GREEN BAG 2D 71, 73–75 (2005); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 811–15, 820–21 (1983).

may not in practice serve the interests of those women, which your opinion does seek to serve.

At the same time, however, I share your concern for recognizing the State's interest in insuring that abortions be done under safe conditions. If the opinion stated explicitly that, between the end of the first trimester and viability, state regulations directed at health and safety alone were permissible, I believe that those concerns would be adequately met.

It is implicit in your opinion that at some point the State's interest in preserving the potential life of the unborn child overrides any individual interests of the women. I would be disturbed if that point were set before viability, and I am afraid that the opinion's present focus on the end of the first trimester would lead states to prohibit abortions completely at any later date.

In short, I believe that, as the opinion now stands, viability is a better accommodation of the interests involved, but that the end of the first trimester would be acceptable if additions along the lines I have suggested here were made.¹²⁷

The following day, William Brennan sent Blackmun a lengthier but very similar letter. Thanking Blackmun for "giving second thoughts to the choice of the end of the first trimester as the point beyond which a state may appropriately regulate abortion practices," Brennan nonetheless went on to say that "if the 'cut-off' point is to be moved forward somewhat, I am not sure that the point of 'viability' is the appropriate point," since "if we identify the state's initial interests as the health of the woman and the maintenance of medical standards," viability "as the point where a state may begin to regulate in consequence of these interests seems to be technically inconsistent" since viability concerned the fetus, not the woman.¹²⁸ Fetal viability occurred only "at a point in time after the state has asserted its interest in

127. Letter Regarding *Abortion Cases* from Justice Marshall to Justice Blackmun (Dec. 12, 1972) (on file with the Library of Congress, Marshall Box 99); see also GARROW, *supra* note 6, at 583–84 (quoting Justice Marshall's letter).

128. GARROW, *supra* note 6, at 584 (quoting Letter from Justice Brennan to Justice Blackmun (Dec. 13, 1972) (on file with the Library of Congress, Brennan Box 282)).

safeguarding the health of the woman and in maintaining medical standards.”¹²⁹ Brennan went on to say that

I have no objection to moving the ‘cut-off’ point . . . from the end of the first trimester . . . to a point more closely approximating the point of viability (20 to 28 weeks), but I think our designation of such a ‘cut-off’ point should be articulated in such a way as to coincide with the reasons for . . . creating such a ‘cut-off’ point.¹³⁰

Warren Burger and Potter Stewart weighed in less pointedly as well,¹³¹ while in Lewis Powell’s chambers Larry Hammond was elated at Blackmun’s memo, telling Powell that Blackmun’s acknowledgment that many young women might not appreciate their predicament early in pregnancy was crucial.¹³² Powell bracketed Hammond’s comments and wrote a bold “yes” by them in the margin, and then drafted a letter of his own to Blackmun, writing that “once we take the major step of affirming a woman’s constitutional right, it seems to me that viability is a more logical and defensible time for identifying the point at which the state’s overriding right to protect potential life becomes evident.”¹³³ Reprising Hammond’s points about young women in denial, Powell added that “if there is a constitutional right to an abortion, there is much to be said for making it effective where and when it may well be needed most,” and he closed by again mentioning how “favorably impressed” he was with Jon Newman’s opinion that “identified viability as the critical time from the viewpoint of the state.”¹³⁴

Powell left his letter unsent, either because he expressed his views to Blackmun in person, and/or because Marshall’s and

129. *Id.*

130. *Id.*

131. Letter from Chief Justice Burger to Justice Blackmun (Dec. 13, 1972) (on file with the Library of Congress, Brennan Box 282); Letter from Justice Stewart to Justice Blackmun (Dec. 14, 1972) (on file with Library of Congress, Brennan Box 282); *see also* GARROW, *supra* note 6, at 585 (quoting Justice Burger’s and Justice Stewart’s responses).

132. *See* Garrow, *Revelations*, *supra* note 89, at 83 (quoting a memo from clerk Larry Hammond to Justice Powell expressing Hammond’s elation at Justice Blackmun’s recognition of the reality of young women’s difficulty in obtaining an abortion in the first trimester).

133. *Id.*

134. *Id.*

Brennan's successive letters had made much the same points,¹³⁵ and in Blackmun's chambers Randall Bezanson concluded that revised opinions should

articulate the two state interests, and the point at which they assume increasing significance. With respect to the state's interest in preserving the safety of the operation and the conditions surrounding it, regulation might be permissible somewhere between the end of the 1st trimester (if that is the cut-off selected) and 'viability' or beyond. But with respect to the state's interest in preserving fetal life, the opinion might, for example, indicate that only after "viability" does this interest become sufficiently compelling to support regulation in furtherance of this interest.¹³⁶

On December 15, Blackmun himself wrote to all his colleagues, thanking them for "the helpful suggestions" that had been made over the previous four days and saying he would revise his opinions in light of them.¹³⁷ "I have in mind associating the end of the first trimester with an emphasis on health, and associating viability with an emphasis on the State's interest in potential life. The period between the two points would be treated with flexibility."¹³⁸

Six days later, Blackmun circulated his all-but-final drafts of both *Roe* and *Doe*, highlighting in a cover memo how in *Roe* "I have tried to recognize the dual state interests of protecting the mother's health and of protecting potential life" and believed this was "a better approach" than his previous drafts.¹³⁹ *Roe*'s all-too-

135. *Id.*

136. Garrow, *The Brains Behind Blackmun*, *supra* note 85, at 30 (quoting Memorandum from Randall P. Bezanson Regarding Mr. Justice Brennan's Letter on the *Abortion Cases* (Dec. 14, 1972) (on file with the Library of Congress, Blackmun Papers, Box 151)).

137. Memorandum to the Conference Regarding *Abortion Cases* from Justice Blackmun to the Justices of the Supreme Court (Dec. 15, 1972) (on file with the Library of Congress, Blackmun Box 151); *see also* GARROW, *supra* note 6, at 585 (quoting Justice Blackmun's memo).

138. Memorandum to the Conference Regarding *Abortion Cases* from Justice Blackmun to the Justices of the Supreme Court (Dec. 15, 1972) (on file with the Library of Congress, Blackmun Box 151); *see also* GARROW, *supra* note 6, at 585 (quoting Justice Blackmun's memo).

139. Memorandum to the Conference from Justice Blackmun to the Justices of the Supreme Court (Dec. 21, 1972) (on file with the Library of Congress, Blackmun Box 151); *see also* GARROW, *supra* note 6, at 585–86 (quoting Justice Blackmun's memo).

brief constitutional discussion had not been significantly beefed up over the previous four months,¹⁴⁰ but the opinion clearly delineated the two distinct compelling state interests that the Justices' private exchanges had identified, holding that with regard to maternal health, "the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester."¹⁴¹ Secondly, "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."¹⁴² Blackmun observed that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to protect the life or health of the mother," and in closing he emphasized that *Roe's* holding "is consistent with the relative weights of the respective interests involved" and "leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests."¹⁴³

Blackmun's supportive colleagues quickly signed on, with Potter Stewart remarking that he was "greatly impressed" with the new drafts' "thoroughness and care"¹⁴⁴ and Lewis Powell commending Blackmun for his "exceptional scholarship."¹⁴⁵ Thus when *Roe v. Wade* and *Doe v. Bolton* emerged to public view a few

140. See *Roe v. Wade*, 410 U. S. 113, 153 (1973)

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

This was, of course, the crucial statement.

141. *Id.* at 163.

142. *Id.*

143. *Id.* at 163–65.

144. Letter from Justice Stewart to Justice Blackmun (Dec. 27, 1972) (on file with the Library of Congress, Blackmun Box 151); see also GARROW, *supra* note 6, at 586 (quoting Justice Stewart's letter).

145. Letter from Justice Powell to Justice Blackmun (Jan. 4, 1973) (on file with the Library of Congress, Blackmun Box 151); see also GARROW, *supra* note 6, at 586 (quoting Justice Powell's letter).

weeks later on January 22, 1973, the two opinions articulated radically different holdings than would have been the case eight months earlier had Blackmun's May 1972 drafts been handed down instead. *Griswold's* doctrinal "privacy" legacy, and the young attorneys who had championed it, were by early 1972 historical "givens," as was Dr. Jane Hodgson's impending appeal of her Minnesota criminal conviction, which was a direct echo of how *Griswold* itself had finally forced the Court to address the constitutionality of a state's criminalization of the use of contraceptives.¹⁴⁶ But from there forward, the ironies of what had transpired within the Supreme Court of the United States over the course of those eight months abound, often starkly.

Had not Byron White, who in the end dissented far more vociferously than he had ever indicated in conference or in his comments to Blackmun,¹⁴⁷ successfully derailed Blackmun's initial void for vagueness approach in *Roe* by pointing out the fundamental contradiction between that view of "life" and what the Court in *Vuitch* had held regarding "health," *Roe v. Wade* at age forty would be only somewhat more widely remembered than *Vuitch*.

Three months later, in August 1972, just as he was leaving his clerkship with Harry Blackmun, George Frampton full well realized, and expressly pointed out, that due to his lack of time the two draft opinions were badly deficient in their explication of their constitutional "right to privacy" analysis and that "considerable explanation is required" beyond what little the drafts then contained,¹⁴⁸ but notwithstanding all of the very

146. See *Griswold v. Connecticut*, 381 U.S. 479, 480–81 (1965) (challenging Connecticut's statute that made using contraceptives, or assisting another in using them, illegal).

147. Complaining about how, prior to viability, the majority's holding meant that "the Constitution of the United States values the convenience, whim, or caprice of the pregnant woman more than the life or potential life of the fetus," White declared that "I find nothing in the language or history of the Constitution to support the Court's judgments. The Court simply fashions and announces a new constitutional right for pregnant women . . . with scarcely any reason or authority for its action . . ." *Roe v. Wade*, 410 U.S. 113, 221–22 (1973) (White, J., dissenting). Calling the rulings "an improvident and extravagant exercise of the power of judicial review," White decried how the Court was barring "state efforts to protect human life" and giving "women and doctors . . . the constitutionally protected right to exterminate it." *Id.*

148. Garrow, *The Brains Behind Blackmun*, *supra* note 85, at 29.

detailed exchanges amongst justices and clerks over the ensuing four months about what the actual holdings should be, that deficient constitutional explanation was never again addressed, debated, or remedied.¹⁴⁹

In sharp contrast, beginning with Lewis Powell, and then including both his clerk, Larry Hammond, as well as Potter Stewart, two of the most interested and influential Justices focused upon District Judge Jon Newman's brand new opinion in *Abele v. Markle* and its discussion of fetal viability as best illuminating the unclear path that lay before them. It was far from unusual for the Justices to rely so heavily upon the analytical approach of lower federal jurists; less than two years earlier, in *Griggs v. Duke Power Company*,¹⁵⁰ a landmark ruling that represented the Court's first substantive interpretation of Title VII of the Civil Rights Act of 1964,¹⁵¹ Chief Justice Burger's ruling for a unanimous Court drew extensively and directly from recent opinions authored by prominent Circuit Judges John D. Butzner, John Minor Wisdom, and Simon E. Sobeloff.¹⁵²

The impact of Newman's opinion, particularly upon Powell, went a long way towards explaining why fetal viability, rather than the end of the first trimester, became the fundamental constitutional "cut-off point" for abortion in the eyes of the U.S. Supreme Court.¹⁵³ Powell's repeated recommendation of that shift finally prevailed upon a clearly hesitant Harry Blackmun after first Mark Tushnet, on behalf of Thurgood Marshall, and then William Brennan, just like Randall Bezanson and George

149. See, most famously, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973). "[Roe] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." *Id.*

150. 401 U.S. 424 (1971).

151. Pub. L. No. 88-352, 78 Stat. 251 (1964) (codified as amended at 42 U.S.C. §§ 1981–2000h-6 (2012)). See also *Griggs*, 401 U.S. at 425–26 (considering whether the Civil Rights Act of 1964 prevents employers from imposing requirements that employees have a high school education or pass a general intelligence test).

152. See David J. Garrow, *Toward a Definitive History of Griggs v. Duke Power Company*, 67 VAND. L. REV. 197, 227–30 (2014) (outlining the opinion and noting which lower court decisions were influential).

153. See Garrow, *Revelations*, *supra* note 89, at 83 (providing examples of Justice Powell referencing Judge Newman's opinion).

Frampton before him within Blackmun's own chambers, strongly endorsed Powell's view that *Roe* and *Doe*'s protection of a woman's largely unfettered right to choose abortion should be extended from approximately twelve weeks of pregnancy to twenty-four.

It is of course ironic that Harry Blackmun, who has gone down in history first and overwhelmingly foremost as the author of *Roe v. Wade*, privately opposed making the case's holding anywhere near as extensive as his final opinion actually came to be. Less striking perhaps, but still notable, is the initially similar opposition by the Court's most notorious liberal, William O. Douglas, and a strong and perhaps poignant counterfactual argument can be made that an actual majority of the *Roe* Court, if one further tallies the always-reluctant Warren Burger along with the two actual dissenters, Byron White and William Rehnquist, would have preferred a holding that reached only to the end of the first trimester. But, instead, the more strongly articulated preferences of Lewis Powell, William Brennan, Thurgood Marshall's chambers, and Potter Stewart decisively prevailed as Blackmun, encouraged also by Randall Bezanson, finally moved to accept Jon Newman's emphasis upon the decisiveness of fetal viability. That a supposedly conservative, southern appointee of Republican President Richard M. Nixon, in tandem with a Roman Catholic justice named to the Court by Republican President Dwight D. Eisenhower, and indirectly aided months earlier by the dissenting Byron White, made *Roe v. Wade* and *Doe v. Bolton* dramatically more far-reaching than they would have been had Harry Blackmun adhered to the view of pregnancy he brought to those repeated 1972 exchanges further underscores how ironic indeed it is that *Roe* and *Doe* came to be what they were on January 22, 1973.

* * *

In the spirit of this Symposium, three final points are in order. First, nine years ago, Jack Balkin stated the fundamental bottom-line of the constitutional principle concerning abortion as accurately and succinctly as any federal jurist ever has: "Individuals have the fundamental right to decide whether they want to become parents" and "the state may not force people to

become parents against their will.”¹⁵⁴ Additionally, as Balkin correctly framed it, “[w]here a woman’s life or health is not in danger, the right to abortion is the right to a fair and realistic opportunity to choose whether or not to become a mother.”¹⁵⁵

Second, it is imperative, especially for those of us who believe, as the controlling “trio” opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁵⁶ rightly emphasized more than twenty years ago,¹⁵⁷ that *Roe v. Wade* stands in complete partnership with *Brown v. Board of Education*¹⁵⁸ as one of the two greatest twentieth-century constitutional beacons of human liberty and equality,¹⁵⁹ and who also unapologetically embrace that oftentimes in many women’s lives, to utilize the title of a wonderful but little-remembered 1975 book, *Abortion Is A Blessing*,¹⁶⁰ to forthrightly acknowledge that there is a fundamental difference between an eight- or ten-week abortion and an eighteen- or twenty-week abortion. Late second trimester abortion procedures¹⁶¹ are ethically as well aesthetically more difficult than first trimester pregnancy terminations, just as

154. WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 126, at 40; *see also* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 294 (2007) (“[A] woman’s right not to be forced by the state to become a mother and thus to take on the responsibilities of parenthood.”).

155. WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 126, at 53; *see also* Balkin, *supra* note 154, at 294–95 (explaining that this right requires “a reasonable time to decide whether or not to become mothers and a fair and realistic opportunity to make that choice”).

156. 505 U.S. 833 (1992).

157. *See id.* at 867 (describing *Brown* and *Roe* as cases in which “the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution”).

158. 347 U.S. 483 (1954).

159. *See* Laura Kalman, *On Roe at Forty*, 41 REV. IN AM. HIST. 756, 756–57 (2013). As Kalman observes, “Roe is doing better than conventional wisdom indicates.” *Id.* at 756.

160. ANNE NICOL GAYLOR, *ABORTION IS A BLESSING* (1975).

161. “Late” denotes sixteen weeks and after. Some deeply committed pro-choice clinicians would choose fourteen weeks as a ceiling. *See* David J. Garrow, *From the Front Lines of the Abortion Wars*, CHRISTIAN SCI. MONITOR, Feb. 28, 2008, at 17, 17 (reviewing pro-choice abortion clinician Susan Wicklund’s book, SUSAN WICKLUND, *THIS COMMON SECRET: MY JOURNEY AS AN ABORTION DOCTOR* (2008), in which she explains her decision to perform abortions only prior to fourteen weeks).

Harry Blackman clearly acknowledged before the combined efforts of Lewis Powell, William Brennan, and a handful of young law clerks changed *Roe* and *Doe* into the opinions that we have known since 1973. Fetal viability, as *Casey*, *Stenberg*,¹⁶² and even *Gonzales*¹⁶³ all acknowledge, should indeed remain the fundamental constitutional threshold, but we who defend *Roe* and champion *Casey*¹⁶⁴ must not be shy in accepting open-minded discussion of what sorts of therapeutic standards, depending upon women's individual circumstances, might properly govern access to legal abortion once a pregnancy reaches sixteen weeks or later.

But that discussion cannot take place absent two things: first a universal acknowledgement that in every individual case, an earlier abortion is ethically preferable to a later abortion, and that statutes that have the effect of forcing women later into their pregnancies before they are able to access a legal abortion are thus *a fortiori* ethically repugnant; and second a universal acknowledgement that anyone and everyone who professes to want to reduce the incidence of abortion must publicly champion the widest and freest possible availability of all forms of contraception. Too oftentimes in debates over abortion, some participants who focus upon the undeniable humanity of the fetus refuse to acknowledge that their opposition to abortion is inseparable from an absolute opposition to all forms of "artificial" contraception. *If* any implicit or explicit "grand bargain" is to resolve, on the ground, the United States' ongoing conflict over how easily and in what circumstances should legal abortion be readily available, an ungrudging embrace of maximum possible contraceptive access is the absolute essential and foundational building block.

162. *Stenberg v. Carhart*, 530 U.S. 914, 920–22 (2000).

163. *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

164. See David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 20 (2008) (summarizing the holdings of *Casey*, *Stenberg*, and *Gonzales*); David J. Garrow, *A Landmark Decision*, 39 DISSENT 427, 427 (1992) (arguing for the potential that *Casey* "will rightfully come to be recognized as one of the most important statements about individual rights and the judiciary's role in affording them constitutional protection issued by the Court in this century").