485 (484 is blank)

Honorable Harry A. Blackmun

on Roe v. Wade

Recorded on June 20, 1995

Blackmun: It is about 9:45 in the morning of June 20, 1995. We are at the Federal Judicial Center, and this is part of the oral history project that has been conducted by Professor Harold Koh for some time, and is now nearing completion.

This has to do with the rather controversial case of *Roe against Wade*.[1] That case landed on my desk early in my years here. I came on board in June 1970, and *Roe against Wade* was decided in January 1973. It is a case that is controversial; that is, constantly under scrutiny. There is a question, I suppose, whether it ever will cease to be under scrutiny.

I felt early along that perhaps I should make some personal notes about *Roe against Wade*, how it developed and how it came to be assigned to me to write. I shall carry it, in a way, to my grave, but I think that I have written a lot in other areas of the law, and would like to be remembered for some of those areas as well as *Roe against Wade*.

I should state that I do not give this review of *Roe against Wade* everywhere or very often. I've given it only at the seminar at Aspen annually for a number of years now, and twice abroad in a seminar at the University of Aix-en-Provence in 1986, and again at the Salzburg Seminar in 1989. I do this with some diffidence. I do not feel that any question of ethics is involved, but in the minds of some, there may be a question of propriety if one grants that there is a difference between the two.

One usually does not speak about matters that take place, or have taken place, at a conference of the Supreme Court of the United States, but in a way I have done otherwise here, as some justices have done otherwise on other occasions. Why do I do this? I do it mainly in the hope of promoting a better understanding of the Supreme Court process, its overtones, and its pressures. As I've gone about the country, visiting law schools and making other public appearances, I have found that there is a substantial factor of ignorance about "your Supreme Court," and yet a great hunger to know what it is and how it operates.

Well, let me turn, then, to *Roe against Wade*, reported at 410 U.S. 113, and the companion case of *Doe against Bolton*, reported at page 179 of the same volume. Each was decided on January 22, 1973, now more than twenty-two years ago. In a way, as some judicial decisions are measured, that's a long time, and I think it is correct to say that it's a long time in an active constitutional area that is so controversial and constantly before the public.

---

[1] Roe v. Wade, 410 U.S. 113 (1973).

The concept and importance of privacy was given impetus by an article published in 4 *Harvard Law Review*, in 1890, a century ago. Its authors were a man named Samuel Warren and a young lawyer just into the Boston area from St. Louis named Louis D. Brandeis. That article was extant and had been noticed by the academic world and elsewhere.

But two cases of great thrust and importance were on the books when *Roe* and *Doe* finally were decided by the Supreme Court. The first was *Griswold against Connecticut*, 381 U.S. 479, decided in 1965, five years before my time. A Connecticut statute forbade the use of a contraceptive, and such use was made a crime. The executive director of a local Planned Parenthood group and its medical director, a licensed physician, were convicted for giving married persons information and medical advice as to how to prevent conception and providing them with a contraceptive device. The defendants took the position that this violated their rights under the Fourteenth Amendment. The intermediate Connecticut Court of Appeals and that state supreme court, however, affirmed the convictions.

Your Supreme Court—and I use the word "your" advisedly, because I think I'm talking to the public—your Supreme Court reversed by a seven-to-two vote. The majority opinion was written by Justice William O. Douglas, and there was a concurrence by Justice Goldberg, joined by Chief Justice Warren and Justice Brennan. The dissenters—and there were two of them—were Hugo L. Black and Potter Stewart. Each wrote separately.

The Court held that the Connecticut statute violated marital privacy, which is in the "penumbras" of the specific guarantees of the Bill of Rights. Appearing for the appellants was Professor T. I. Emerson, Tommy Emerson of Yale Law School, whom Yale graduates will know or remember. There was an *amicus* brief filed in favor of reversal by no less a personage than Whitney North Seymour, Sr., and there were other *amicus* briefs in favor of reversal, among them those filed by the Catholic Council on Civil Liberties and by the American Civil Liberties Union.

At this point I read from the Court's opinion. In 381 U.S., I quote, "The association of people is not mentioned in the Constitution, nor in the Bill of Rights. The right to educate a child in a school of the parents' choice, whether public or private or parochial, is also not mentioned, nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights. In other words, the state may not consistently, with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read, and freedom of inquiry, freedom of thought, and freedom to teach, indeed the freedom of the entire university community, without those peripheral rights, the specific rights would be less secure."

Then there was a review of a number of cases, and the opinion goes on and says this: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras formed by emanations by those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy.

The Fourth Amendment explicitly affirms the right of the people to be secure in their persons and houses, papers, and effects, against unreasonable searches and seizures. The Fifth Amendment, in its self-incrimination clause, enables a citizen to create a zone of privacy which government may not force him to surrender to his detriment.

"The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.

"We deal with a right of privacy older than the Bill of Rights, older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

Those words are found at pages 482 to 486 of 381 U.S. They were written for the Court by William O. Douglas, and I think they approach a standard of William O. Douglas at his best.

Justice Goldberg's concurrence, which the chief justice, Earl Warren, and Justice Brennan joined, stated this: "I agree with the Court that Connecticut's birth control law unconstitutionally intrudes upon the right of marital privacy."

I stress again that the *Griswold* case was decided in 1965, more than seven years before *Roe against Wade* came to the Court.

The second case was *Eisenstadt against Baird,* 405 U.S. 438, decided in 1972. It arrived at the Court between the argument and the reargument of *Roe* and *Doe.* A Massachusetts statute made it a felony to give a drug or article for the prevention of conception except (a) by a registered physician prescribing it for a married person, or (b) by an active registered pharmacist furnishing it to a married person presenting a physician's prescription. Dr. Baird was convicted in state court for giving a woman a contraceptive foam after he had delivered a lecture to university students. He brought an action in federal *habeas* attacking his conviction.

The district court dismissed his petition. The First Circuit vacated that dismissal, holding that the statute was a prohibition on contraception per se and conflicted with fundamental human rights under the *Griswold* case. The Supreme Court, with only seven justices participating, affirmed, ruling that dissimilar treatment for married and unmarried persons violated equal protection, and that the right of privacy inheres in the individual

and not in the marital relationship. The opinion in that case was by Justice Brennan, and he was joined by Justices Douglas and Stewart and Marshall, a majority of the seven. Justice White, whom I joined, concurred in the result. We felt that a narrower ground was available because of the tendency of the Equal Rights Amendment at the time. The chief justice, Burger, was in solitary dissent, and Justices Powell and Rehnquist took no part. Appearing for Dr. Baird was then Senator Joseph D. Tydings of Maryland.

Such was the Supreme Court case law situation when *Roe against Wade* and *Doe against Bolton* were decided. Both Justice Hugo L. Black and Justice John Marshall Harlan—the second Harlan—became ill in 1971, and both retired in September of that year, just before the long conference which takes place at the end of the summer, and they then died; Justice Black, a week after retirement, and Justice Harlan, as I recall, on December 29, 1971.

The rest of the Court tried to function as a seven-member court from October to the end of 1971. It was a difficult period, for there were three two-week argument sessions. The chief justice appointed a committee to screen the cases that were ready for argument. The goal, the stated goal, anyway, was to select cases for hearing that it was hoped would not be decided by a single vote. In other words, there was a desire to avoid four-to-three decisions, for four votes, though prevailing, would not constitute a majority of a full court of nine persons.

The screening process, in my estimation, was poorly conducted by the committee. Potter Stewart was chairman, I was on the committee, and I think the third person was Justice White. There were some four-to-three decisions during that period. None of those, however, proved to be disastrous or embarrassing. *Roe* and *Doe* were both placed on the calendar for oral argument without waiting for the roster of the Court to be filled, and the same was true, of course, for *Eisenstadt against Baird*, to which I have referred.

It seems to me that this was a basic and serious error on the part of the screening committee. At argument, and indeed before then, some of us realized that we had an important case on our hands, a bull by the tail, so to speak. The cases were argued in tandem on December 13, 1971. At issue was the validity of the respective Texas and Georgia statutes which proscribed, forbade, procuring or attempting an abortion except for the purpose of saving the mother's life. There were differences in the two statutes, for the Georgia legislation was more recent and, by amendment, much more carefully drawn.

Three of the four oralists were women. I'm not critical in saying that; I'm merely pointing out the gender situation. The sole male was an assistant attorney general from Texas, who was defending that state's statute. Attacking the statute was Sarah Weddington, who later held a post in the Carter Administration, and who has gone about the country speaking about her victory in *Roe against Wade*, and, as a matter of fact, even noting it on her letterhead. Defending the Georgia statute was Dorothy T. Beasley, and attacking the Georgia statute was Margie Pitt Hames, now deceased.

During the argument, I inquired about the Hippocratic Oath. I was disturbed by the fact that it had not even been mentioned in any of the briefs or in the oral argument. The answer to my inquiry to Miss Hames was this: she said that the oath was "irrelevant." My response was that I had attended several medical school commencements at which the administration of some form of the Hippocratic Oath to the candidates for the degree of doctor of medicine was a tradition. I also told her that copies of the oath hang on the walls of many of the examining rooms at the Mayo Clinic, where I had labored for a decade. One will recall, I think, that some versions of the oath include, among other things, the statement that the physician will not prescribe a pessary for a woman. Was it really irrelevant? I got nowhere with my inquiry.

At the ensuring conference on the cases a few days later, the discussion by the Court and voting were indecisive and uncomfortable. Only Douglas, Brennan, and White, and perhaps Marshall, Thurgood Marshall, seemed to be positive in their positions, the former two to reverse and invalidate the statute, and White to affirm. Justice Marshall was a little equivocal. I was the junior justice, and there were only seven of us.

Immediately after the conference, as he occasionally did, Chief Justice Burger announced that under these circumstances, someone should prepare a memorandum rather than an opinion. Usually the rest of us groaned silently when he made a suggestion of that kind, as a helpful memorandum for most of us took just as much time and effort in preparation as did a full-fledged proposed majority opinion. It was apparent to me at the conference that Justice Douglas wanted that assignment. The chief, however, gave it to me. Some say, such as the late Joe Rauh, that he made the assignment from a minority position. I assume, but do not know, that the assignment was made because of my ten-year association with a prominent medical clinic.

In due course, I produced a memorandum ending with a suggestion that the judgments of conviction in each case be reversed. Immediately, however—and I do mean immediately—I moved that the cases be reargued. There were several reasons why I proposed reargument. I was not well satisfied with the draft I had prepared, and I was also concerned about the Hippocratic Oath and what to do with it in view of its distinctive and traditional place in the history of medicine. I was concerned because absolutely no help had been given us on that issue by any of the lawyers' briefs or in their oral arguments.

Still another reason was the fact that Lewis F. Powell, Jr., and William H. Rehnquist, Jr., by that time had been nominated and confirmed, so that we had a full Court available. I felt that the issues were important and sensitive enough to deserve resolution by a court of nine rather than by a court of seven.

At this time, there were intimations in the Washington press and in Woodward and Armstrong's book, *The Brethren*, that Potter Stewart was dissatisfied with my memorandum, and that he suggested the reargument. He did not make that suggestion.

Whether he was dissatisfied with the draft, as I was, is something, of course, I really do not know. He denied it, however, to me in person and inferentially in his writing.

When my motion for reargument came up at the next conference, Justice Douglas loudly complained. I saw recently a segment on the tube to the effect—Nina Totenberg said this—that all the other justices complained. That is not true. Only Douglas complained. He said he was very much against rearguing the two cases. He never told me why he took the position, but I'm fairly certain that he thought that a tentative six-to-one vote to reverse in both cases might be converted, in the event of delay and a full court, to a four-to-five vote to affirm. He was afraid of how the two new justices might vote, and he felt that the chief was not fixed in his position and might change his tentative vote and perhaps influence me by that change. It was an unpleasant and, indeed, rather an ugly conference.

A subsidiary issue arose. Powell and Rehnquist had come on the Court on January 7, 1972. The question that then presented itself was whether they were entitled to vote on the motion to reargue. I shall not go into details as to this. I shall say only that the vote to reargue was taken and was favorable, and the cases were sent over for the following term.

In the summer of 1972, I spent two weeks, more or less, in Mayo's excellent medical library in Rochester, Minnesota. That was a familiar place for me. I was content and happy to work there. Later aspersions in the media were cast about this, with the intimation that physicians at Mayo's influenced me in the decision. The only people who knew what I was doing there, however, were the assistant librarian in charge of medical history and her assistant. Each culled books for me when I wanted them, and what I desired to do was to learn what I could about the origin of the Hippocratic Oath and to review its history.

I finally found a definitive answer, I concluded, in a monograph written in 1943 by a Johns Hopkins physician named [Ludwig] Edelstein. All this is set forth in some detail in the *Roe* opinion, 410 U.S., at 130 to 132. It is there for one to read if he is interested. It convinced me that the Hippocratic Oath was localized and parochial and became a happy tradition that was no barrier professionally or legally to the prescription of a contraceptive. All this was done on my part without any knowledge whatsoever of how the assignment of the opinion in *Roe* and *Doe* after reargument would be made, or, indeed, how Powell and Rehnquist would vote.

The second argument took place on October 11, 1972, right at the beginning of the 1972 term. A different male assistant attorney general for Texas appeared, but otherwise counsel were the same. I thought all counsel were better the second time around, but there still was no mention whatsoever of the Hippocratic Oath in any brief or in oral argument. That, of course, was a disappointment so far as I was concerned. At conference, the vote was seven-to-two to reverse, but it still was tentative and was so regarded by all nine of us.

The chief justice, although very tentative in his vote, chose to make the assignment. The cases were assigned to me to write. Why me? I have never asked for a case assignment, although other justices have done so on occasion. What I am now about to say is sheer speculation on my part. I never asked Chief Justice Burger what his thinking was in making that assignment. I may be totally in error, but this at least is my perceived analysis. The chief justice, of course, could have assigned the case to himself. I think, however, that he realized that the cases were controversial. Also it was early in his tenure, and I think he did not want to assume the primary responsibility for them in those early years. I can understand and sympathize with this. There also seems to have been personal reasons, due to his family situation, and I think that from the start he was never very certain or secure in his vote on the issue.

Douglas was next in line. He wanted the assignment, but I suspect that the chief felt that William O. Douglas, in his declining years, and we were in that period, was bored and would indulge in rather shallow and hasty writing of the type he was producing at the time. Also—and I think this is very important—Douglas was under threat of impeachment by a movement in the House of Representatives, headed by the then Congressman Gerald R. Ford. Had Douglas written the opinions and had reversals come along, it probably would have enhanced the cry for his impeachment.

Brennan was a possibility, but Justice Brennan was then the only Roman Catholic on the Court, and a very prominent and honored one. It would have been a great burden for him, but knowing him, he would have assumed it willingly, like the good soldier he is. I have never had an expression from Justice Brennan as to whether he really wanted those cases. As you may surmise, he has been severely criticized by certain segments of his church, and he repeatedly has expressed to me his concern about the abuse I have taken.

Potter Stewart was next, and was a possibility for the assignment. White was next, but White was an adverse vote, and majority opinions could not go to him. Marshall was next, and Marshall was the only African American on the Court, and I think the chief felt that an assignment to Marshall would be almost as uncomfortable as an assignment to Brennan. I was next in line, and a possibility. In addition, I had written the earlier memorandum. Lastly came Powell and Rehnquist. Rehnquist was not a possibility because his vote was the other way. Powell was a possibility, but I think the chief felt that he had just come on the Court, had not heard the initial arguments, and should not be burdened with such emotional cases so early in his tenure.

Thus, it seemed to me to come down to a choice between Stewart and me. I had done the memo, there was the Mayo background, and therefore I assume I caught the assignment. I was not enthusiastic about it, but cases are argued and cases must be decided, and opinions usually must be written. We cannot pick and choose among comfortable options.

I was able to get the new drafts out fairly promptly. I think the first circulation was on November 22, 1972. Promptly came a concurrence from Douglas, joining the opinion

but writing separately. Promptly came joinders from Brennan, Marshall, and Powell, and I had a majority. Justice Stewart made a suggestion and said if that suggestion were adopted, he wanted a few sentences added, he would join the opinion. I complied with his request, and promptly came his separate concurrence with a joinder.

A dissent by White came along without undue delay. It was a bitter one, and one will recall that he accused the majority—that is, me—of what he called "an exercise of raw judicial power." That's at page 222 of 410 U.S.

Rehnquist joined White and wrote separately. The last vote out, then, was that of the chief justice, and day after day went by, and still no word from him. Finally, a separate concurrence with a joinder came in. It was short, being only a little over a page. To this day I do not know for certain why he took so long. I am grateful, however, for the final sentence of his opinion. The chief said this: "Plainly, the Court today rejects any claim that the Constitution requires abortion on demand." That surely was true, and coming from him, it was a welcome sentence.

Why the delay on the part of the chief justice? President Nixon was due for his second inaugural on January 20, 1973. The chief's opinion circulated in January, and when it did, with no further writing coming along, the cases were ready to be announced. The timing was such that the next decision date—Monday in those days—was January 22, two days after the inauguration. It proved to be one of those rare instances when the dissent was announced separately from the bench. We do this perhaps once or twice a year to maintain what Stewart used to call "this art form."

Byron White was rather emotional in delivering the dissent, and stressed the "raw judicial power" business. Why was Byron White so strongly on that side of those cases? It surprised me a little, and I've never asked him. I have some thoughts about it.

On that very day, however, January 22, 1973, Lyndon B. Johnson died, and news of the abortion cases was distinctly secondary. A few days later, however, the roof fell in. The mail to the Court proved to be the greatest in its history on a specific case or pair of cases. The record theretofore had been held by the prayer-in-the-schools case. I well recall officers in the Court standing at their posts, sorting mail into nine separate receptacles. I suspect that to date I have received over 70,000 letters about *Roe*. I had read nearly all of them, much to the dismay of Lewis Powell. He feels I should not subject myself to that stress. Letters on the subject still come in.

A few remarks about the mail. Much of it was organized. Not all of it, by any means, was one way. Some of the most beautiful letters I have ever received have come to me from Roman Catholic nursing nuns. There were instances of thirty or so letters from pupils in a particular parochial elementary school grade. One that I recall was from a third-grade youngster who said, "I know all about abortion," talked about it a little, and then concluded, "I like you anyway." And there were the expected comments to the effect that, "Your mother should have aborted you," or, "I have been praying for your immediate death," and much of the correspondence is abusive. I suspect I've been called

every possible epithetical name: author of a new *Dred Scott* opinion; Hitler; butcher of Dachau; Pontius Pilate; Herod; murderer; madman; and the like. I can outrun Joseph Swan, the abolitionist judge, and I suspect I can outrun Chief Justice Roger Taney.

Very shortly after the decisions came down, I was scheduled for a speech in Cedar Rapids, Iowa, and I there encountered my first picketing. It has continued to this day, whenever there is organization by some particular individual or some active Right to Life group. I'm not picketed everywhere, but I usually am picketed when I'm in my home state of Minnesota or in Oregon, at some colleges such as Dartmouth, in Chicago, in Los Angeles, and in northern New Jersey, usually but not always in Georgia, never in New York City. And so it goes.

What we tried to do, of course, was decide the issue on a constitutional basis, not a morality basis. The opinion reviewed the ancient attitudes of the Roman Catholic Church; the Hippocratic Oath; the common law, which had not disapproved abortion prior to quickening; the English statutory law; the laws developed in the United States until the anti-abortion statutes came on the books in the middle and latter part of the 19th century, 100 years ago; the change in attitude of the American Medical Association; the change in attitude of the American Public Health Association; and the change in attitude of the American Bar Association. Research in those areas was rewarding and instructive.

The reaction of the academic community was interesting. John Hart Ely, who later was dean at Stanford Law School, was the first to appear in print with a critical article, almost before the ink had dried on the slip opinion issued by our Court. He obviously was trying to be the first in print.

The academic reaction generally was adverse, but for differing reasons. Professor John Noonan of Bolt, who now is a judge on the Ninth Circuit, based his criticism, I think, largely on his religious views. Some argued pro and con about substantive due process. Others, such as the highly regarded Edward Levi of Chicago, took the position of disliking to constitutionalize the issue. Academia obviously was disturbed.

The reaction of the religious community was varied. Standing strongly against the decision, of course, were the Roman Catholic Church, the Mormon Church, the Missouri Synod Lutherans, conservative Protestant sects, and most of the so-called Born Again Christians. Of the mainline Protestants, the opinions were generally approved, but there certainly were individual exceptions. Jewish reaction was mostly favorable.

The commentators of the media were divided. The *New York Times* generally approved, and continues to do so in articles that appear almost annually after each Right to Life January march. Letters to the editor were divided. The conservative George Will was antagonistic and seems to be my most persistent critic on all fronts. The even more conservative James Kilpatrick, the squire of Scrabble, Virginia, and once the champion of interposition and of the drug Laetrile, which was put to rest by the *Rutherford* case,[2] is always critical.

[2] United States v. Rutherford, 442 U.S. 544 (1979).

My own reaction to all of this is that it was well to have the cases reargued. The second arguments were better, and the delay entitled us, or enabled us, to get deeper into history and do the research counsel had not provided. The three women oralists, each time, I think, outdid the solitary male. The former chief justice never was fully firm in his vote, and would seem to have departed from it since. The old votes, White and Rehnquist against *Roe against Wade*, remained solid. The old votes in favor of that result remained just as solid—Brennan, Marshall, I. Vacillating somewhat, in my view, were O'Connor, torn between her states' rights concept and a feeling of loyalty to her sex; Powell, due to his basic assumption of close family relationships; the former chief justice, due to family influences; and Stevens, whose position guided, I think, primarily by his loyalty to *stare decisis*. I also learned that in some cases lawyers are of comparatively little help on certain issues.

The cases have been criticized on a number of grounds. It has been said that *Griswold* and here the Court revisited and revived substantive due process, which had been somewhat discredited. The arguments on this appear in Stewart's separate concurrence at page 167 of 410 U.S., which, it seems to me, is almost flippantly written, and in Douglas's response thereto, which he relegated to a footnote at page 212. I stayed out of that substantive due process crossfire.

The cases have been criticized because, it is said, they denied the fetus the status of a person within the meaning of the Fourteenth Amendment. Comment to that effect is in the opinion at pages 156 to 159. I say only that that comment was not in the original draft. That is the material that was inserted at the specific request of Justice Stewart, and when it was inserted, as I said before, his joinder came along immediately.

In retrospect, I wish that comment had not been made. I think it was unnecessary, and much of the emotional initial opposition centered on it. The comment is legally correct, however, and the opposition would have been there anyway.

Criticism has been made that the opinions overlooked the right of the fetus, and are concerned only with the rights and health of the mother. My response to that is that nearly all of the anti-abortion statutes are drawn in the same vein. The opinions have been criticized because, it is claimed, life begins at the instant of conception and not at some later date. It has been said that the historical analysis is faulty, but I have not seen the historical faults pointed out. The opinions have been criticized on the grounds that they violate the Hippocratic Oath. They've been criticized initially by Ely and later by another, on the ground that the Court should have waited and decided the homosexual aspects of privacy first. Well, in all respect, cases come to the Court when they come. We seldom are able to pick and choose them in an out-of-order way.

The cases have been criticized because they did not cover all aspects of abortion, such as the father's rights and the parental veto. They have been criticized because they rely too much on the integrity of the medical profession. They have been criticized as being unnecessary. It is said that women are in the majority in this country and can take care of

themselves through the political process. They have been criticized because, it is said, I was under the influence by physicians at the Mayo Clinic. They've been criticized because of the viability point. After all, it is claimed, viability is constantly being pushed back to earlier points in pregnancy. A recent partially suppressed "Doonesbury" strip sarcastically took it all the way back to the two-cell stage.

Justice O'Connor, for a while, took up this particular attack by speaking of *Roe against Wade* as being on a "collision course with itself." I think that was a clerk's suggestion. And I think the answer to her is that the remark is self-defeating and embraces an element of flippancy. She no longer repeats it, for she now recognizes that there is a point before which lung development is insufficient to sustain life. Furthermore, the *Roe* opinion itself recognized that the point of viability at that time was twenty-eight weeks, "but may occur earlier." Page 160.

Of course, after *Roe* and *Doe* were decided, there was much additional activity. State legislatures and Congress went to work to block the result. The states usually sought to do this by devices such as prohibiting certain methods of contraception or abortion, or by denying welfare funding. Some also passed statutes requiring the consent of one or both parents, where the pregnant woman was a minor and unmarried, and this often was so, despite the fact that the parents might be divorced or separated, or the father's whereabouts or even his identity completely unknown. Some statutes provided that a second, or even a third, medical opinion was to be obtained. There also were provisions for detailed, almost excessive, recordkeeping. Congress took up the cause by restricting federal funding in the welfare area, and this is largely spearheaded by the conservative Republican Congressman Henry Hyde of Illinois.

There were many cases, actually. Among them were *Harris versus McRae*[3] in June 1980; the *City of Akron* cases;[4] *Planned Parenthood of Missouri*,[5] argued by the then Attorney General John Danforth; and *Simopoulos*,[6] all in June 1983, and others I shall not take the time to list.

I was driven to a complaining dissent in three cases in 1977, where I said this: "The Court today, by its decisions in these cases, allows the states and such municipalities as choose to do so, to accomplish indirectly what the Court in *Roe against Wade* and *Doe against Bolton*—by a substantial majority and with some emphasis, I had thought—said they could not do directly. The Court concedes the existence of a constitutional right that denies the realization and enjoyment of that right on the ground that existence and realization are separate and distinct. For the individual woman concerned, indigent and financially helpless, as the Court's opinions in the three cases concede her to be, the result is punitive and tragic. Implicit in the Court's holdings is the condescension that

[3] Harris v. McRae, 448 U.S. 297 (1980).

[4] Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Ohio v. Akron Center for Reproductive Health, Inc., 497 U.S. 502 (1990).

[5] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

[6] Simopoulos v. Virginia, 462 U.S. 506 (1983).

she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of [the old phrase]: 'Let them eat cake.'

"The Court's financial argument, of course, is specious. To be sure, welfare funds are limited and welfare must be spread perhaps as best meets the community's concept of its needs. But the cost of a nontherapeutic abortion is far less than the cost of maternity care and delivery, and holds no comparison whatever with the welfare costs that will burden the state for the new indigents and their support in the long, long years ahead.

"There is another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all even-handedly and, in so doing, would better the lot of the poorest among us." That's in *Beal against Doe*, 432 U.S., at page 462.[7]

Nevertheless, throughout the presentation and decisions in this series of cases, *Roe against Wade* itself was reaffirmed, and this was done with some emphasis by Justice Powell when he wrote for the Court in the *City of Akron* cases and their companions. I refer to what he said on page 420 of 462 U.S., "We respect *stare decisis* today and reaffirm *Roe against Wade*."

With the Reagan administration, the solicitor general took a flat adverse position, and this was intimated during Rex Lee's regime, but it was brought to a head when Professor Charles Fried of Harvard became solicitor general. Professor Fried is now under consideration for appointment to the First Circuit.

The following are excerpts from the *amicus* brief filed by the Department of Justice in the *Thornburgh* and *Diamond* cases.[8] I read from the Department's brief. "The constitutional inquiry mandated by *Roe against Wade* is not easy for courts to conduct in a principled fashion. The key factors in the equation, viability, trimesters, the right to terminate one's pregnancy, have no moorings in the text of our Constitution or in familiar constitutional doctrine, because the parameters of the inquiry are indeterminate. Courts are disposed to indulge in the free-ranging, essentially legislative process of devising regulatory schemes that reflect their notions of morality and social justice.

"The second compelling ground for our urging reconsideration of *Roe against Wade* is our belief that the textual, historical, and doctrinal basis of that decision is so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided. We respectively submit that by these criteria *Roe against Wade* is extraordinarily vulnerable. It stands as a source of trouble in the law not only on its own terms, but also because it invites confusion about the sources of judicial authority and the direction of this Court's own future course.

---

[7] Beal v. Doe, 432 U.S. 438, 462 (1977).

[8] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Diamond v. Charles, 476 U.S. 54 (1986).

"*Stare decisis* is a principle of stability. A decision as flawed as we believe *Roe against Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment."

This was the position of the Reagan administration in its last years, and it became the position of the Bush Department of Justice as they came into power. I think I am correct when I say that five times the Court has been asked to overrule *Roe v. Wade*, and five times the Court did not take that step.

During the Bush administration, four cases pertinent to the subject came to the Court. The first was *Webster against Reproductive Health Services, Inc.* in 492 U.S. 490, decided in July 1989. At issue was a Missouri statute regulating the performance of abortions. Health professionals and others brought suit challenging the constitutionality of the statute. A district court struck down each of what would claim to be offending provisions, and enjoined their enforcement. The Eighth Circuit Court of Appeals affirmed, ruling that they violated *Roe against Wade* in subsequent cases.

The Supreme Court, however, reversed in what is essentially a five-to-four vote. Several opinions were written, with Chief Justice Rehnquist announcing the judgment. In effect, the Court substantially cut back on *Roe*, but said that it was unnecessary to overrule it. The chief observed that the principle of *stare decisis* has less force where constitutional rather than statutory issues are concerned. He criticized the trimester framework. Justice O'Connor wrote separately. She joined most of the chief's opinion and stated that there was time enough in the future to reconsider *Roe*, and she, for the first time, I believe, did not repeat the "collision course with itself" language that she had employed in criticizing the trimester approach. I think she was finally seeing the unsoundness of that statement.

Justice Scalia wrote separately and focused his attention on Justice O'Connor. He would do away with *Roe* here and now, and he excoriated Justice O'Connor for not taking the same position. He also referred to *Roe* as "constitutionalizing abortion law constructed overnight." Well, literally it could be said that he speaks from ignorance, for he was not present at either the argument or the reargument, and the decision certainly was not constructed overnight.

I wrote in partial dissent in *Webster*, was joined by Justice Brennan and Justice Marshall. Justice Stevens wrote at some length also in partial dissent.

The second case was *Ohio against the Akron Center for Reproductive Health*, 497 U.S. 502, decided June 25, 1990. Ohio statute made it a crime for a physician or other person to perform an abortion on an unmarried, unemancipated minor, unless, among other things, the physician provided timely notice to one of the minor's parents, or juvenile court issued an order authorizing the minor to consent. This was official challenge to the statute's constitutionality. The district court enjoined its enforcement. The Sixth Circuit affirmed, concluding that several of the statutes' provisions were constitutionally defective.

The Supreme Court again reversed. In an opinion by Justice Kennedy, joined by the chief justice and Justices White, Stevens, O'Connor, and Scalia, the Court held that the parental notice provision was not an undue burden on the minor. The statute was valid on its face, despite some severely restrictive provisions. It was not unconstitutional to require the physician to give the notice. Part V of the Kennedy opinion, however, was not joined by Justice O'Connor or Justice Stevens, so it is not a Court opinion as to that part.

Justice Scalia wrote separately, stating that the Constitution contains no right to an abortion. He would leave it to the political process. Justice Stevens wrote separately, stating in some situations the one-parent notice requirement would not reasonably further the state's interest. The state must provide an alternative whenever notice would not be in the minor's best interest.

I wrote in dissent and was joined by Justice Brennan and Justice Marshall. I said this: "The Ohio legislature, in its wisdom, in 1985 enacted its antiabortion statute. That statute, when subjected to *facial* challenge, has been held unconstitutional by the United States District Court for the Northern District of Ohio and by the Court of Appeals for the Sixth Circuit. It is now, however, upheld on that challenge by a majority of this Court. A majority opinion takes up each challenge provision in turn; concludes with brief comment, that it is within the bounds of the plurality opinion in a case called *Bellotti II*,[9] and moves on routinely and in the same fashion to the succeeding provisions one by one. A plurality then concludes in Part V of the primary opinion with hyperbole that can have but one result, to incite an American press, public and pulpit, already inflamed by the pronouncements made by a plurality of this Court last Term in *Webster*. The plurality indulges in paternalistic comments about 'profound philosophic choices'; the '[woman's] own destiny and personal dignity'; the 'origins of the other human life that lie within the embryo'; the family as 'society's most intimate association'; the striving of the family to give to the minor 'advice that is both compassionate and mature'; and the desired assumption that 'in most cases' the woman will receive 'guidance and understanding from a parent.'

"Some of this may be so 'in most cases' and, it is to be hoped, in judges' own and other warm and protected, nurturing family environments. But those 'most cases' need not rely on constitutional protections that are so vital for others. I have cautioned before that there is 'another world out there' that the Court 'either chooses to ignore or refuses to recognize.' It is the unfortunate denizens of that world, often frightened and forlorn, lacking the comfort of loving parental guidance and mature advice, who most need the constitutional protection that the Ohio Legislature set out to make as difficult as possible to obtain.

"That that legislature set forth with just such a goal is evident from the statute it spawned. The underlying nature of the Ohio statute is proclaimed by its strident and

[9] Bellotti v. Baird, 443 U.S. 622 (1979).

offensively restrictive provisions. It is though the legislature said: 'If the courts of the United States insist on upholding a limited right to an abortion, let us make that abortion as difficult as possible to obtain' because, basically, whether on professed moral or religious grounds or whatever, 'we believe that is the way it must be.' This often may be the way legislation is enacted, but few are the instances where the injustice is so evident and the impediments so gross as those inflicted on the Ohio Legislature on these vulnerable and powerless young women." That was in 497 U.S. at 540-542.

The third case was *Hodgson against Minnesota,* 497 U.S. 417, also decided on June 25, 1990. The Minnesota statute contained a two-parent notice requirement and a forty-eight-hour waiting period with a pregnant woman who was under eighteen years of age and unmarried. Upon a full record, the district court held the statute unconstitutional in its entirety, and enjoined its enforcement. The Eighth Circuit, *en banc* by a divided vote, reversed. It ruled that the forty-eight-hour provision was not unconstitutional and was not an undue burden on a minor. It also held that the bypass provisions saved the statute.

The Supreme Court generally affirmed in an opinion by Justice Stevens. It held, however, that the two-parent notification provision was invalid, and again there were several opinions. Suffice it to say that four justices would have upheld the statute all the way: the chief, White, Scalia, Kennedy. One, O'Connor, would uphold the statute with a bypass protection. Three would not uphold the statute: Brennan, Marshall, and myself.

The fourth case was *Rust against Sullivan,* decided May 23, 1991, in 500 U.S. 173. A federal statute provided that none of the federal funds appropriated for federal planning services "shall be used in programs where abortion is a method of family planning." Regulations issued by the secretary of HHS carried out this direction. The lower courts upheld the regulations and the Supreme Court affirmed with what essentially was a five-to-four vote. Chief Justice Rehnquist, writing for a majority consisting of himself and Justices White, Scalia, Kennedy, and Souter, held that the regulations were a permissible construction of the statute and did not violate the First Amendment free-speech provisions or a woman's Fifth Amendment right to choose whether to terminate her pregnancy. I filed a dissent, which Justice Marshall joined in its entirety, and which Justice Stevens and O'Connor joined in part.

Then the next term came the *Casey* case, *Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor.*[10] This concerned a Pennsylvania abortion statute with its substantial and extensive requirements and restrictions. I have the distinct impression that the petition for *certiorari* was presented by Planned Parenthood and perhaps acquiesced in by the Commonwealth of Pennsylvania, so as to get the case on the April calendar for decision before the term concluded. Thus an issue would be examined and established for the national election of 1992.

We took the case, and so the parties' efforts to expedite was successful. It was argued at the end of the April session, about the worst time of year, in my estimation, for a case

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

of such importance. It came to us by *certiorari* from the Court of Appeals for the Third Circuit, and under challenge were five provisions of the Pennsylvania act: one, a requirement of informed consent with certain information provided the woman at least twenty-four hours before the abortion; two, a requirement of informed consent of one parent for a minor to obtain an abortion, but with a judicial bypass procedure; three, with a woman who was married, a requirement that the husband be notified; four, a definition of medical emergency which excused compliance with these requirements; and, five, extensive reporting provisions.

Abortion clinics and a doctor of medicine brought an action seeking a declaratory judgment that these statutory provisions were *facially* unconstitutional, and seeking injunctive relief. The district court, following *Roe*, held all the challenged statutory provisions unconstitutional and enjoined their enforcement. The court of appeals struck down the husband-notification requirement, but upheld the others, and thus generally reversed.

At oral argument before us, the United States, through Solicitor General [Kenneth] Starr, once again asked that *Roe* be overruled. At the initial conference, the vote was five-to-four to uphold the statute without reaching the question of *Roe*'s continued vitality, an approach designed to follow the approach taken in the *Webster* case and to avoid political repercussions so far as possible.

The chief justice, as I and others perhaps expected, assigned the case to himself to write. He gave the clerk ten days to produce a draft, but, not surprisingly, it took twice that amount of time. The draft upheld the statute in its entirety and asserted that *Roe*, although criticized, really was not implicated. The chief's opinion concluded that abortion restrictions should be upheld so long as they are rationally related to a legitimate state interest, a test that was completely toothless. Justice White joined immediately.

Meanwhile, unknown to any but the three justices and their clerks, Justices O'Connor and Kennedy and Souter were at work on a joint opinion of their own. While I do not know all of the factual details, it appears that Justices O'Connor and Souter went to Justice Kennedy to ask him if he would join them in an opinion upholding the entire statute except the spousal-notification provision. This was intended to reaffirm what they saw as the essential holding of *Roe*, that the Constitution protects a woman's right to terminate her pregnancy under specified conditions. The three justices decided, however, not to go as far as *Roe* in concluding the right to reproductive choice is a fundamental right entitled to the protection of strict scrutiny as implemented by *Roe*'s trimester framework.

Having worked out their general approach, the three justices decided that Justice Kennedy would write the individual-liberty section, Justice Souter would write the *stare decisis* section, and Justice O'Connor would write the section setting forth the undue burden test and applying it to the challenged statutory provisions.

Sometime after the chief's opinion circulated, Justice Kennedy came to inform me of the joint opinions in pending circulation. He, however, also informed the chief justice, who then spent some time in walks with Justice Kennedy to persuade him to change his mind. Justice Kennedy seemed deeply concerned about being saddled with this issue for the rest of his career. He was especially worried about the attention he would get as a Roman Catholic reaffirming *Roe*. He, nonetheless, held firm, and the joint opinion circulated.

As originally planned, that opinion upheld all the Pennsylvania restrictions with the exception of the spousal-notification requirement. But perhaps more important than the actual holding was the opinion written by those three justices. Based on a robust view of individual liberty and a profound respect for *stare decisis*, the three reached out to reaffirm *Roe*'s holding that the Constitution protects a woman's right with her position to terminate her pregnancy in its early stages. The joint opinion then departed from *Roe* by replacing the strict scrutiny approach with an undue burden test that invalidated abortion regulations that had the purpose or effect of placing two serious obstacles in the path of the woman before the fetus attains viability.

The opinion also departed from *Roe*'s trimester framework by holding that a state may regulate to serve its legitimate interest in maternal health and fetal life throughout pregnancy. Finally, the joint opinion departed from the Court's earlier precedence by concluding that a state could enact measures intended to persuade the women to choose childbirth over abortion. To the extent they were inconsistent, the *Thornburgh* and second *Akron* cases were overruled.

The chief justice immediately went to work in a new opinion attacking the *stare decisis* section. Continuing to maintain that *Roe* was not implicated, the chief decided to argue that the joint opinion did not reaffirm *Roe* since it did not adopt strict scrutiny and the trimester framework. In the new words of the chief, the joint opinion had left *Roe* as nothing more than "a storefront on a Western movie set."

In profound contrast, Justice Scalia attacked the joint opinion as setting forth a task that in its rigor opposed strict scrutiny. While not directly calling for *Roe* to be overruled, he argued that the abortion issue should be returned to the states, and he then went on colorfully to compare the joint opinion to Chief Justice Taney's opinion in *Dred Scott*. This, of course, is nothing new, judging from my mail and earlier writings.

Justice Stevens circulated an opinion concurring in the joint opinion to the extent that it reaffirmed *Roe*, struck down the spousal-notification provision, and upheld the reporting requirements. He dissented to the extent that it upheld content-based counseling provisions, the twenty-four-hour delay, and the parental notification consent provisions. His opinion also eloquently defended the trimester framework, especially *Roe*'s conclusion that the state did not have a compelling interest in fetal life before the beginning of the third trimester.

While disagreeing with the joint opinion's departure from *Roe*, I wrote that the joint opinion had much to be commended. I also concluded, since the undue burden test was the test that lower courts would have to apply at least in the immediate future, there was a need to set forth exactly how an undue burden could be demonstrated, and, finally, I felt that I had to oppose the chief justice in his extreme approach, since it was just one vote shy of majority. As Justice Scalia agreed with the chief on all important respects, I decided to ignore Justice Scalia's more extreme arguments.

With these goals in mind, I circulated an opinion concurring in the joint opinion to the extent that it reaffirmed *Roe* and struck down the spousal-notification provision. I dissented to the extent that it departed from strict scrutiny and the trimester framework and upheld the other restrictions. While I remained steadfast in my commitment that the right to reproductive choice is fundamental, I notice that I was heartened to see that the joint opinion's undue burden test had been applied here in a way that was sensitive to the realities facing women making that difficult choice. Indeed, there was an almost equal protection undertone to their entire opinion. I was also pleased that the joint opinion left open the possibility that on remand, evidence could be introduced to show that the other restrictions imposed undue burdens. Lastly, I concluded by attacking the chief justice for failing to admit that he was overruling *Roe* when the tests he proposed certainly would have that effect.

The day before the opinion was ready to go to print, the Court at long last, by a revision, admitted that he was voting to overrule *Roe*. I therefore modified my final section to demonstrate just how extreme, in my view, the chief's opinion was. Under his standard, the Constitution would not protect even a woman whose life was endangered by carrying the pregnancy to term. Justice Thomas also joined the chief, and that, I suppose, was no surprise to anyone.

October Term 1992 produced two abortion cases. The first was *Ada, Governor of Guam, against the Guam Society of Obstetricians and Gynecologists*.[11] *Cert* was denied by a vote of six to three on November 20, 1992. The majority did not write. Justice Scalia wrote in dissent and was joined by the chief and Justice White. The Ninth Circuit had held that a Guam statute was unconstitutional on its face when it outlawed all abortions except in cases of medical emergency. I fully expected *cert* would be granted, but, as noted, it fell one vote short. A *facial* challenge is very difficult to sustain, for almost always there are some applications of the statute that are constitutional.

I wondered, however, what influenced O'Connor and Souter and Kennedy here. Were they beginning to be fed up with these cases? This certainly is an instance of a *facial* challenge that was successful.

---

[11] Guam Society of Obstetricians and Gynecologists v. Ada, 962 F. 2d 1366 (9th Cir., 1992), *cert. denied*, 506 U.S. 1011 (1992).

The second case was *Bray against Alexandria Women's Health Clinic,*[12] decided January 13, 1993. Abortion clinics had sued under 42 USC Section 1983, to enjoin the petitioners from conducting demonstrations in their clinics. The Eastern District of Virginia ruled that this was a violation of the statute which prohibited a conspiracy to deprive any person of equal protection or of the privilege and immunities to which he was entitled. The Fourth Circuit affirmed. Our Court reversed by an opinion by Justice Scalia, joined by the chief and Justices White, Kennedy, and Thomas. There was a separate concurrence by Justice Kennedy. Justice Souter filed an opinion concurring in the judgment in part and dissenting in part. Justice Stevens filed a dissent which I joined. Justice O'Connor filed a dissent in which I also joined.

In March 1993, Justice Ginsburg delivered a Madison Lecture at New York University. She picks on *Roe* to a degree and intimates that it would have been better had it been decided on equal protection grounds. Well, my response to this, with all respect, is that it could not have been done on that ground. Justice Douglas was all for privacy, and this was the road to take at that time. What Ginsburg wrote was essentially a professor's appraisal twenty years after the fact. One has to be in the heat of the battle to appreciate what something of that kind really means. Will she stand up to Scalia?

During the October Term 1993, there were two fairly significant abortion cases. The first was *National Organization for Women against Scheidler,* decided January 24, 1994.[13] The basic issue was whether RICO—that is, the Racketeer Influence and Corrupt Organizations Act—required the Enterprise, an anti-abortion group, to have an economic motive. Petitioners RICO and Sherman Act claims had been dismissed by the district court, and this dismissal was affirmed by the Seventh Circuit. There was a split among the courts of appeals, with the Eighth and Second Circuits opting for an economic goal, and the Third Circuit going the other way.

The Supreme Court unanimously held that no such economic motive was necessary. The opinion was by the chief. Justice Souter filed a concurring opinion, which Justice Kennedy joined. Thus, NOW, National Organization for Women, prevailed on the issue. I suppose the chief took the case himself to show impartiality or perhaps to assure that it was written narrowly.

The second case was *Madsen against Women's Health Center*, decided June 30, 1994, at the very end of the term.[14] The case involved anti-abortion protesters in a Florida clinic. The state court had enjoined the protesters from interfering with access and from physically abusing patients. Then by amendment, the injunction established a thirty-six-foot buffer zone and prohibited protesters within 300 feet from approaching patients who did not consent to talk, and a 300-foot buffer zone around the residences of

---

[12] Bray v. Alexandria Women's Health Center, 506 U.S. 263 (1993).
[13] National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994).
[14] Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).

clinic staff. The Florida Supreme Court upheld this ruling against the claim by petitioners that it violated the First Amendment's right to freedom of speech.

The Supreme Court reversed in what essentially was a six-to-three decision. The primary opinion was by the chief. Justice Stevens joined in large part. Justice Souter filed a concurring opinion. Justice Stevens also filed an opinion concurring in part and dissenting in part. Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, and was joined by Justices Kennedy and Thomas.

The principal opinion stated that an injunction must be on the narrowest possible terms. The government interests here were sufficient to justify an appropriately tailored injunction. The thirty-six-foot buffer zone around the entrance and drive was approved, but was disapproved as to property north and west of the clinic. Noise restrictions were upheld. The 300-foot zone on the record burdened more speech than necessary. Scalia announced the dissent at great length from the bench, and thus wound up the term in that fashion.

That brings us up to October Term 1994, which is under way at the present time, and which I shall now review here. What lies ahead? I am optimistic that the joint opinion of Justices O'Connor, Kennedy, and Souter in the *Casey* case will generally stand, and that those three justices will continue to reaffirm *Roe*'s holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages under specified conditions. I even believe that there is a chance that eventually those three justices will come to adopt strict scrutiny and the trimester framework. In short, their robust view of individual liberty and the equal protection undertone of their opinion and their respect for *stare decisis* is, to quote Justice O'Connor's formerly used phrase, on a collision course with the undue burden test. That test, it seems to me, is likely to cause excessive litigation and may force the three justices to reassess their commitment to this subjective standard.

It is important to note, however, that Justice Scalia and Justice Thomas joined the chief justice and Justice White in calling for the overruling of *Roe*. Only one more vote was required. If it were obtained, the politicization of the issue by the Reagan and Bush administrations would have accomplished its obvious goal.

Certainly *Webster* and *Akron* and *Hodgson* and *Rust*, and now *Casey*, in its turn, have whittled away the broad reach of *Roe against Wade*. Despite, however, the earnest and repeated pleas of Solicitor Generals Fried and Starr that *Roe* be overruled, the Court thus far has refrained from that step, even though, in my view, the votes were there. Indeed, it has kept reaffirming it, but the opposing lines have been drawn, and the numbers have been exceedingly close.

I have often suspected that Justice O'Connor has been uncomfortable in the intervening years because of the possibility that she might have to become the fifth and deciding vote. She is a believer in states' rights in the sense that she feels an issue of this general nature should be left to the state legislatures and not be federally constitutionalized. Perhaps she has some kind of commitment made during her

confirmation hearing before the Senate Judiciary Committee. On the other hand, she is a woman and may fear somewhat any accusation of being a traitor to her sex. Some women's organizations would so conclude.

Perhaps I rationalize over much. Nevertheless, we have had twenty-two years of *Roe against Wade*. As I have indicated, personally, I feel it was a correct decision, and I feel it was a necessary one. It has resulted to me in immense good over the intervening years. It abolished the back-alley abortionist. It has given assurance to a generation of women. It has demonstrated the correct rule, in my estimation, for the future. It certainly, in my view, was the right decision in its day. The Court may choose to regress for a time, perhaps for a long time. Do we ever go all the way back?

All this has been a bit of an experience for me personally. I never thought that I would be standing against the combined might of the Roman Catholic Church and the Mormon Church and 1600 Pennsylvania Avenue and other forces, with all of their respected political power. It showed me once again that the federal bench is no place to win a popularity contest, but it has also taught me again that loneliness of decision is just as much present in a multiple-judge court as when a judge is sitting alone. But it has been exciting to be centrally placed in the development and resolution of an issue that is so divisive and emotional, and that has been so politically charged by the executive branch. There have been elements of anguish and there have been elements of reward.

When I first came on the Court, Justice Hugo Black called about an opinion I had circulated, and asked whether he might come to my chambers. He entered waving a copy of the proposed opinion. He said, "I like it. You go for the jugular. Always go for the jugular, but never agonize in an opinion." I took his advice for that case and eliminated the words of agony I had employed. I violated that advice, however, in *Roe,* for the second, third, and fourth paragraphs of the opinion, on page 116 of 410 U.S., state specifically our emotional concerns with the issue. I did that purposefully.

I think that *Roe* and *Doe* are examples of the Court's commitment to protecting against the tyranny of an assume majority. I think the decisions are distinctly in line with the expanding concepts of privacy. There even was some feeling embraced by Douglas and Brennan and Marshall that the constitutional path, as with *Brown against Board of Education*[15] and *Baker against Carr,*[16] was the only one realistically available. *Roe* and *Doe* perhaps are among the most "liberal" decisions in my years on the Court, although some defenders say that they are distinctly conservative.

The days of what we used to call appeal brought about a revolution, and I suppose the abortion decisions were a part of that revolution. I make no apology for the scholarship in those opinions. I did that research personally, and I am certain of its integrity. Indeed, I question some of the early academic writings. I have never seen the scholarship refuted, although it has been condemned in general and conclusory terms.

---

[15] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[16] Baker v. Carr, 369 U.S. 186 (1962).

Roe and *Doe* were Court opinions, not H.A.B.'s. The vote was seven to two. I have challenged the loose description of the cases as H.A.B.'s, but no one member of the Court can lead other members in that way, but perhaps no harm has been done by that description.

It is silly to say that "homosexual problems" should have been considered first. We take cases as they come. It is not realistic to say that women are a majority and take care of themselves through the political process. I think history refutes that assertion. Certainly the voting case that came out of San Antonio not too long ago is an example, where Hispanics were a majority there and yet were granted relief.

The shift historically in the formal positions of the Roman Catholic Church is instructive and, I think, is important. I hope in saying this that I offend no one. It has never been denied. I am certain about the Hippocratic Oath history. I think that the Reagan and Bush position presented by their respective Solicitor Generals Fried and Starr has distinct political overtones. Those presidents, of course, in their annual January address to the Right to Life movement, exacerbated the issue and made it a political one reproduced in the Republican platforms of 1984 and 1988 and 1992.

The presence now of Justice Ginsburg and Justice Breyer produces still another factor. Justice Ginsburg, I think, will stand by *Roe*. Justice Breyer seemingly has been somewhat equivocal. It is almost assured that they will be tested. I feel in my bones, however, that *Roe*'s status is more assured today than it was three years ago, despite the combination of votes represented by the chief justice and Justices Scalia and Thomas.

It's been a great life, really, and I realize it more and more as I have gone over this review of *Roe against Wade* at much too great length, but it's something, of course, I'll always remember and maybe it was a privilege to have been in the midst of the tumult and the excitement as the years went by. I repeat, it's been a great life and a fantastic experience.

[End of recording]