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Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy

Joseph F. Kobylka¹

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.²

– Justice Harry A. Blackmun, *Roe v. Wade*

I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an “abominable crime not fit to be named among Christians.”³

– Justice Harry A. Blackmun, *Bowers v. Hardwick*

When Justice Harry Blackmun left the Supreme Court at the end of its 1993 term – and again upon his death in 1999 – commentators repeatedly painted him as one of the Court's “liberal” Justices, as one of those who retarded the changes in constitutional interpretation sought by Presidents Nixon, Reagan, and Bush. This portrait presented Blackmun as a Justice who, over time, changed pigment, eventually becoming a voice for “the little people.”⁴ According to the conventional wisdom, the reason for this transformation was his opinion for the Court in *Roe v. Wade*⁵ and the battle he waged over the remainder of his tenure to protect the rights it coined. This extended battle took its toll on Justice Blackmun, but it also emboldened him and gave him voice. In

1. Altshuler Distinguished Teaching Professor, Southern Methodist University, Department of Political Science.

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

3. *Bowers v. Hardwick*, 478 U.S. 200, 199-200 (Blackmun, J., dissenting), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

4. Joan Biskupic, *Justice Blackmun Dies, Leaving Rights Legacy*, WASH. POST, Mar. 5, 1999, at A1.

5. 410 U.S. 113.

his personal notes for the Court's conference in *Colautti v. Franklin*,⁶ he wrote "more abortion and more refinement in our theorizing. . . I grow weary of this."⁷ Yet Justice Blackmun's weariness did not dissuade him from writing proportionately more frequently in the area of abortion rights/privacy rights than any other. Because of the prominence of his abortion opinions, *Roe* became the sigma of his judicial career – the snapshot of his legacy to the law.⁸

While *Roe* and abortion rights obviously loom large in Blackmun's legacy, the conventional wisdom is misleading. Viewing Justice Blackmun's career solely through the abortion prism dulls the colors that fill the both the canvas of *his* career and *the Court* on which he sat. It misplaces his ultimate contribution to this particular area of constitutional law because Justice Blackmun made significant contributions in a number of other areas of law. For example, he was the craftsman who first gave shape to the modern era of commercial speech jurisprudence.⁹ He worked with some success to protect the "wall of separation" framed in *Lemon v. Kurtzman*¹⁰ during a period of unrelenting assault from forces of religious accommodation.¹¹ His was also a signal voice in expanding constitutional protection for aliens residing in the United States.¹² Finally, save for the areas of capital punishment and jury selection, both driven by an expanding egalitarianism, he remained a relatively strong pro-state vote

6. 439 U.S. 379 (1979).

7. Blackmun Papers, Box 281. Some of what is noted here is drawn from research conducted by the author in the papers of former Justices Blackmun, Brennan, and Marshall in the Library of Congress, Manuscript Division, Washington, D.C. For purposes of attribution, citations to these papers will be noted by reference to the Justice whose papers have been cited (Blackmun Papers, Brennan Papers, or Marshall Papers) and by the box in which the relevant case folders are found.

8. Linda Greenhouse makes *Roe* a twin hub – along with the decay of his relationship with Warren Burger – in his blossoming as a Justice. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN 72-121* (2005).

9. See *Bigelow v. Virginia*, an interesting a case that involved a state ban on abortion advertising. 421 U.S. 809 (1975). Blackmun's interest here may have been heightened by the abortion nexus, but his joining only in part of Justice Stewart's dissent in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), makes clear that he was leery of a broad reading of the *Valentine v. Chrestensen*, 316 U.S. 52 (1942), which seemed to put commercial speech outside constitutional protection.

10. 402 U.S. 602 (1971).

11. See, for example, Justice Blackmun's opinions in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), *Wolman v. Walter*, 433 U.S. 229 (1977), *Lynch v. Donnelly*, 465 U.S. 668, 726-27 (1984) (Blackmun, J., dissenting), and *Lee v. Weisman*, 505 U.S. 577, 597-609 (1992) (Blackmun, J., concurring), and Joseph F. Kobylka, *The Mysterious Case of Establishment Clause Litigation: How Organized Litigants Foiled Legal Change*, in *CONTEMPLATING COURTS* 93, 93-128 (Lee Epstein ed., 1995).

12. See *Graham v. Richardson*, 403 U.S. 365 (1971). This began *before* his opinion in *Roe v. Wade*, 410 U.S. 113 (1973).

in criminal cases.¹³ In short, Justice Blackmun's career was much more variegated and interesting than an abortion obsession would suggest.

A *Roe*-centric evaluation of Justice Blackmun also distorts his true legacy in the area of personal autonomy. Any analysis of his privacy jurisprudence begins with *Roe*, but cannot *end* with it. Justice Blackmun's legacy in his "sigma" field is not abortion, *per se*, but a more generally-conceived notion of privacy. Ironically, his contribution was originally born in frustration and dissent as the Court was backing away from his cherished *Roe* right, and began to manifest itself as a more mature constitutional doctrine in a context that he mistakenly saw as a gathering storm of doom. Justice Blackmun's success in recasting the privacy right became apparent only after his retirement and death. Ironically, those inheriting and executing his legacy were some of the very Justices that he believed were trying to take it away. Viewing Justice Blackmun's contributions to constitutional law solely from the perspective of *Roe* obscures this larger impact.

Viewing Justice Blackmun's record through lenses grounded by obstetrics creates a third distortion. Justice Blackmun could not and did not grant abortion rights alone, a host of other Justices participated in the decision. Felix Frankfurter, a frustrated soloist himself, put the posture of an individual Justice in this way: "A member of the Supreme Court is at once a soloist and part of an orchestra."¹⁴ This is obviously true while a Justice sits on the Court. For example, Justice Blackmun repeatedly pointed out that while he was *Roe's* *author*, it was not *his* decision but that of seven members of the Court.¹⁵ Part of Blackmun's development as a Justice – and, thus, part of his legacy – resulted from working with a varying cast of other players. This was especially true in the area of abortion rights. The cacophony on the Court that surrounded the *Roe* deliberations, and that which attended to the bargaining contexts occasioned by subsequent cases, worked to muddle Justice Blackmun's articulation of the principled underpinnings of the abortion right. Indeed, the concept of a right of privacy developed very little in the abortion cases, as the Justices spent their energies wrestling with the more "legislative" dimensions of the right: trimesters and the place of state regulation within their confines. A portion of this splashed back on Justice Blackmun's

13. Joseph F. Kobylka, *Blunted Paths of Change: Justice Blackmun and the Constitutional Retrenchment of Criminal Law*, address before the Western Political Science Association, (Mar. 29, 2003). *But see* Stephen L. Wasby, *Justice Blackmun and Criminal Justice: A Modest Overview*, 28 AKRON L. REV. 125 (1995).

14. Letter from Justice Frankfurter to Prof. Charles Fairman (1948), in OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 108 (Philip Elman ed., 1956).

15. "People like to personalize *Roe against Wade* as though it's a Blackmun opinion. . . . [A]nd I've called them on it, because it was a seven-to-two decision." HAROLD KOH, THE JUSTICE HARRY A. BLACKMUN ORAL HISTORY PROJECT 205 (2004), available at <http://lcweb2.loc.gov/cocoon/blackmun-public/collection.html>.

attempts to provide order to this area of law and left his opinions workmanlike, but not constitutionally informed or profound.

The battles over abortion were messy affairs with combatants sometimes switching sides, but in *Bowers v. Hardwick*¹⁶ the Court's treatment of homosexuality was clean. Here, Justice Blackmun found himself in dissent, working on a canvas uncolored by the work of others. Unfettered by cross-pressures from other Justices seeking accommodation of their interests, he was able to focus, for the first time, on the right to privacy unburdened by the analytical apparatus of abortion. In doing so, Justice Blackmun framed and fleshed out a concept of privacy more clearly linked to constitutional text, logic, and precedent. In the uncluttered quiet of dissent, Justice Blackmun crafted what would become his legacy in this area of law.

Even after he leaves the Court, a Justice remains part of the orchestra. Those who succeed him may not copy his style, but often play within the same melodic and rhythmic structures. Justice Blackmun himself, over the course of preparing his *Roe* and *Doe* opinions, eventually fell into the structures put in place in cases ranging from *Union Pacific Railway Co. v. Botsford*¹⁷ to *Stanley v. Georgia*.¹⁸ The Justices he left behind did much the same with *Roe* and, more significantly, *Bowers*. The Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁹ represented a partial "victory" for Justice Blackmun, because it preserved the conceptual nub of the *Roe* right to abortion. However, Justice Blackmun's *real* victory came when Justices O'Connor, Kennedy, and Souter embraced the broader outlines of the privacy right implicitly in *Romer v. Evans*²⁰ and explicitly in *Lawrence v. Texas*.²¹ In the hardest of senses – in the sense that a legacy is something that outlasts its creator – Justice Blackmun's greatest legacy in this area of law is not the elaborated abortion right coined in *Roe*, but the fuller conception of personal autonomy in *Bowers*.

I. THE FIRST BRUSHSTROKES

It is important to recognize the posture from which Justice Blackmun viewed the early cases that came to the Court in approaching his initial consideration of the privacy right. As an appellate judge, Blackmun's job was not to innovate, but largely to apply rules laid down. Occasionally, this led him to

16. 478 U.S. 186 (1986).

17. 141 U.S. 250 (1891).

18. 394 U.S. 557 (1969).

19. 505 U.S. 832 (1992).

20. 517 U.S. 620 (1996).

21. 539 U.S. 558 (2003). O'Connor concurred in the result in *Lawrence*, holding that the statute offended the Equal Protection Clause. *Id.* at 579-85 (O'Connor, J., concurring). This formally kept her from voting to overrule *Bowers*, a case in which she was in the majority. 478 U.S. at 187. The other members of the majority were Stevens, Ginsburg, Breyer, and Souter. 539 U.S. at 561.

results with which he was not personally comfortable but which he thought, were compelled by existing doctrine.

*Jones v. Alfred H. Mayer Co.*²² illustrates his understanding of the appellate role. Sitting on the Court of Appeals for the Eighth Circuit, Blackmun wrote an opinion – in an outlined and mechanical fashion – rejecting a claim by black citizens that a racially motivated refusal to sell a home violated federal law.²³ He explained himself in this way:

It is not for our court, as an inferior one, to give full expression to any personal inclination any of us might have and to take the lead in expanding constitutional precepts when we are faced with a limiting Supreme Court decision which, so far as we are told directly, remains good law.²⁴

He further noted:

It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind. [Blackmun then lists three ways it might do so.] . . . We feel, however, that each of these approaches, at the present time, falls short of justification by us as an inferior tribunal. . . . If we are wrong in this conclusion, the Supreme Court will tell us so and in so doing surely will categorize and limit those of its prior decisions, cited herein, which we feel are restrictive upon us.²⁵

Unfettered, Blackmun might have squared constitutional interpretation with a “just” outcome, but as an appellate judge he felt constrained by his position. When the Supreme Court subsequently overturned his decision in *Jones*, this outcome pleased Blackmun; however he did not see it to be *his* job.²⁶

In campaigning for the presidency, Richard Nixon ran against perceived excesses of the Warren Court and denominated what he would look for in his appointees.

They would be strict constructionists who saw their duty as interpreting law and not making law. They would see themselves as caretakers of the Constitution and servants of the people, not super-

22. 379 F.2d 33 (8th Cir. 1967).

23. *Id.* at 45.

24. *Id.* at 43.

25. *Id.* at 45.

26. A former clerk suggests that *Alfred Mayer* “demonstrates [Blackmun’s] respect for limits on judicial power.” Donna M. Murasky, *Justice Blackmun, in EIGHT MEN AND A LADY: PROFILES OF THE JUSTICES OF THE SUPREME COURT* 147, 147-78 (1990).

legislators with a free hand to impose their social and political viewpoints upon the American people.²⁷

Nixon's conception of judicial restraint was the general conception of the judicial role that Blackmun carried with him to the Supreme Court. Upon his elevation he did not have a philosophy of the Constitution, *per se*, but he did have an understanding of the task of judging. This understanding, framed by his experiences on the Eighth Circuit, set the palette of his approach to judging. It did not well prepare him for his privacy pilgrimage.

The Court's privacy pilgrimage began in *Griswold v. Connecticut*.²⁸ As an appellate judge, Blackmun did not have occasion to deal with the concept, so there is no way to assess his position on the constitutional privacy right prior to serving on the Supreme Court. However, as a Nixon appointee, one would not expect him to be sympathetic to its expansion. Consistent with this expectation, in the first two cases during his tenure implicating *Griswold's* privacy right – *U.S. v. Vuitch*²⁹ and *Eisenstadt v. Baird*³⁰ – Justice Blackmun did little publicly to influence its elaboration of the scope of that right.

A. *Vuitch, Eisenstadt, and Roe: "Here we go into the abortion field"*³¹

The Court first addressed governmental restrictions on abortion in *U.S. v. Vuitch*.³² In *Vuitch*, the district court struck down Washington, D.C.'s prohibition on abortion as unconstitutionally vague.³³ The statute criminalized and made punishable by up to ten years of incarceration provision of "an abortion or miscarriage on any woman, unless . . . done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine."³⁴ After dispatching jurisdictional questions,³⁵ Justice

27. E.W. Kenworthy, *Nixon, in Texas, Sharpens His Attack*, N.Y. TIMES, Nov. 3, 1968, at 1.

28. 381 U.S. 479 (1965).

29. 402 U.S. 62 (1971). This case was decided without the benefit of a trial to develop the factual record.

30. 405 U.S. 438 (1972).

31. Justice Blackmun began his personal notes on *Vuitch* with this sentence. Blackmun Papers, Box 122.

32. 402 U.S. 62.

33. *Id.*

34. *Id.* at 67-68.

35. *See id.* at 65. Different coalitions made up Black's majority on the issues of jurisdiction and merit. Five Justices – Black, Burger, Douglas, Stewart, and White – held that the Court did have jurisdiction to reach the substantive merits of the case. *Id.* at 63. However, Justice Douglas would have struck the law as a violation of due process, *id.* at 74, and Justice Stewart would have upheld it only if interpreted to require the government to defer to the judgment of the doctor as to the necessity of the abortion, *id.* at 97. To give Justice Black a majority on the merits, Justices Harlan and

Black wrote for a five-member majority. He read the word “health” to include “psychological as well as physical well-being,” and held the law to be sufficiently clear to withstand a due process challenge.³⁶ Significantly, Justice Black’s opinion did not mention the rights or liberty of the woman seeking an abortion. Indeed, he concluded his discussion by noting “whether a particular operation is necessary for a patient’s physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.”³⁷ Invisible here were the rights or liberties that attached to the woman; no mention was made of her judgment or choice.³⁸

At first blush, there is little more to *Vuitch* than meets the eye. Although the district court’s opinion rested on vagueness, it also relied on *Griswold v. Connecticut*³⁹ and *Loving v. Virginia*⁴⁰ – cases establishing “fundamental rights” which a state may regulate only in light of a “compelling state interest.”⁴¹ Justice Black’s opinion ignored the lower court’s analysis, noting *Griswold* only in its last paragraph and only then to dismiss its relevance to the case.⁴² At oral arguments, Vuitch’s attorney raised the “basic constitutional right . . . whether or not to bear a child” and grounded it on the district court’s analysis.⁴³ Although the fundamental right argument drew some attention from Justices White, Stewart and Chief Justice Burger, the majority of the hearing focused on vagueness.⁴⁴

Justice Blackmun’s contribution to the decision was minimal. At oral arguments, he asked about the sweep of the law,⁴⁵ noted the ubiquity of ambiguity in the practice of medicine,⁴⁶ and – in response to counsel’s point about the constitutional dimension of a decision to have a child – inquired as to whether this notion of autonomy would encompass a “right” to commit

Blackmun joined the section of his opinion upholding the law against a due process challenge. *Id.* at 63, 67-73.

36. *Id.* at 72-73.

37. *Id.* at 72.

38. In fairness, it should be noted that the law entailed penalties for doctors only. That said, though, Black’s opinion is remarkable in not even giving a passing nod to the woman whose pregnancy gave reason to the law.

39. 381 U.S. 479 (1965).

40. 388 U.S. 1 (1967). In *Loving*, the Court unanimously held that a statute prohibiting the marriage of individuals of different races violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

41. *See id.* at 11; *Griswold*, 381 U.S. at 485.

42. *Vuitch*, 402 U.S. at 72-73.

43. DAVID J. GARROW, *LIBERTY AND SEXUALITY* 477 (1994).

44. *Id.* at 475-80. At conference, the Justices split on both the jurisdictional and vagueness issues, and these divisions frame the final opinions.

45. He asked if a woman who had contracted rubella during her pregnancy could get an abortion under the law, and the attorney representing the U.S. replied that she could not. *Id.* at 475.

46. He noted, for example, that doctors faced with malpractice actions face the same kinds of seemingly vague language as that used in the D.C. law. *Id.* at 477.

suicide.⁴⁷ Blackmun's queries suggest an interest in the privacy/autonomy dimensions of the case, but he did not follow this line in judicial conference, the memo traffic that flowed during circulation of opinions, or in his own separate opinion. His pre-conference memo parallels the brief opinion he ultimately issued finding that the Court lacked jurisdiction and, regardless, the district court's vagueness analysis was unpersuasive.⁴⁸ To give Justice Black a majority, his separate opinion concurred in the judgment on jurisdiction and joined Black's vagueness analysis.

However, Justice Blackmun's private notes expressed concerns about the operation of the D.C. statute. For example, he wrote that if the government enforced the statute, it would have to bear "the burden of proof as to all aspects of the crime," requiring "expert medical testimony."⁴⁹ Justice Blackmun also noted that he would "pump a lot of area into the [statute's preservation of the mother's life or health] exception."⁵⁰ Justice Blackmun's deference to doctors – natural in light of his experience as counsel for the Mayo Clinic – arose indirectly in a memo he sent to Black after the circulation of the latter's fourth draft opinion:

Sometime you might enlighten me as to the significance of the word 'competent' when the statute speaks of a 'competent licensed practitioner of medicine.' I would have assumed that if the physician is licensed, he is, at least presumably, competent, and, therefore, that the word 'competent' is redundant here. If he proves to be incompetent, that, it seems to me, has no bearing on the abortion problem. It would, of course, be important where malpractice is alleged.⁵¹

Justice Blackmun's years at the Mayo Clinic, combined with his tendency to defer to authority, led him to doubt that the state, once it certified a physician, could overrule a doctor's medical judgment.⁵²

In addition to his concern about protecting the "good faith medical judgment" of doctors, Justice Blackmun's pre-conference memo also addressed the underlying privacy issue:

Certainly Griswold, with its approach to the private use of contraceptives, and Stanley v. Georgia, with its approach to private possession of pornographic material, afford potent precedence in the

47. *Id.* at 478. The discussion regarding a right to commit suicide was directly in response to arguments about the constitutional dimension of a decision to have a child.

48. Blackmun Papers, Box 122.

49. *Id.*

50. *Id.*

51. *Id.*

52. Blackmun's focus on the physician would ultimately muddy the locus of the right announced in *Roe*.

privacy field. *I may have to push myself a bit*, but I would not be offended by the extension of privacy concepts to the point presented by the present case.⁵³

However, Justice Blackmun ended this memo by indicating that he was not inclined to be pushed at this point: "If the Court . . . [does] reach the merits, then I am inclined to uphold the statute at this point and to reverse and remand for trial and see what happens."⁵⁴ That, in the end, is what he did. Justice Blackmun was not ready to step out.

The next term in *Eisenstadt v. Baird*,⁵⁵ Justice Blackmun again exhibited little inclination to extend a doctrine protective of autonomy interests. In *Eisenstadt*, the Court struck down a Massachusetts law criminalizing distribution of contraceptives to unmarried persons.⁵⁶ Although Justice Brennan's majority opinion held that the law "violates the rights of single persons under the Equal Protection Clause,"⁵⁷ he also wrote with an eye to the abortion cases. It is important to note that *Eisenstadt* was argued during the same term as *Roe* and *Doe*, and that the *Eisenstadt* drafts circulated while Blackmun was working on these opinions.⁵⁸ David Garrow tells well the story of Justice Brennan's machinations but most significant for present purposes is Justice Blackmun's *complete* detachment from them.⁵⁹

At the *Eisenstadt* conference, five Justices, including Blackmun, indicated that they would uphold the court of appeals decision.⁶⁰ The Court, however, did not settle upon grounds for affirmance, as indicated in a memo from Chief Justice Burger to Justice Douglas which stated that: "discussion with Bill Brennan confirms that no court emerged for any basis of decision, and I concur in your idea of a *per curiam* disposition followed by such opinions as may develop."⁶¹ Justice Brennan persisted, drafting and circulating a signed opinion the day the Court heard oral arguments in *Roe* and *Doe* that struck the Massachusetts statute on grounds that it unconstitutionally provided for "dis-

53. *Id.* (emphasis added).

54. *Id.*

55. 405 U.S. 438 (1972).

56. *Id.* (6-1 decision). Chief Justice Burger dissented; Justices Rehnquist and Powell did not participate in the decision.

57. *Id.* at 443.

58. *See id.* (argued on Nov. 17-18, 1971). Brennan's first draft majority opinion circulated on December 13, 1971. GARROW, *supra* note 43, at 520. His seventh and final draft circulated on March 21, 1972. The Court heard its first set of oral arguments in *Roe* on December 13, 1971, and Blackmun's first draft circulated May 18, 1972 – almost two months after *Eisenstadt* came down and fully five months after Brennan's initial draft made its rounds. *See Roe v. Wade*, 410 U.S. 413 (1971); GARROW, *supra* note 43, at 547.

59. GARROW, *supra* note 43, at 517-21, 541-44.

60. *Id.* at 520.

61. Brennan Papers, Box 255.

similar treatment for married and unmarried persons who are similarly situated.”⁶² In so holding, Justice Brennan extended the *Griswold* privacy right from married couples to single people.

Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁶³

In hindsight, it is remarkable that this passage elicited *no critical comment* from any of the Justices throughout the opinion’s seven circulations or in Chief Justice Burger’s dissenting opinion.⁶⁴ At conference, where Justice Brennan argued that the statute impinged on “the penumbra of *Griswold*,” the only dissenting comments came from Chief Justice Burger and Justice White. Justice White thought that precedent required the Court to stay away from assessing the constitutionality of commercial regulations.⁶⁵ Justice Blackmun did not address the privacy question at all, but rather had difficulties because the law was “not a public health statute,” and was “bothered by [the] fact that . . . a device may be prescribed only by doctors.”⁶⁶ None of the memo traffic in *Eisenstadt* contested the privacy analysis woven into Justice Brennan’s equal protection analysis or the dicta implicitly extending *Griswold* to “the decision whether to bear or beget a child.”⁶⁷ Two weeks after Justice White switched ground and circulated an opinion concurring in judgment because there was no showing that the contraceptive⁶⁸ was dangerous and, hence, regulable with respect to married people, Justice Blackmun sent a memo to him saying, “subject to further writing which may yet be forthcoming, please join me.”⁶⁹ Unmoved by Chief Justice Burger’s dissent, that is where he ended up without writing another word in the case.⁷⁰

62. *Eisenstadt*, 405 U.S. at 454-55.

63. *Id.* at 453.

64. Chief Justice Burger largely focused on a state’s right to regulate medical practices, holding that privacy interests are not violated by “limiting the distribution of medicinal substances to medical and pharmaceutical channels.” *Id.* at 472.

65. GARROW, *supra* note 43, at 579.

66. Blackmun Papers, Box 136.

67. *Eisenstadt*, 405 U.S. at 453.

68. The contraceptive at issue in the case was vaginal foam.

69. Blackmun Papers, Box 122.

70. On May 1, 1972, Chief Justice Burger sent Justice Blackmun a copy of a note from John Hart Ely of Yale Law School that said “Dear Mr. Chief Justice: Though I am not ordinarily given to writing fan letters, I wanted to express my admiration for your recent dissent in *Eisenstadt v. Baird*. It so convincingly destroyed the

Heading into *Roe* and *Doe*, Harry Blackmun had exhibited no interest – in oral arguments, conference discussion, or internal Court memoranda – in an extensive privacy right, let alone one that would encompass a right to an abortion. Although he voted differently than his benefactor Chief Justice Burger in these cases, nothing in his opinions suggested that he was anything other than the cautious and deferential Justice that Nixon sought for the Court. His disinclination continued throughout the rest of the 1971 term, and frames not only his work in those cases, but his larger development as a Justice.

B. *Roe and Doe*

A variety of sources have detailed the dynamics of the Court's deliberations in *Roe v. Wade*⁷¹ and *Doe v. Bolton*.⁷² The cases were initially argued during the Court's 1971 term, and after the conference discussion, it was clear that the Court would strike the Texas and Georgia statutes by votes of 4-3 or 5-2.⁷³ Chief Justice Burger – although most, if not all of his colleagues

majority position I was amazed (and disappointed) it did not gather more votes." Blackmun Papers, Box 136. Given that Justice Blackmun was working on the abortion decisions at this time – his first draft of *Roe* did not circulate until May 18, it seems a fair inference that Chief Justice Burger was trying to keep Justice Blackmun from writing a broad decision – favored by Justices Douglas and Brennan – in the abortion cases. Ironically, Ely became one of the earliest academic critics of Blackmun's *Roe* opinion. See John Hart Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920 (1973).

71. 410 U.S. 113 (1973).

72. 410 U.S. 179 (1973); LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* (1992); GARROW, *supra* note 43; DAVID M. O'BRIEN & BARBARA H. CRAIG, *ABORTION AND AMERICAN POLITICS* (1993); BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* (1996); BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979).

73. Only seven Justices participated in the first iteration of these cases, as Powell and Rehnquist were not sitting on the Court when it heard oral arguments. Four Justices -- Douglas, Brennan, Stewart, and Marshall – unquestionably voted to strike the two statutes. However, depending on whose conference notes are consulted, Justice Blackmun either voted to strike both statutes or to strike Texas' but uphold Georgia's. Justice Douglas's notes had the vote, at least in *Doe*, as 4-3. William Douglas Papers, Box 1589; Brennan's notes show a 5-2 split in both cases. Brennan Papers, Box 420b. Garrow, though, notes that – according to Justice Douglas's clerks – that after the conference discussion of the cases, the Court's senior member “was in an especially good mood, for he had been very pleasantly surprised by Harry Blackmun's comments about both *Roe* and *Doe*.” GARROW, *supra* note 43, at 532. Because of this, even though he had initially considered Potter Stewart for authorship of the opinions, he was now inclined to assign them to Justice Blackmun. *Id.* at 533. If this is true, then Justice Douglas's reaction to Chief Justice Burger's assignment was more a result of anger at the Chief Justice's “theft” of the assignment than concern about how Blackmun would write the opinions. It is also possible, however, that Justice Douglas

thought him to be in dissent – assigned the opinion to Justice Blackmun. This elicited a sharp internal row between Justice Douglas and Chief Justice Burger,⁷⁴ as Douglas feared that Burger was trying to steal the opinion to gain a narrow ruling. In the face of Chief Justice Burger's assertion of his right to assign the opinions,⁷⁵ Justice Douglas dropped the matter, in part, no doubt, to avoid alienating Justice Blackmun.

Justice Blackmun was clearly jittery about the cases, whether because of the *contretemps* over the assignment, the difficulties of the issue, hesitancy borne of his "newness" on the Court, or a combination of these factors. On January 18, he sent a memo to the conference nominating *Roe* and *Doe* for reargument.⁷⁶ With no takers, he finally circulated a memorandum four months later.⁷⁷ It struck the Texas statute, but on vagueness rather than privacy grounds.⁷⁸ In his cover memo, Justice Blackmun noted that his *Doe* draft would follow shortly, though "I am still tentatively of the view, as I have been all along, that the Georgia case merits reargument before a full bench."⁷⁹

saw Chief Justice Burger's assignment to Blackmun as an indication that Blackmun was not as settled on the cases as his conference comments indicated. This concern, in light of Justice Blackmun's close attachment to Chief Justice Burger, and Burger's comment in his response to Justice Douglas's angry memo that these "sensitive cases . . . are quite probable candidates for reargument," Brennan Papers, Box 281, would be understandable.

74. A letter from Justice Douglas to Chief Justice Burger stated:

As respects your assignment in this case, my notes show there were four votes to hold parts of the Georgia Act Unconstitutional and to remand for further findings, e.g., on equal protection. Those four were Bill Brennan, Potter Stewart, Thurgood Marshall and me.

There were three to sustain the law as written, you, Byron White, and Harry Blackmun.

I would think, therefore, that to save future time and trouble, one of the four, rather than one of the three, should write the opinion.

Justice Douglas to Chief Justice Burger, Dec. 20, 1971, Brennan Papers, Box 281.

75. "At the close of the discussion of this case, I remarked to the Conference that there were, literally, not enough columns to mark up an accurate reflection of the voting in either [of the cases]. I therefore marked down no votes and said this was a case that would have to stand or fall on the writing, when it was done." Blackmun Papers, Box 151.

76. *Id.* This memo surely sent shivers through the chambers of the other *Roe* and *Doe* majority members, as Chief Justice Burger's assignment to Justice Blackmun could suggest that he "knew" something that the others did not: Blackmun, when push came to shove, would not strike the statutes. If so, and if the case was reargued with the two new Nixon appointees sitting, a one-time 5-2 decision to extend the privacy right to cover the abortion choice could turn into a 5-4 vote supportive of substantial state regulation.

77. *Id.*

78. *Id.*

79. *Id.*

A week after *Roe* circulated,⁸⁰ Justice Blackmun circulated his *Doe* memorandum.⁸¹ As it rested on privacy grounds, this draft was more to the liking of his colleagues.⁸² Pleased by this change in analytical focus, and fearing reargument, Justices Douglas, Marshall, Brennan, and Stewart joined Blackmun immediately, giving him the five votes needed for a majority.⁸³ However, on May 31, Justice Blackmun circulated a memo saying that “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.”⁸⁴ Chief Justice Burger immediately endorsed this call stating: “This is as sensitive and difficult an issue as any in this Court in my time and I want to hear more and think more when I am not trying to sort out several dozen other difficult cases.”⁸⁵ Justices Douglas, Brennan, and Marshall opposed reargument, but newly seated Justices Powell and Rehnquist voted for reargument, making five votes to hold the case over.⁸⁶ Despite Justice Douglas’s threat to air his version of the events that led to the reargument order,⁸⁷ the majority held firm, and the case was reargued before a full Court on October 11, 1972.⁸⁸

The summer months saw the Justices scatter. Justice Blackmun repaired to the library at the Mayo Clinic to research the medical history of abortion

80. The *Roe* draft circulated amidst a flurry of memos from other majority justices suggesting, as Justice Douglas put it, that “we should meet what Bill Brennan calls the ‘core issue.’” *Id.*

81. GARROW, *supra* note 43, at 550.

82. *Id.* at 551.

83. *Id.*

84. Blackmun Papers, Box 151.

85. *Id.*

86. *Id.*

87. Justice Douglas had stated “If the vote of the Conference is to reargue, then I will file a statement telling what is happening to us and the tragedy it entails.” *Id.*

88. Justice Douglas did draft and circulate an angry, caustic, and pointed dissent to the reargument order. In it, he recounted his perception of Chief Justice Burger’s manipulation of the opinion assignment (“When the minority seeks to control the assignment, there is a destructive force at work in the Court”), suggested that Burger was trying to change the decision on the merits (“The plea that the cases be reargued is merely another strategy by a minority somehow to suppress the majority view with the hope that exigencies of time will change the result”), and that Burger was more concerned with the electoral prospects of Richard Nixon than the “integrity” of the Court (“This is an election year. . . . To prolong these *Abortion Cases* into the next election would in the eyes of many be a political gesture unworthy of the Court.”). Draft Dissent from Order to Reargue, June 13, 1972, Blackmun Papers, Box 151.

Although Douglas’s dissent was not published in the U.S. Reports, its substance was published in the *Washington Post* on July 4, 1972. Although Chief Justice Burger thought Justice Douglas – despite his assurances to the contrary – or a clerk leaked the draft dissent, according to Garrow, Potter Stewart was the source for the story. GARROW, *supra* note 43, at 558.

and tasked one of his clerks to write this research into the *Roe* and *Doe* opinions.⁸⁹ When the cases were reargued the next October, the contending attorneys turned over no new ground.⁹⁰ Strategically, the primary issue of consequence was whether Justice Blackmun would hold the line drawn in his May circulations.

At the conference Justice Blackmun began his comments with: "I am where I was last spring."⁹¹ Further, perhaps because of the more favorable reception given his *Doe* opinion the prior term, he noted that he would rely on a privacy rationale and "make Georgia the lead case."⁹² If Chief Justice Burger had hopes that the new members of the Court would put the brakes on any broad-ranging ruling, Lewis Powell quashed them when announced that he was "basically in accord with Harry's position,"⁹³ though he was inclined to lead with *Roe*.⁹⁴ Justice Rehnquist voted to uphold both statutes, leaving the Court divided six to two with Chief Justice Burger between the blocs with no balancing or moderating role to play.⁹⁵ Indeed, as a majority quickly joined Justice Blackmun's circulations, Chief Justice Burger held off joining until January 18, 1973 – four days before the Court announced its decision.⁹⁶

89. GARROW, *supra* note 43, at 558-59. Blackmun served as the General Counsel for the Mayo Clinic in Rochester, Minnesota, from 1950-1959. GREENHOUSE, *supra* note 8, at 18. This was not the first time Justice Blackmun sought out the Mayo Clinic in this case. On December 17, 1971, after receiving the opinion assignment, he wrote the Mayo Librarian and inquired if "your well-equipped library [would] have anything about the history of abortion. You can imagine why I ask." Blackmun Papers, Box 151.

90. EPSTEIN & KOBYLKA, *supra* note 72, at 190-93.

91. Chief Justice Burger was clearer in his opposition of the Texas statute, while holding the Georgia case to be "much more complex." Brennan Papers, Box 420b. In Blackmun's hand-written notes for his conference comments, he wrote, "I did not expect any change, though some of you perhaps did." Blackmun Papers, Box 151. It is not clear whether he actually uttered these words to his brethren.

92. Blackmun Papers, Box 151.

93. *Id.*

94. According to Justice Powell's biographer, the Virginian knew well his vote prior to the Court took up the case in October.

He returned from Richmond in the fall of 1972 with his mind already made up. . . . There was no equivocation, no debate, no exchange of memoranda, no tentative drafts. He would vote to strike the abortion laws because he thought it intolerable that the law should interfere with a woman's right to control her own body during early pregnancy.

JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 346 (1994).

95. Justice Brennan's notes show the conference vote at 7-1-1, with Justice White passing and Justice Rehnquist in dissent. Brennan Papers, Box 420b. Eventually White joined Rehnquist. Justice Blackmun's tally had it 6-1-2, with Rehnquist "agreeing essentially with White." Blackmun Papers, Box 151.

96. Chief Justice Burger's foot dragging here resulted in a second press "leak" in these cases: *Time* magazine, in an article that hit the newsstands the weekend before the cases came down, detailed the as-yet-to-be-announced opinions. The source for

On January 22, 1973, the Court handed down its *Roe* and *Doe* decisions.⁹⁷ The *New York Times* noted their salient features, including: Justice Blackmun's authorship, the trimester framework, and the grounding in the doctor's and woman's right to privacy.⁹⁸ It also noted Justice White's dissent which accused the majority of "an exercise of raw judicial power."⁹⁹ What it could not report, because it could not foretell, was the reaction the decisions – forever known simply as "*Roe*" – would prompt or the effect they would have on Justice Blackmun's legacy.¹⁰⁰

II. THE POORLY PACKED BAGGAGE OF *ROE* AND *DOE*

It is ironic that Justice Blackmun wrote the path-breaking abortion decision considering his resistance to whatever inclinations he had to extending the privacy right in *Vuitch* and *Eisenstadt*. It is also stunning that a "strict constructionist," such as Justice Blackmun purported to be, paid so little attention to the constitutional grounding of his opinions. Only portions of four paragraphs address the "constitutional" basis for the expansion of the privacy right, and these are perfunctory at best:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as . . .

the piece was a Powell clerk who unwittingly spoke to a correspondent thinking that the opinions would come down by the coming weekend. Chief Justice Burger's last-minute opinion delayed announcement of the cases, and thus background became a leak. See JEFFERIES, *supra* note 94, at 343-46.

97. The announcement of the decisions did not dominate that day's news. Although it made the front page of the *New York Times* the next day, articles on President Johnson's death, Henry Kissinger's trip to Paris to begin the Vietnam peace talks, and boxer George Foreman's thrashing of Joe Frazier joined it. N.Y. TIMES, Jan. 23, 1973, at 1.

98. Warren Weaver, Jr., *National Guidelines Set by 7-to-2 Vote*, N.Y. TIMES, Jan. 23, 1973, at 1, 20.

99. *Id.* at 20. The *New York Times* also included a number of excerpts from the opinions. *Id.*

100. In his oral history, Blackmun contended that he was surprised by the reaction to the case. When Koh asked if he thought "this is the biggest case I've written since I've been on the Court?" Blackmun responded, "No, I didn't feel that at all. I just didn't appreciate it at the time" KOH, *supra* note 15, at 204. This is clearly wrong. Six days before the decision was announced, Blackmun proposed to the conference that he release his eight-page oral announcement to the press to keep it from "going all the way off the deep end." Blackmun Papers, Box 151. Powell thought this a fine idea, but Brennan nixed it: "Our practice in the past has always been not to record oral announcements of opinions in order to avoid the possibility that the announcement will be relied upon as the opinion or as interpreting the filed opinion. I think that policy is very sound and, important as the Abortion Cases are, I do not think we ought to depart from that policy." Brennan Papers, Box 281.

[1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty,” are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education.¹⁰¹

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.¹⁰²

The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . [A] state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.¹⁰³

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.¹⁰⁴

A former Blackmun clerk has argued that the modern Court is now “bereft of persuasion and its crucial ingredients: reason, consistency, and principle.”¹⁰⁵ Regardless of what one thinks of Justice Blackmun's opinions for the Court as constitutional policy, his opinions in *Roe* and *Doe*, demonstrate pre-

101. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (citations omitted).

102. *Id.* at 153.

103. *Id.* at 153-54.

104. *Id.*

105. EDWARD D. LAZARUS, *CLOSED CHAMBERS* 517 (1998).

cisely this. He was not up to the task of crafting the contours of an evolving constitutional concept in the 1971 and 1972 terms.

Three factors account for the jurisprudential emptiness of these opinions: the lingering effect of Blackmun's appellate style, the muddled constitutional grounding of the newly announced right, and the failure of his senior colleagues to help craft a more stable doctrinal basis for the right. The result indelibly marked Justice Blackmun and the Court on which he sat, and ultimately worked to obscure his profound impact on modern constitutional development by narrowly tying his legacy to *Roe*.

A. The Appellate Hang Over

Justice Blackmun's *Roe* and *Doe* opinions rested on the privacy right articulated in *Griswold*, but did not explain the connection between the abortion choice and the choice to use contraceptives. Justice Blackmun's opinions essentially took the abortion-privacy linkage as a given, reflecting the cautious jurisprudential style of a long-time appellate court judge. The opinions read as if the derivation of an abortion right flowed directly and logically from the penumbral privacy right of *Griswold*. This odd sort of jurisprudential conservatism – writing as if existing precedents compel a conclusion in a case easily distinguishable on factual grounds rather than doing the close analysis necessary to make that link – suggests a Justice still viewing his relationship to the law through the constrained lens of an appellate judge.

Justice Blackmun's initial draft of the *Roe* opinion struck down the Texas statute because it dealt “with a procedure that is exempt from criminality only if it is ‘for the purpose of saving the life of the mother.’ So viewed, we encounter difficulties of great consequence under the vagueness challenge.”¹⁰⁶

Does it mean that he may procure an abortion only when, without it, the patient will surely die? Or only when the odds are greater than even that she will die? Or when there is a mere possibility that she will not survive? . . . Further, who is to exercise that judgment – the physician alone in light of his training and experience, or a group of committee of his peers, or a medical association, or a hospital review committee? And when is the saving of a life to be measured in the time scale? Must death be imminent? Or is it enough if life is prolonged for a year, a month, a few days, overnight?¹⁰⁷

Given these ambiguities, the law, “with its sole criterion for exemption as ‘saving the life of the mother,’ is insufficiently informative to the physi-

106. Blackmun Papers, Box 151, *Roe* draft at 14.

107. *Id.* at 14-15.

cian . . . who must measure its indefinite meaning at the risk of his liberty, and . . . cannot withstand constitutional challenge on vagueness grounds.”¹⁰⁸

Justices Brennan and Douglas immediately circulated memos finding the draft “memorandum” inadequate to its task.¹⁰⁹ Byron White’s draft dissent, circulated on May 29, did the same in noting that if the statute in *Vuitch* was not vague, then the more specific language of the Texas statute could not be vague.¹¹⁰ The obvious *Vuitch* problem raises an intriguing question: why did Justice Blackmun rely on vagueness to strike the law on narrow grounds when the conference majority seemingly settled on a privacy rationale?¹¹¹ Here, Justice Douglas’s concerns about a stolen decision become clear: one could infer that Chief Justice Burger assigned the opinion to Justice Blackmun hoping to forestall a broad ruling on the privacy question. This would create a smaller constitutional wake – a result comfortable for a cautious, fact-bound former appellate judge and closer to the preference of the Chief Justice¹¹² – and invite states to tailor more specific laws that would pass constitutional muster before a Court reinforced with two new Nixon appointees.

The comments that the then junior Justice Blackmun made at the initial *Roe/Doe* conference suggest the cautiousness with which he approached the cases. As to *Roe*, he said,

Can a state outlaw all abortions? If we accept fetal life, there’s a strong argument that it can. But there are opposing interests: the right of the mother to life and mental and physical health, the right of parents in the case of rape, the right of the state in the case of incest.

108. *Id.* at 15.

109. Blackmun Papers, Box 151. Perhaps because he was not sure his approach would not command a majority – recall that Chief Justice Burger wrote Justice Douglas that “this was a case that would have to stand or fall on the writing” – or perhaps because he was leaning toward having the cases reargued, Justice Blackmun’s initial *Roe* and *Doe* opinions circulated under the title of “Memorandum of Justice Blackmun” rather than the more usual “Justice Blackmun delivered the opinion of the Court.” Blackmun Papers, Box 151.

110. The statute in *Vuitch* permitted abortion only for “preservation of the mother’s life or health.” *U.S. v. Vuitch*, 402 U.S. 62, 67-68 (1971).

111. The conference consensus on privacy grounds was clear in Justice Brennan’s notes, but Justice Blackmun’s show only Justices Brennan and Marshall explicitly resting on privacy. Blackmun Papers, Box 151. Significantly, Blackmun’s notes on Burger’s conference comments have the Chief Justice contending that the statute was “not at all vague” and concluding “I have trouble in finding Texas statute unconstitutional.” Blackmun Papers, Box 151.

112. Indeed, it is striking that in Justice Blackmun’s first *Roe* draft he did not get to the merits of the case until the 11th of 17 pages. Blackmun Papers, Box 151. Devoting almost two-thirds of an opinion to factual and jurisdictional questions smacks of a lower court judicial style. *Id.*

I don't think there's an absolute right to do what you will with [your] body. This statute is a poor statute that. . . infringes too far on her.¹¹³

Even more circumscribed were Justice Blackmun's comments regarding *Doe*:

Medically, this statute is perfectly workable . . . I would like to see an opinion that recognizes the opposing interests in fetal life and the mother's interest in health and happiness. I would be perfectly willing to paint some standards and remand for findings as to how it operates: does it operate to deny equal protection by discriminating against the poor?¹¹⁴

Justice Douglas's December concern about Chief Justice Burger's assignment is easy to understand; nowhere in Justice Blackmun's discussion of the cases is there any sense of a privacy right, as it scarcely scratched constitutional ground.

Circulated a week after his *Roe* draft, Justice Blackmun's *Doe* memorandum was more to the liking of the other Justices in his majority. While he struck the Georgia statute on privacy grounds, he merely advanced a tentative argument. Taking up the privacy issue, he wrote that "a woman's interest in making the fundamental decision whether or not to bear an unwanted child is within the scope of personal rights protected by the Ninth and Fourteenth Amendments."¹¹⁵ However, this right – though "fundamental" – was not absolute: "The pregnant woman cannot be isolated in her privacy. At some other point in between [conception and quickening], another being becomes involved and the privacy the woman possessed has become dual rather than sole."¹¹⁶ Dismissing the vagueness claims based on *Vuitch*, he returned to the privacy right, weighing it against state requirements for performance of abortions only in accredited hospitals, concurrence of two other doctors with the woman's doctor's decision to perform the abortion, and hospital committee approval of the procedure. Although he found these provisions unconstitutional, Justice Blackmun's rejection of them was extremely deferential to medical professionals.¹¹⁷ He also made clear that state governments had broad authority to regu-

113. Brennan Papers, Box 420b.

114. BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM* 299 (1990).

115. Blackmun Papers, Box 152, *Doe* draft at 8.

116. *Id.* at 9.

117. Note, for example, two brief passages from the *Doe* draft:

[Doe's] approach obviously is one founded on suspicion and one that discloses a lack of confidence in the integrity of physicians. . . . [It] is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions and the concern of his feminine patients.

Id. at 15-16.

late the practice of abortion services.¹¹⁸ It was as if he wanted to limit the effect – in law and perhaps in his mind – of this exercise of judicial power, an understandable posture for an appellate judge deciding a constitutional question.

B. A Conceptually Empty Right

Not only was Justice Blackmun hesitant to use the privacy right to allow abortions, he also lacked a clear conception of that right. His hesitancy and confusion regarding the privacy right muddled his draft memoranda, and persisted into the final opinions. Long after *Roe* and *Doe* came down, Justice Powell stated that they were “the worst opinions I ever joined.”¹¹⁹ Whether this is a post hoc effort at face-saving or a true reflection of his feelings at the time,¹²⁰ it is clear that their loose mooring in studied constitutional analysis weakened the persuasive force of Justice Blackmun’s opinions.¹²¹

And the good physician – despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are ‘good’ – will have a sympathy and an understanding for the pregnant woman patient that probably is not exceeded by any of those who participate in other areas of professional counseling.

Id. at 17.

118. To further emphasize this point, he circulated an addendum to his opinion on May 26 “

[T]o specify . . . what remains in the Georgia statute and what we uphold as constitutional today, are the provisions (a) that an abortion is a crime except an abortion performed in a licensed hospital by a licensed physician ‘based upon his best clinical judgment that an abortion is necessary’; (b) that the physician reduce his judgment to writing; (c) that the writing be timely filed for confidential record-keeping with the hospital and with the Director of the State Department of Public Health; and (d) that the hospital may refuse an abortion patient and a physician, a hospital staff member, or a hospital employee my refuse, on moral or religious grounds, to participate in the abortion procedure.

Justice Blackmun, Memo to Conference, May 26, 1972, Blackmun Papers, Box 152.

119. JEFFERIES, *supra* note 94, at 341.

120. It merits noting – as does Jeffries – that when Justice Blackmun’s draft opinions circulated in the 1972 Term, Justice Powell wrote him “As I have said to you, I am generally in accord with your fine opinions in these cases” (Dec. 5, 1972), and “I commend you on the exceptional scholarship of the opinions” (Jan. 4, 1973). The day the cases came down, he wrote Dottie Blackmun, the Justice’s wife, a note saying, “Harry has written an historic opinion, which I was proud to join.” He also sent Justice Blackmun favorable letters from a Virginia newspaper with a note saying “These should be gratifying to you, especially when much of what you receive through the mail is so irrational.” Blackmun Papers, Box 151.

121. This, of course, has produced an academic cottage industry: arguments against *Roe* and the abortion right, against *Roe* but in favor of the right it articulated,

The subsequent Blackmun *Roel/Doe* drafts vary little in the way in which they embed the abortion right in the privacy right. Once he fixed on it as the basis with which to strike the statutes, Justice Blackmun never elaborated on the grounding of the right, its scope, or why it included the abortion choice. Although some scholars see the final opinions to be stronger in their development of the right than the *Doe* draft,¹²² no significant evolution occurred in its conceptualization. In his May 1972 *Doe* draft, as in his final opinions, Justice Blackmun cited a host of cases in addition to *Griswold* and *Eisenstadt* in support of the decision,¹²³ however, he offered no analysis explaining *why* the logic of these precedents extended to abortion. Justice Blackmun concluded his “analysis” by *asserting*:

We agree that a woman’s interest in making the fundamental personal decision whether or not to bear an unwanted child is within the scope of personal rights protected by the Ninth and Fourteenth Amendments, as articulated in the decisions cited above.¹²⁴

Justice Blackmun’s draft labeled the right not to bear a child as “fundamental,”¹²⁵ but rejected as “unpersuasive” the “contention . . . that the woman’s right to make the decision is absolute – that Georgia has either no valid interest in regulating it, or no interest strong enough to support any limitation upon the woman’s sole determination.”¹²⁶ To underscore the latter point, he continued, “The pregnant woman cannot be isolated in her privacy. . . . The situation is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or the right to procreate, or private education, with which [prior cases] were respectively concerned.”¹²⁷ The “heart of the matter” was that, at some point in the pregnancy, “another being becomes involved and the privacy the woman possessed has become dual rather than sole. The woman’s

and in favor of both. This division in the academy’s reaction to the opinion fanned the flames of the controversy it created.

122. For example, Bernard Schwartz writes “so far as the [*Doe*] draft contained intimations on the matter, they tended to support state substantive power over abortions. . . . [It, in a manner] utterly unlike the final Blackmun opinions, stressed the countervailing interest in fetal life.” SCHWARTZ, *supra* note 114, at 301-02.

123. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Loving v. Virginia*, 388 U.S. 1 (1967); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891); *Boyd v. United States*, 116 U.S. 616 (1886).

124. Blackmun Papers, Box 152, *Doe* draft at 9.

125. *Id.* at 13.

126. *Id.* at 9.

127. *Id.* at 10.

right of privacy must be measured accordingly.”¹²⁸ However, if “the situation is inherently different from marital intimacy,” the question arises as to *why* it was insufficiently different to preclude abortion from constitutional protection.¹²⁹

This question remained unaddressed in the final opinions. While *Roe* became the lead opinion, the logic of the earlier *Doe* draft still dominated its privacy discussion, with the inclusion of the trimester framework being the only significant change. When he first tilted with framing the scope of the right, he wrote:

The heart of the matter is that somewhere, either forthwith at conception, or at “quickening,” or at birth, or at some other point in between, another being becomes involved and the privacy the woman possessed has become dual rather than sole. The woman’s right of privacy must be measured accordingly. It is not for us of the judiciary, especially at this point in the development of man’s knowledge, to speculate or to specify when life begins.¹³⁰

Justice Blackmun retained the logic of balancing privacy and state interests and carried over much of this language to the final *Roe* draft.¹³¹ Although the trimester demarcations were significant additions to the opinion, they did nothing to develop the privacy right they parsed. In asserting that “the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and . . . protecting the potentiality of human life,”¹³² Justice Blackmun drew constitutional *lines* but did not advance a constitutional *argument*. The trimester analysis, and the detailed specificity with which it defined the gestational period, served to underline the conceptual thinness of the right on which it sat. Justice Blackmun gave more attention to the edifice than its foundation. The lack of explicit analysis made a “judicial” decision look more like a “legislative” one, because its analysis assumed, but did not develop, the privacy right at its core.¹³³

128. *Id.*

129. *Id.*

130. *Id.*

131. *See Roe v. Wade*, 410 U.S. 113, 159 (1973) (“We need not resolve the difficult question of when life begins.”).

132. *Id.* at 162.

133. The Justices were aware that this was a problem. In the memo that accompanied the circulation of the first 1972 Term draft of *Roe*, Blackmun wrote:

In its present form it contains dictum, but I suspect that in this area some dictum is indicated and not to be avoided. You will observe that I have concluded that then end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.

Nov. 21, 1972, Blackmun Papers, Box 151. Potter Stewart, in his memo in response to Blackmun’s circulation, noted concern with “the specificity of the

Parallel to this conceptual vacuousness was Justice Blackmun's confusion over the locus of the abortion right: did it reside in the woman, the doctor, or both? The first *Roe* draft struck the Texas law because it too vaguely put at "risk . . . [the doctor's] liberty," leaving the rights of the woman as barely an afterthought.¹³⁴ Although he addressed "the fundamental personal privacy right of Mary Doe" in his first *Doe* draft,¹³⁵ Justice Blackmun's balancing approach vested a great deal of authority for the exercise of this right in her physician.¹³⁶ Even when *Roe* – involving a statute silent on the doctor-patient relationship – became the lead opinion the next fall, he continued to locate the abortion right in a relational context.

- “. . . these are factors the woman and her responsible physician necessarily will consider in consultation”¹³⁷
- “. . . for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy”¹³⁸
- “. . . the attending physician decides in consultation with his patient that in his best medical judgment her pregnancy should be terminated, that judgment is sufficient”¹³⁹
- “Up to that point [end of first trimester], the abortion decision inherently is a medical one, and the responsibility for that decision must rest with the physician”¹⁴⁰

With the addition, at Thurgood Marshall's suggestion,¹⁴¹ of a second trimester to the analysis, Justice Blackmun's final opinion included this guideline

dictum. . . . I wonder about the desirability of the dicta being so inflexibly 'legislative.'" Dec. 14, 1972, Blackmun Papers, Box 151. The final opinion, which added viability into the mix, was even more "legislative" in changing the bar for state regulation depending on the stage of the pregnancy. *See Roe*, 410 U.S. at 163-64 (1973).

134. Blackmun Papers, Box 151.

135. *Id.*, *Roe* draft at 13.

136. One could argue that this emphasis was, in part, a function of the specific statute at issue in that case: Georgia required, among other things, that a "hospital abortion committee" certify the need for an abortion.

137. *Id.* at 38.

138. *Id.* at 40.

139. *Id.* at 47.

140. *Id.* at 49.

141. *See* Justice Marshall's memo to Justice Blackmun and the Conference, Dec. 12, 1972. Marshall Papers, Box 99.

[F]or the period of pregnancy prior to this 'compelling' point [the end of the first trimester], the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.¹⁴²

The right to have an abortion must be the woman's in some sense, as it is *her* pregnancy and *her* decision that brings the doctor into play. However, Justice Blackmun – perhaps because of the time he spent earlier in his career with doctors at the Mayo Clinic – carved a prominent place for doctors the woman's exercise of her privacy right. The dichotomy of these two rights resulted in ambiguity, which compounded the other ambiguities of the decision and further muddled its analysis. The final *Roe* and *Doe* opinions did make two things clear. There is a constitutional right to an abortion, and governments can regulate it at certain points to advance certain interests. There is a reason for this, and it helps to explain the glaring holes that riddle the *Roe* analysis.

C. Court Dynamics

The ambiguity and indefiniteness of Justice Blackmun's musings about the contours of the privacy right carried over, *with little improvement or clarification*, into his final *Roe* and *Doe* opinions. In part, the problems in the *Roe* and *Doe* opinions can be attributed to Justice Blackmun's newness on the Court, as he received the initial assignment in his first full term. Further, nothing in his appellate court career prepared him to write an opinion expanding a constitutional right. However, other members of his majority were not laboring under these burdens. Thus, it is surprising that not one of the Justices helped guide Blackmun to a stronger constitutional justification for the right minted in *Roe*. Though the analytical lapses present in *Roe* and *Doe* must ultimately rest on Justice Blackmun's shoulders, their contribution to his legacy rests, in part, on the result-oriented failings of his senior colleagues.

Justice Blackmun's brethren received his initial *Roe* draft coolly because it did not rest on privacy grounds. The day Justice Blackmun circulated the initial draft, Justice Brennan wrote a memo urging him to move beyond the vagueness rationale. He reminded Justice Blackmun that the conference majority believed that:

[T]he Constitution required the invalidation of abortion statutes save to the extent they required that an abortion be preformed by a licensed physician within some limited time after conception In the circumstances, I would prefer a disposition of the core constitutional question This does not mean, however, that I disagree

142. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

with your conclusion as to the vagueness of the Texas statute. I only feel that there is no point in delaying longer our confrontation with the core issue on which there appears to be a majority and which would make reaching the vagueness issue unnecessary.¹⁴³

Justice Douglas followed the next day saying it was “puzzling,” given the conference discussion, that Blackmun got the assignment in the first place, and at any rate, “we should meet what Bill Brennan calls the ‘core issue.’”¹⁴⁴ So worried was Justice Douglas that either Justice Blackmun’s draft would be forced on the conference or the case would be held over for reargument (with Justices Powell and Rehnquist sitting this time), that on May 22, Douglas suggested in a private memo to Justices Brennan, Stewart, White, and Marshall that they consider joining his proposed opinion.¹⁴⁵

The May 25 circulation of the *Doe* draft ended Douglas’s gambit. Specifically because it rested on a privacy rationale, this draft garnered more enthusiasm. Fearing reargument or a decision on grounds other than privacy, Justices Marshall, Douglas, and Brennan all joined the opinion immediately; though each said they would later make suggestions. Justice Marshall’s memo captures the flavor of their joiners: “I have several ideas which I will suggest to you when I get them into more concrete form, but with or without any suggestions I might make I wholeheartedly join your opinion.”¹⁴⁶ On May 29, Justice White circulated a brief dissent, but the next day Justice Stewart joined Justice Blackmun.¹⁴⁷ With four of seven sitting Justices now with him, Stewart’s joiner gave Blackmun a majority opinion. Despite this, however, Justice Blackmun circulated a memo calling for reargument of the two cases.¹⁴⁸ Justices

143. Marshall Papers, Box 98:10.

144. Blackmun Papers, Box 151.

145. Why he included White in this distribution – he was clearly not a supporter of the privacy rationale, or even of striking the statutes – is not clear. It could have been a mistake on Douglas’s part, or it could have been an appeal to the other four non-Nixon appointees to avoid political manipulation of the Court by Chief Justice Burger – a fear Douglas clearly had. See Justice Douglas’s threatened dissent to the reargument order, circulated June 13, Blackmun Papers, Box 151.

146. Marshall Papers, Box 99.

147. Justice Stewart’s memo, 30 May, demonstrates that his joiner, like that of other members of the majority, was conditional: “Confirming our telephone conversation of yesterday, I am in basic agreement with your memorandum in this case, subject to modifications which I understand you intend to make.” Blackmun Papers, Box 282.

148. May 31, 1972, Blackmun Papers, Box 151. The memo stated:

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. I feel this way because:

Brennan, Douglas, and Marshall immediately circulated memos opposing reargument.¹⁴⁹ However, Chief Justice Burger and Justices Powell, Rehnquist, and White joined Blackmun, setting the case for reargument.

Judicial scholars have closely examined the intra-Court dynamics, such as those in play here, that characterize the Court's work.¹⁵⁰ Perhaps feeling events sliding away from him, Chief Justice Burger may have privately prevailed on Justice Blackmun to withdraw his opinions in hopes of gaining a majority for a position supportive of abortion regulation the next term.¹⁵¹ Blackmun's long personal history with Burger – combined with his insecurity in his still new job,¹⁵² the tepid reaction that greeted his *Roe* draft, and Justice

1. I believe, on an issue so sensitive and so emotional as this one, the country deserves the conclusion of a nine-man, not a seven-man court, whatever the ultimate decision may be.

2. Although I have worked on these cases with some concentration, I am not yet certain about the details. Should we make the Georgia case the primary opinion and recast Texas in this light . . . ?

Id.

149. Justice Douglas's memo said, in part,

I feel quite strongly that they should not be reargued. . . . I know you have done yeoman service and have written two difficult cases, and you have opinions now for a majority, which is five. . . . [T]hose two opinions of yours . . . are creditable jobs of craftsmanship. . . . While we could sit around and make pages of suggestions, *I really don't think that is important. The important thing is to get them down.*

William O. Douglas to Conference, May 31, Blackmun Papers, Box 151 (emphasis added).

150. *See generally* LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964)

151. Under this logic, Chief Justice Burger would have counted Justices Powell and Rehnquist – not on the Court when the cases were argued – along with White and himself forming the core of the new majority, with Justice Blackmun coming along for the ride. Clearly this is what Justice Douglas's proposed dissent from the reargument order assumed to be the strategy. Marshall Papers, Box 99:1. Justice Douglas was not alone in thinking this, as a hand-written note from Justice Brennan to Douglas (dated only June 1972) makes clear:

I will be God-damned! At lunch today, Potter expressed his outrage at the high handed way things are going, particularly the assumption that a single Justice if CJ can order things his own way, + that he can hold up for nine anything he chooses, even if the rest of us are ready to bring down 4-3. He also told me . . . he resents CJ's confidence that he has Powell + Rehnquist in his pocket.

Douglas Papers, Box 1589.

152. Snyder has called this the "freshman effect." *See* ELOISE SNYDER, *THE SUPREME COURT AS A SMALL GROUP* (1958). Although she defined this as seeking a middle ideological ground between factions until a Justice feels comfortable with his or her job, there is no reason why it cannot also apply to cleaving to a clearly developed faction on the Court. Either way, the new Justice holds to a position that in-

White's strong dissent – would clearly make him a ripe target for such a strategy. If this was the Chief Justice's strategy, it failed miserably. At the post-reargument conference, once Justice Blackmun said "I am where I was last spring" and Justice Powell voted with him, the game was over.¹⁵³ While Justice Blackmun still wanted to make *Doe* the lead case and strike the Texas statute for vagueness,¹⁵⁴ Justice Powell's expressed desire to lead with *Roe* and decide it on privacy grounds caused Justice Blackmun to alter his position and make *Roe* the lead opinion.¹⁵⁵

These dynamics are interesting, but the story here from the perspective of Justice Blackmun's construction of the abortion right is that from the moment that he announced that he would strike both statutes on privacy grounds, no Justice questioned the tenuous constitutional mooring of the abortion right. Much discussion ensued, especially after the circulation of the revised *Roe* draft, but it focused exclusively on the necessary *partitions* required by the right and not on its conceptual *architecture*. Once Justice Blackmun committed to strike the statutes on privacy grounds, and throughout the two months of drafting and revising, the conversation among Justices in the majority centered on the point(s) at which states could regulate the abortion choice. Thus, the opinion became increasingly top-heavy because the analysis as to when the right applied was built on a thin pedestal of constitutional justification.

In the cover memo to his first 1972 term draft of *Roe*, Justice Blackmun wrote, "You will observe that 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."¹⁵⁶ Once the majority began the substantive discussions of the draft,¹⁵⁷ they focused exclusively on the point at which the state's interests became sufficiently "compelling" to justify interfer-

creases his or her initial comfort level. Because of Blackmun's long relationship with Burger, the latter would be a logical person with whom to join.

153. Blackmun Papers, Box 151.

154. Here again we see Justice Blackmun's caution. He told the conference that, if they struck the Texas statute on privacy grounds, the "abortion laws in a majority of our states fall." Brennan Papers, Box 420b. Because he was not eager for this sort of "complete disorganization," he suggested putting the more general privacy issue off for another day.

155. Blackmun Papers, Box 151.

156. *Id.*

157. Discussion began about two weeks after the November 22 circulation of the draft opinion. Justice Douglas (November 24), Justice Stewart (November 27), and Justice Powell (December 5) all endorsed Blackmun's general approach relatively quickly. GARROW, *supra* note 43, at 581. Conspicuously absent from the early endorsements were Brennan and Marshall. *Id.* Garrow contends that this was a function of the close camaraderie that had developed between Blackmun's clerks and the clerks from these chambers: *communications among them were back channel. Id.*

ence in the woman-doctor decision.¹⁵⁸ On December 11, Justice Blackmun circulated a memo to the conference raising viability as a “better choice” for the point at which a state’s interest becomes compelling.¹⁵⁹ He noted:

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.¹⁶⁰

The memo makes clear that he was only floating the *possibility* of a change – “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 . . . general agreement with the circulated memorandum” – and asking simply for “reactions.”¹⁶¹

The reactions came quickly. That day, Justice Douglas circulated a memo stating, “I favor the first trimester, rather than viability.”¹⁶² For the first time in writing Justices Marshall and Brennan weighed in over the next two days. On December 12, Justice Marshall noted that he favored viability, as some women, especially those without good medical care, might not know they were pregnant during the first trimester.¹⁶³ Justice Brennan’s points, delivered the next day in a detailed three page memo, were more searching, but focused only on the regulation permissible under the new right, not on the right itself.¹⁶⁴ He commended Justice Blackmun on his “excellent medical and legal discussion,” but questioned viability as the point “beyond which a state may appropriately regu-

158. This concern came out of Brennan and Marshall’s chambers, and Brennan brought it up in a conversation with Blackmun in the first week of December. *Id.* at 582.

159. *Id.*

160. Blackmun Papers, Box 151.

161. *Id.*

162. *Id.*

163. *Id.*

164. The first draft focused on the woman; it said that “the unborn have never been recognized [sic] in the law as persons in the whole sense” and thus assumed that the State’s interest centered on the woman. It appears that this memo was sent *only* to Blackmun – it does not appear in Marshall’s papers, and the designation at the bottom of its last page is “Mr. Justice Blackmun” rather than “cc: conference.” Brennan Papers, Box 281. Brennan could have sent this memo only to Blackmun in an effort to avoid prompting other responses that could further muddle the question and also slow down the progress being made toward bringing the case quickly. *Id.*

late abortion practices.”¹⁶⁵ Making clear that he had “no objection to moving the ‘cut-off’ point . . . to a point more closely approximating the point of viability,” Justice Brennan’s suggestions focused on a rationale that supported pushing a strong right later into the pregnancy.¹⁶⁶

In particular, Justice Brennan focused on what he saw as a clash of the “state interests” articulated in the first draft – maintaining medical standards and protecting the health of women – and using “viability” as an outer point of regulation.¹⁶⁷ The fact that viability “is a concept that focuses upon the fetus rather than the woman” was at the core of his criticism.¹⁶⁸ Justice Brennan wrote, “It seems to me that our reasons for the choice of a ‘cut-off’ point (which I think we all agree must be found) should be consistent with the state interest which allow the states to select a ‘cut-off’ point.”¹⁶⁹ To accomplish this he asked:

[C]ould we not simply say that at that point in time where abortions become medically more complex, state regulation – reasonably calculated to protect the asserted state interest of safeguarding the health of the woman and maintaining medical standards – becomes permissible.¹⁷⁰

Justice Brennan further stated:

By way of discussion, we might then explain that this point usually occurs somewhere between 16 and 24 weeks (or whatever the case may be), but the exact “cut-off” point and the specifics of the narrow regulation itself are determinations that must be made by a medically informed state legislature. Then we might go on to say that as some later stage of pregnancy (i.e., after the fetus becomes “viable”) the state may well have an interest in protecting the potential life of the child and therefore a different and possibly broader scheme of state regulation would become permissible.¹⁷¹

Two days later, Justice Blackmun announced that he would revise the opinion to “associat[e] the end of the first trimester with an emphasis on health, and associat[e] viability with an emphasis on the State’s interest in potential life.

165. *Id.*

166. *Id.*

167. *Id.*

168. See Blackmun Papers, Box 151, *Roe* Draft at 47.

169. Brennan Papers, Box 281.

170. *Id.* Although not stated explicitly within his memo, this question also served to avoid the question of fetal rights generally.

171. *Id.*

The period between the two points would be treated with flexibility.”¹⁷² Clearly, Justice Brennan’s suggestions had a major impact on the *Roe* opinion.

Following the revisions inspired by Justices Marshall and Brennan, Blackmun circulated the revised drafts on 21 December.¹⁷³ Regarding these drafts, which differed from the final opinions only in a few clerical and stylistic points, he wrote that:

I have tried to recognize the dual state interests of protecting the mother’s health and of protecting potential life. This, I believe, is a better approach than that contained in the initial memorandum. I have tried to follow the lines suggested by Bill Brennan and Thurgood.¹⁷⁴

Responding to a concern of Chief Justice Burger’s about the “rights of the father,” he noted that he addressed the point in a footnote, but added, all too presciently, “I suspect there will be other aspects of abortion that will have to be dealt with at a future time.”¹⁷⁵ The opinion issued on January 22.¹⁷⁶

From the moment of Justice Blackmun’s initial 1972 term circulation – indeed, from that of the *Doe* circulation of the previous term – the Justices in the majority ignored the opinion’s weak constitutional grounding. Gaining the desired result, they ignored the *right* on which it was based and simply wrangled over the details of a permissible regulatory scheme.

Roe was fated to be a controversial opinion regardless of how well it was written. However, it is unclear how different the reaction of scholars and the general public would have been if Blackmun’s opinion parsed the constitutional locus closely rather than simply asserting that wherever privacy was found in the Constitution, it was sufficiently broad to cover the abortion choice.¹⁷⁷ The blame must ultimately rest with Blackmun, because he wrote

172. Blackmun Papers, Box 151. Interestingly, Potter Stewart wrote Blackmun the day after Justice Brennan’s (unknown to him) memo and expressed concern with “the specificity of the dictum – particularly in its fixing the end of the first trimester as the critical point for valid state action. . . . I wonder about the desirability of the dicta being quite so inflexibly ‘legislative.’” He concluded that he wanted to give “states more latitude to make policy judgments” *Id.* However, after circulation of the *more* legislative draft incorporating the trimester analysis, he wrote Blackmun that “over the week-end I re-read your memoranda in these cases. I think your most recent circulations are even better than the original ones. . . . I have now decided to discard the rather lengthy concurring opinion on which I have been working” *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *See Roe v. Wade*, 410 U.S. 113, 153 (1973) (“ . . . 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 . . .”).

the opinion. In focusing solely on the result, Brennan and the rest of the majority missed an opportunity to ground the new “right” more firmly in the logic of constitutional law.

Justice Brennan and the rest of the restive majority Justices simply sought to get a good result down instead of tending carefully to developing a coherent justification for the abortion right. In doing so, they encouraged Justice Blackmun to bring forth a decision light on legal reasoning and heavy with legislative dicta. This left the top-heavy *Roe* vulnerable to the passage of Justices and time. Instead of tutoring an unsteady new Justice in crafting new constitutional doctrine, the majority simply seized the result they wanted and ran.

III. FENCING THE ABORTION RIGHT: BLACKMUN PLAYS DEFENSE

Much of Justice Blackmun’s subsequent work in this area involved efforts to patch the holes left by *Roe*’s analytical weaknesses. As he grew more practiced in his role as a Justice, he increasingly took the lead in defining areas of the right capable of legislative regulation and defending it from efforts at whole-scale evasion. These efforts led him to personalize his attachment to *Roe*, commit himself to a rhetorical style that was sometimes poignant and other times shrill, and vest the abortion right with dimensions of egalitarianism that were not part of its initial formulation. While defending *Roe* from its critics became a mission for Justice Blackmun, it did nothing to steer its justification towards more cogent constitutional analysis. Instead, he sought to bolster *Roe* with additional precedent by fighting skirmishes as they came before the Court.

The post-*Roe* period was personally and judicially difficult for Justice Blackmun, as he became the target of broad-based and sustained public attention for the first time in his life. Letters, both supportive of and hostile to his opinion, poured into his chambers. Demonstrators picketed and protested when he visited colleges and universities to give speeches.¹⁷⁸ Politicians used his name to advance their fortunes. No longer was he an obscure governmental official; he became a public metaphor for abortion. For the 65 year-old “White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs”:¹⁷⁹

It was an experience I’d never had before, that I, just a shrimp growing up on the East Side of St. Paul, Minnesota, would encounter this national reaction to something that I’d done, be in the midst of such a controversy, and it was something to live through, actually. . . .

178. In his discussions with Justice Blackmun, he frequently referenced the public response to him as the author of *Roe*. KOH, *supra* note 15, at 203-07. Indeed, in his papers on *Roe*, there are ten folders devoted to letters, newspaper clippings, and commentary on the decision. See Blackmun Papers, Boxes 151, 152, & 153.

179. John R. Walz, *The Burger-Blackmun Court*, N.Y. TIMES MAGAZINE, Dec. 6, 1970, at 61.

The mail right now [1995] has dropped off, but every now and then something will happen and there will be another avalanche . . . there are several boxes in my storeroom that I never did get to read, but I'm guessing 75,000 to 80,000 letters now have come in . . .¹⁸⁰

Instead of following Hugo Black's admonition – "Always go for the jugular . . . Never agonize in an opinion"¹⁸¹ – Blackmun wallowed in the reactions, reading his mail, and occasionally standing on the steps of the Supreme Court building and anonymously watching protests aimed at him.

[A] lot of [the comments in the letters were] abusive. And I think you can think of any name to call someone, and I have been called it. Butcher of Dachau, murderer, Pontius Pilate, King Herod, you name it. It's all in there. Some of it is very intemperate.¹⁸²

Justice Blackmun agonized, perhaps masochistically, by subjecting himself to the *Roe* reaction.

The judicial tensions *Roe* created exacerbated Justice Blackmun's personal agony. Some states reacted to the decision by passing new legislation to evade, fully or partially, *Roe*'s requirements and effects. The resulting appeals demonstrated cleavages among the Justices of the *Roe* majority and, upon occasion, Court decisions that Justice Blackmun thought undermined the meaning of *Roe*. When he found himself in dissent in cases interpreting *Roe*, his critics were no longer just outside the Court; he was working among them. Forces at work in American society exacerbated these on-bench tensions.

What are best dubbed "political" difficulties added to the personal and judicial tensions Blackmun faced. For the growth of the "religious right" and the rise to prominence of social conservatives in the Republican Party, *Roe* became a political lightning rod. Demonized by televangelists Pat Robertson and Jerry Falwell, Justice Blackmun became synonymous with a perceived breakdown in the moral order of American society. Ronald Reagan used the *Roe* decision, along with the Court's school prayer cases, to build his constituency in his runs for the presidency. *Roe* was in peril with "movement" conservatives in ascendance, Reagan in the White House, and divisions on the Court. Sandra Day O'Connor's confirmation in 1981 as Reagan's first appointment to the Court heightened the threat. Justice Blackmun took this increasing threat personally.

Between its 1972 and 1985 terms,¹⁸³ the Supreme Court heard 20 cases raising issues of privacy and sexual autonomy.¹⁸⁴ The majority were abortion

180. KOH, *supra* note 15, at 205.

181. *Id.* at 157.

182. Interview by Daniel Schorr with Justice Harry Blackmun, United States Supreme Court Justice, in Washington, D.C. (Nov. 24, 1982), in *AMERICAN GOVERNMENT: READINGS AND CASES 500* (Peter Woll ed., 8th ed. 1984).

183. This period brackets the post-*Roe* remainder of Chief Justice Burger's tenure.

cases (16), with two raising issues of homosexuality,¹⁸⁵ and one each involving marriage¹⁸⁶ and contraception.¹⁸⁷ Three of these cases were decided without addressing the merits of the constitutional claims.¹⁸⁸ Of the 17 cases decided on their merits, 14 dealt with abortion regulations.¹⁸⁹

Table 1 summarizes the post-*Roe* Burger Court cases, their disposition, and Justice Blackmun's posture in them. It shows that in slightly over one-half of the cases, the Court upheld the regulations in question.¹⁹⁰ Justice Blackmun joined only one of these decisions, *Simopoulos*, where the Court upheld a state requirement that second-trimester abortions be performed in licensed outpatient clinics. He dissented in all five of the Medicaid funding cases, and from decisions that upheld second-physician and most parental consent requirements. In contrast to the Court, Justice Blackmun would have only upheld one of the 14 challenged statutes. He was increasingly out of sync with the majority in "his" area. Prior to 1981, the reasons for this were simple: Lewis Powell, Potter Stewart, and John Paul Stevens. When these Justices broke from Blackmun, they were joined by *Roe* dissenters White and Rehnquist and, frequently, by Chief Justice Burger (whose attachment to *Roe* was always tenuous).¹⁹¹ In 1981, when O'Connor replaced Justice Stewart,

184. *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *New York v. Uplinger*, 467 U.S. 246 (1984); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Bellotti v. Baird (Bellotti I)*, 428 U.S. 132 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

185. See *Bowers*, 478 U.S. 186; *Uplinger*, 467 U.S. 246.

186. See *Zablocki*, 434 U.S. 374.

187. See *Carey*, 431 U.S. 678.

188. Two of these dealt with abortion, *Singleton*, 428 U.S. 106, and *Bellotti I*, 428 U.S. 132, and one with homosexuality, *Uplinger*, 467 U.S. 246.

189. See *Thornburgh*, 476 U.S. 747; *Simopoulos*, 462 U.S. 506; *Planned Parenthood of Kansas City*, 462 U.S. 476; *Akron*, 462 U.S. 416; *Matheson*, 450 U.S. 398; *Zbaraz*, 448 U.S. 358; *Harris*, 448 U.S. 297; *Bellotti II*, 443 U.S. 622; *Colautti*, 439 U.S. 379; *Poelker*, 432 U.S. 519; *Maher*, 432 U.S. 464; *Beal*, 428 U.S. 132; *Planned Parenthood of Cent. Mo.*, 428 U.S. 52; *Bigelow*, 421 U.S. 809.

190. The "omnibus" cases involved an array of abortion regulations. As such, it was not unusual for the Court to uphold some of their provisions (e.g., reporting and record-keeping requirements, adult consent, and facility standards) even when striking down others. *Planned Parenthood of Kansas City*, 462 U.S. 476, however, is almost Solomonic in its splitting of the issues, and it is coded accordingly.

191. Note Justice Douglas's fears at the time of the reargument order in *Roe*, Chief Justice Burger's conference statement after the second argument of *Doe* ("I'm

the center of the Court tipped further away from Blackmun. Justice O'Connor's arrival did little to change established decisional dynamics, but it did add a Justice who, in her first writing on the subject, rejected the trimester framework by memorably stating: "The Roe framework, then, is clearly on a collision course with itself."¹⁹² As time went on, Justice Blackmun's grasp on the direction of the development of the *Roe* right, never firm, grew weaker.

TABLE 1: 1974-85 TERM "PRIVACY/AUTONOMY" CASES

Case Title	Subject	Regulation Held			HAB
		Unconst	Const	Other	
<i>Bigelow v. Virginia</i> (1975)	Advert.	X			Maj
<i>Planned Parenthood of Cent. Mo. v. Danforth</i> (1976)	Omnibus	X			Maj
<i>Singleton v. Wulff</i> (1976)	Funding			X	Maj
<i>Bellotti v. Baird</i> (1976)	Consent			X	Maj
<i>Carey v. Population Services Int'l</i> (1977)	Birth Control	X			Maj
<i>Beal v. Doe</i> (1977)	Funding		X		Dis
<i>Maher v. Roe</i> (1977)	Funding		X		Dis
<i>Poelker v. Doe</i> (1977)	Funding		X		Dis
<i>Zablocki v. Redhail</i> (1978)	Marriage	X			Maj
<i>Colautti v. Franklin</i> (1979)	Viability	X			Maj
<i>Bellotti v. Baird II</i> (1979)	Consent	X			Dis
<i>Harris v. McRae</i> (1980)	Funding		X		Dis
<i>Williams v. Zbaraz</i> (1980)	Funding		X		Dis
<i>H.L. v. Matheson</i> (1981)	Consent		X		Dis
<i>City of Akron v. Akron Ctr. for Reproductive Health</i> (1983)	Omnibus	X			Maj
<i>Planned Parenthood Assoc. v. Ashcroft</i> (1983)	Omnibus	X	X		Con/Dis
<i>Simopoulos v. Virginia</i> (1983)	Facilities		X		Maj
<i>New York v. Uplinger</i> (1984)	Gay Rights			X	Maj
<i>Thornburgh v. Am. Coll. of OBGYN</i> (1986)	Omnibus	X			Maj
<i>Bowers v. Hardwick</i> (1986)	Gay Rights		X		Dis

inclined to hold the statute constitutional," Blackmun Papers, Box 153), and his joiner of the *Roe* opinion only 4 days before the case was announced. In his last term on the Court, Chief Justice Burger formally renounced the *Roe* approach in his dissent in *Thornburgh*, 476 U.S. at 785. Justices Stewart, Powell, and Stevens, despite breaks from Justice Blackmun, never questioned the legitimacy of the abortion right or the correctness of the trimester approach.

192. *Akron*, 462 U.S. at 458.

Justice Blackmun's volume of writing provides one measure of the significance he attached to this area. In 11 of the 17 formally decided cases, Justice Blackmun wrote four times for a majority, once concurring and dissenting, and six times in dissent.¹⁹³ He wrote in 10 of the 14 abortion cases. Significantly, his other opinion came in *Bowers v. Hardwick*,¹⁹⁴ where the Court first addressed the rights of homosexuals. These opinions, and the accompanying memoranda in his files, illustrate a deeper sense of Justice Blackmun's growing personal attachment to *Roe*, a change in his rhetorical style, and an egalitarian evolution in his conception of the abortion right.

A. Personal Attachment

In the four abortion cases that followed *Roe* and *Doe*, Justice Blackmun wrote for the majority. In terms of the right to an abortion, *Planned Parenthood of Central Missouri v. Danforth*¹⁹⁵ was the most significant.¹⁹⁶ The conclusion of Justice Blackmun's pre-conference note for *Danforth* registers both his sensitivity to the criticism *Roe* was taking, and his unflagging commitment to it: "All in all, I can anticipate that I'll be chewed upon at length during these abortion arguments. My position as heretofore taken remains much the same."¹⁹⁷ Even before *Danforth*, Justice Blackmun was hypersensitive in protecting *Roe*. For example, a note he sent to Justice Douglas regarding the latter's majority opinion in *Kahn v. Shevin*¹⁹⁸ shows just how closely attentive he was to *Roe*: "I am somewhat disturbed by the addition to footnote 10 on page 5. Am I correct in thinking that the reference there to *Roe v. Wade* is not consistent with what was said in footnote 67 at page 165 of that opinion?"¹⁹⁹ Justice Douglas removed the footnote and Justice Blackmun remained on guard.

Two general strategies manifested Justice Blackmun's protective attachment to *Roe*. Not only did he write extensively in abortion cases, but he was very attentive to the references to abortion cases in the opinions of others. The *Kahn* example illustrates the degree of his sensitivity. Justice Douglas strongly supported the *Roe* right, and yet Blackmun's chambers scanned

193. He also wrote for the majority in *Bellotti I*, 428 U.S. 132, and *Singleton*, 428 U.S. 106, cases not decided on the merits.

194. 478 U.S. 186.

195. 428 U.S. 52 (1976).

196. Justice Blackmun wrote, at the outset of his pre-conference note, that "[t]hese are the cases concerning the new Missouri abortion statute adopted after our 1973 decisions and in a serious attempt to restrict the impact of those opinions." Blackmun Papers, Box 199.

197. *Id.*

198. 416 U.S. 351 (1974) (upholding a property tax exemption for widows that was not available to widowers). Justice Blackmun joined Justice Douglas's majority opinion. *Id.*

199. Brennan Papers, Box 321.

even his footnotes in unrelated cases in an effort to limit any potential damage.²⁰⁰ Such concern was also evident in a hand-written note on his joinder memo to Justice Marshall in *Zablocki v. Redhail*:²⁰¹

I would feel a good bit happier if the citation of *Maher v. Roe* near the top of page 9 were eliminated. The citation, I suppose, is accurate enough, but despite giving lip service to the rule the Court, I feel, in that case disregarded serious infringement of fundamental liberties, and I prefer not to cite it. I suspect that you probably feel the same way about that case.²⁰²

As cracks in the *Roe* coalition developed over time, such asides came more frequently. Note, for example, his private memo to Justices Marshall and Brennan in *H.L. v. Matheson*:²⁰³

I fear that the forces of emotion and professed morality are winning some battles. That "real world" continues to exist "out there" and I earnestly hope that the "war," despite these adverse "battles," will not be lost. You and Bill Brennan, of course, have been most supportive.²⁰⁴

The importance Blackmun placed on *Roe* was also manifest in his interactions with other Justices. Acutely aware that O'Connor's appointment reduced the size of the pro-*Roe* side of the Court, Justice Blackmun sought to maintain the remaining six votes attached to its essential architecture. For example, in *Matheson*,²⁰⁵ his conference notes contain this comment: "CJ will write the dissent and will seek to attract PS and LP."²⁰⁶ Justice Blackmun's prediction came true and Chief Justice Burger's dissent became a majority. The cracks exposed in the Medicaid funding and minors' consent cases were open to exploitation, and Blackmun fought efforts to peel Justices away from the *Roe* core.

At this point, Justice Powell was the primary target of Justice Blackmun's effort. Justice Blackmun was clearly disappointed with his perceived departure from the *Roe* fold in *Maher*,²⁰⁷ *Poelker*,²⁰⁸ and *Beal*,²⁰⁹ and Jeffries argues that this drove a wedge into their personal relationship.

200. *Id.*

201. 434 U.S. 374 (1978).

202. Blackmun Papers, Box 263.

203. 450 U.S. 398 (1981).

204. Blackmun Papers, Box 330.

205. *Matheson*, 450 U.S. 398.

206. Blackmun Papers, Box 330.

207. *Maher v. Roe*, 432 U.S. 464 (1977).

208. *Poelker v. Doe*, 432 U.S. 519 (1977).

209. *Beal v. Doe*, 432 U.S. 438 (1977).

[Powell] did not have Blackmun's intensity of feeling. Consequently, although he consistently supported *Roe*, he did not follow Blackmun into insisting that every aspect and detail of the law of abortion be resolved in its favor. . . . Thus it was that Powell and Blackmun grew apart. . . . Blackmun's odd stridency, his tight-lipped resentments, the occasional outbursts that punctuated his normally mild demeanor, seemed to Powell puzzling and childish. Over time, Powell retreated into a wary formality, delicately trying to avoid anything that would set Blackmun off. He did not always succeed. Powell once went through some weeks in which Blackmun did not speak to him, not even to acknowledge a greeting as they passed in the corridor. . . . Whatever the cause, the tension was resolved by Powell's 1985 prostate surgery at the Mayo Clinic, when an uncontrolled hemorrhage nearly killed him. Blackmun's concern washed away his earlier resentment, and warm relations were reestablished. From then until Powell's retirement three years later, he and Blackmun were on good terms, but always lurking beneath the surface was Powell's awareness of a gulf between them, a psychological divide that was but one small facet of Blackmun's parental protectiveness for *Roe v. Wade*.²¹⁰

In his oral history with Koh, Justice Blackmun vehemently denied any rupture with Justice Powell, saying "I personally felt closer to Justice Powell than almost anyone else on the Court" and calling the account quoted above "hogwash."²¹¹ Regardless, there was the tension between the two on these questions, and Justice Blackmun knew that holding Justice Powell was essential to maintaining *Roe*. Even when the Justices disagreed over its application in the years after the funding cases, Blackmun sought to keep the waters as calm as possible.²¹² The abortion cases decided after Justice O'Connor came to the Court best illustrate Justice Blackmun's knowledge that Justice Powell's vote was essential to *Roe*.

In the 1982 term cases, Justice Powell wrote for the Court in *Akron*²¹³ and Justices Brennan and Blackmun actively encouraged his reaffirmance of *Roe* even as they failed to convince him to adopt their reading of the consent regula-

210. JEFFERIES, *supra* note 94, at 370.

211. KOH, *supra* note 15, at 364-65.

212. For example, in telling Justice Powell that he was joining Justice Stevens's opinion in *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979), Blackmun told Powell, "I have been through these woods before and I know how sticky and difficult the going is in this general area." Blackmun Papers, Box 293. Justice Powell wrote for a separate four-justice grouping that included Justices Burger, Stewart, and Rehnquist. *Bellotti II*, 443 U.S. at 622.

213. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

tions in *Planned Parenthood v. Ashcroft*.²¹⁴ In the former, they privately coordinated their letters of suggestions for Justice Powell's opinion, lest they do something that would push him away from voting to strike the Ohio statute. The two employed the same tactics in *Simopoulos v. Virginia*,²¹⁵ with Justice Brennan sending Justice Blackmun a draft of a letter to Justice Powell requesting changes in his draft opinion: "What would you think of sending something like the attached to Lewis but without circulating it to the conference?"²¹⁶ In *Thornburgh*,²¹⁷ when Chief Justice Burger formally renounced *Roe* and voted with the *Akron* dissenters,²¹⁸ holding Justice Powell was crucial to reaffirming the *Roe* right, and Blackmun acted accordingly.²¹⁹ An increasingly embattled Blackmun would do what it took to protect the architecture of *Roe*.²²⁰

B. Rhetorical Style

Justice Blackmun wrote workman-like opinions for the Eighth Circuit and carried this style over to his early days on the Supreme Court and into his initial writings in the area of abortion.²²¹ His *Danforth* opinion was a straightforward development and application of what constitutes a legitimate state interests in light of the trimester framework of *Roe*.²²² However, as the Court upheld Medicaid funding restrictions, Justice Blackmun, finding himself dissenting for the first time in an abortion case, loosened his pen. Perhaps be-

214. *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983).

215. *Simopoulos v. Virginia*, 462 U.S. 506 (1983).

216. Blackmun Papers, Box 366.

217. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

218. In Justice Blackmun's papers for this case there is an undated note indicating his disgust with Chief Justice Burger: "We reaffirm the general principles of *Roe v. Wade*, a 7-2 decision of the Court from which the Chief Justice – for reasons of his own – has now defected." Blackmun Papers, Box 434.

219. In fact, Justice Blackmun privately sent Powell a draft of his majority opinion and, at Powell's suggestion, removed a critical reference to the Solicitor General's request that the Court overrule *Roe*. Blackmun Papers, Box 434. Blackmun's personal attachment to *Roe* led him to put the rebuke in the opinion; his desire to protect it led him to remove the comment to appease Powell.

220. Justice Blackmun wrote, when the Court deliberated over *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) three years later: "This is a personal attack on me." Blackmun Papers, Box 536.

221. Justice Blackmun's earliest opinions came with numbered paragraphs. His *Roe* opinion was not this mechanical, but with its lengthy discussion of the history of abortion and then the elaboration of the trimester scheme, it will not register in the annals of well-crafted judicial prose.

222. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976). The need to accommodate Justices Powell and Stewart, manifesting the indication of the limited nature of their endorsement of *Roe*, no doubt contributed to this.

cause of Justice Blackmun's parentage of the right, Justice Brennan asked him if he would write the dissenting opinions in these cases.²²³ Justice Blackmun chose to write on his own, and his prose was scorching. From his perspective, the Court had sold out *Roe*. He argued:

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 v. Wade*, and *Doe v. Bolton* by a substantial majority and with some emphasis, I had thought said they could not do directly.²²⁴

From there, the prose took a turn previously unprecedented in Justice Blackmun's opinions.

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 she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: "Let them eat cake." . . . This is not the kind of thing for which our Constitution stands. . . . 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 evenhandedly and, in so doing, would better the lot of the poorest among us.²²⁵

Nowhere here is there any deepening of the grounding of the abortion right. Nowhere is there any constitutional analysis. His focus on poverty could have raised equal protection issues, but four years earlier he had rejected poverty-based distinctions as of constitutional significance in joining Justice Powell's opinion in *San Antonio Independent School District v. Rodriguez*.²²⁶ He made no effort here to reconsider that analysis. The storm of Justice Blackmun's anger did not lead him, at this point, to upend any previously rooted precedents or extend his constitutional analysis. His fury,

223. On the requesting memo, Justice Blackmun wrote, "Called – said I preferred to write secondarily. He will write the primary." Blackmun Papers, Box 240. One day after Justice Brennan circulated his dissent, Justice Blackmun sent out the first and only draft of his.

224. *Beal v. Doe*, 432 U.S. 452, 462 (1977) (Blackmun, J., dissenting) (citations omitted).

225. *Id.* at 462-63.

226. 411 U.S. 1 (1973).

though, was clear, and it appeared in his dissenting opinions in all subsequent abortion cases and, in time, those in other areas of law.²²⁷

Justice Blackmun's rhetorical tempest had a private as well as a public effect. It further cemented Justice Blackmun to Justices Brennan and Marshall. These themes resurfaced in Justice Blackmun's memos to Justice Marshall in *H.L.*, and colored their interactions on consent statutes for minors. Believing the Court to be drifting away from him, Justice Blackmun found common cause with two Warren Court holdovers.

C. Egalitarianism

When the Court allowed states to prohibit the use of Medicaid funds for abortions, Justice Blackmun began to consider the effect of wealth and on the exercise of constitutional rights. Significantly, he had thought this through prior to the 1976 term cases: In his pre-conference memo in *Singleton v. Wulff*²²⁸ – a funding case on its merits – he noted that the lack of standing of the physicians who brought the case was determinative “no matter how apparently unconstitutional the statute may seem.”²²⁹ A heightened awareness of the contextual dimensions of the exercise of individual rights also informed his position in consent cases and in the marriage case. In *Zablocki*, he noted that “[t]his, then, comes down to a discrimination based on wealth. It seems to me that the Boddie case completely controls. We are dealing here with a fundamental right.”²³⁰

Ironically, while increasingly sensitive to egalitarian concerns in factual contexts involving wealth and age, Justice Blackmun's conception of the core of the abortion right had yet to focus itself on the woman. *Roe*'s rendition of the right placed it, in significant part, in the woman's doctor.

- [F]or the period of pregnancy prior to this “compelling” point [the end of the first trimester], *the attending physician, in consultation with his patient*, is free to determine, without regulation by the

227. Among these, were two the memorable lines quoted in nearly every news article dealing with his retirement and death:

Poor Joshua! . . . It is a sad commentary upon American life, and constitutional principles -- so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all' -- that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting); and “I no longer shall tinker with the machinery of death.” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

228. 428 U.S. 106 (1976).

229. Blackmun Papers, Box 223.

230. Blackmun Papers, Box 263.

State, that, *in his medical judgment*, the patient's pregnancy should be terminated.²³¹

- For the stage prior to approximately the end of the first trimester, the *abortion decision* and its effectuation *must be left to the medical judgment of the pregnant woman's attending physician*.²³²
- The decision vindicates *the right of the physician* to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. *Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision*, and basic responsibility for it must rest *with the physician*.²³³

Yet, announcing his retirement at the White House, Justice Blackmun called *Roe* "a step that had to be taken as we go down the road toward the full emancipation of women."²³⁴ Justice Blackmun's comment on this in his oral history is illuminating: "At the time, I don't think I felt much of anything in that respect, but as the furor developed and its integrity was attacked and upheld, certainly I came to that conclusion, and I feel strongly about it today."²³⁵

Justice Blackmun's realization of the importance of the abortion right to the equality of women was slow in coming and he did not manifest it during the Burger years. For example, reviewing the *amicus* brief of the Women's Law Project – one that strongly located the right in the woman – in his *Danforth* pre-conference memo, Justice Blackmun concluded that "[t]his brief, of course, presents the extreme on the female side."²³⁶ Even after Justice Blackmun's epiphany following the Court's fencing of the abortion right in the late 1970s and early 1980s, he continued with the physician-woman construction in his *Thornburgh* draft. Upon her review of this draft, one of Blackmun's clerks twice took offense to his repetitive use of "a woman's right, together with her physician" construction. In pencil, in the margins of page 10 and 18 of the draft, she wrote:

I don't think it's necessary to reiterate this limitation 3 times in the same paragraph. In fact, it detracts from the message because it suggests that the right itself is as much a doctor's as a woman's.

231. *Roe v. Wade*, 410 U.S. 113, 163 (1973) (emphasis added).

232. *Id.* at 164 (emphasis added).

233. *Id.* at 165-66 (emphasis added).

234. Transcript of Remarks by the President at Resignation Ceremony of Justice Blackmun, Office of the Press Secretary (Apr. 6, 1994), available at <http://clinton6.nara.gov/1994/04/1994-04-06-president-justice-blackmun-on-blackmun-resignation.html> (last accessed Nov. 29, 2005).

235. KOH, *supra* note 15, at 206.

236. Blackmun Papers, Box 220.

I'd take out the 2d two times . . . You've already referred to the physician's role on p. 17 and in note 12.²³⁷

These repetitious references are not present in the final opinion, but their removal was engineered from without, and not from within, Justice Blackmun.

IV. THE DECLINE OF *ROE* AND THE RISE OF PRIVACY

The Court's drift away from *Roe* was readily apparent when Chief Justice Burger retired from the Court. Not only had the Court fenced the right and applied it narrowly, but the numbers game was clearly working against even this continued viability. With the arrival of Justice O'Connor and the defection of Chief Justice Burger, a one-time 7-2 margin of support had dwindled to 5-4. Justice Scalia's replacement of Burger did nothing to change this balance, but the subsequent retirements of Justices Powell, Brennan, and Marshall stripped away three of the five remaining members of the *Roe* majority. Presidents Reagan and Bush, both opponents of the abortion right, selected their replacements. States continued to restrict and shape the availability of abortions, cases continued to be appealed to the Court, and the Solicitor General continued to urge the Court to reverse *Roe*.²³⁸ Stripped of on-bench support, Justice Blackmun seemed to be fighting a battle now doomed to failure. In fact, he did largely lose *this* battle. Though it retained an abortion right as part of the liberty protected by the Fourteenth Amendment, *Casey* jettisoned *Roe*'s trimester approach and reversed parts of *Danforth*, *Akron I*, and *Thornburgh*.²³⁹ Still, in a very real sense, Justice Blackmun won the war. How this happened is the key to understanding his legacy in this area of the law.

A. The Conceptual Epiphany: Bowers v. Hardwick

Both for Justice Blackmun personally and for the Court contextually, the context of the construction of the abortion right in *Roe* was not ideal for building a strong base in the privacy right from which it purportedly flowed. Once enshrined in constitutional doctrine, the Court's attention subsequently focused on defining and applying the right, not grounding it more firmly in constitutional logic. Enmeshed in internecine Court maneuvering, any effort to embed it more fully was lost. Almost. Its resurrection came from an

237. Blackmun Papers, Box 434.

238. See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 135-54 (1987); JAMES SIMON, *THE CENTER HOLDS* 83-168 (1995).

239. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). It can be argued that Justice Blackmun did not really lose this battle: the abortion right survived *Casey*. However, the trimester architecture was gone and the refashioned right was one that allowed significantly more state regulation.

unlikely quarter, the litigation of a law criminalizing homosexual sodomy. However, even here Justice Blackmun's first step appeared to be a stumble.

*Bowers v. Hardwick*²⁴⁰ was not the first time the Justices addressed the issue of homosexuality. Two years earlier, in a case ultimately dismissed as improvidently granted, the Court accepted *New York v. Uplinger* for review. *Uplinger* involved a statute prohibiting "loitering 'in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature.'"²⁴¹ The New York Court of Appeals struck the law as unconstitutional on overbreadth and privacy grounds.²⁴² Chief Justice Burger and Justices White, Rehnquist, and O'Connor provided the four votes to grant *certiorari*.²⁴³ After oral arguments, these Justices voted to reverse the judgment.²⁴⁴ Chief Justice Burger's comments at conference captured the essence of their position: "[for] 175 years statutes like this gave no problem . . . [striking it on privacy grounds] makes no sense."²⁴⁵ The decision to DIG (Dismiss as Improvidently Granted) prompted a strong dissent from this cohort, which drew a response in footnote 3 from Brennan, the Justice who wrote the *per curiam*:

Although the dissent is correct in stating that we have concluded that certain privacy rights do not require concomitant protection for all related public activities, we have also recognized that there are constitutional limits to a State's ability to burden certain types of privacy rights through regulation of public speech and conduct²⁴⁶

This footnote was dropped from the final opinion – apparently to secure Justice Stevens's vote to DIG – but it lays clear the core of the division of the Justices on the issue before them. Justice Blackmun had little printed role in the resolution of this case, but his conference notes record his sense of the merits: "What a lot of frumpery. . . . statute is overbroad."²⁴⁷

The Court, after relisting *Bowers* for discussion at conference, granted *certiorari*.²⁴⁸ Justice Blackmun opposed the grant: "it can't win – put off – let go to trial."²⁴⁹ Obviously, his vote was a strategic denial. Given the trenching

240. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

241. *New York v. Uplinger*, 467 U.S. 246, 247 (1984).

242. *People v. Uplinger*, 447 N.E.2d 62 (N.Y. 1983).

243. Blackmun Papers, Box 402; see *New York v. Uplinger*, 464 U.S. 812 (1983).

244. Blackmun Papers, Box 402.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Bowers v. Hardwick*, 474 U.S. 943 (1985). Interestingly, according to Blackmun's papers, Justice Marshall joined Justices Burger, White, and Rehnquist in voting for *certiorari*. Blackmun Papers, Box 451.

249. Blackmun Papers, Box 451.

of the abortion right and the *Uplinger* discussion, this makes sense; Blackmun was leery of the Court further narrowing the privacy right. In his post-argument conference notes, when Justice Powell initially provided the fifth vote to overturn the Georgia statute criminalizing homosexual conduct, Justice Blackmun wrote “Clerks! Can this hold? Court will have to go 5-4 to reverse – eventually.”²⁵⁰ Justice Blackmun was correct and a week later, Justice Powell switched his vote and Blackmun lost the majority opinion he had been assigned. Ironically, freed from the need to craft an opinion that would hold Justice Powell’s vote, Justice Blackmun was able to approach the question unfettered by group pressures. In a way, this was *Roe redux* – Justice Blackmun taking on a novel privacy case with no clear jurisprudential guidance on which to lean; however, this was 1986, not 1972, and Blackmun was not a green Justice, still working to shrug off his appellate style under pressure from result-oriented colleagues. On the Court for 16 years, Justice Blackmun had gone through the abortion wringer, and developed a more acute sense of individual rights. While Justice Blackmun was not up to the task in *Roe*, he was prepared in *Bowers*.

Laying out his argument in his notes for the conference discussion, he noted the following:

- “much of the state’s argument is reminiscent of the arguments in Loving (miscegenation) . . . the state arrays the forces of good vs. the forces of evil”²⁵¹
- “not a case involving primarily the rights of male homos . . . GA statute is not so confined.”²⁵²
- “Court also has recognized that a degree of sexual autonomy is protected by the right to privacy and freedom of association . . . Carey. Stanley”²⁵³
- “The state’s reliance on religious texts suggest that the state basis is religious, rather than secular”²⁵⁴
- “Stanley rejected, as a justification, the desire to control the moral content of ones thoughts, though a state could be concerned with public morality”²⁵⁵

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

- “GA has an interest in protecting the public environment. Does this extend to punishment of private sexual behavior?”²⁵⁶
- “Constitution requires that GA show its statute is narrowly tailored and serves some compelling and neutral interest that the state has in the public environment.”²⁵⁷
- “GA will have its chance to prove its case on the remand”²⁵⁸

All of these points shaped Justice Blackmun’s dissenting opinion. However, more significant is the fact that they were assembled here. Nowhere else in his previous privacy musings – all undertaken, up to this point, in cases dealing with abortion rights – does Justice Blackmun perform such a ranging canvass of the problem. Concerns with fundamental rights, sexual choice, the special case of the home, religion, freedom of thought, and the public-private distinction are embedded in these notes. Notable for its exclusion is reference to *Roe* or any other abortion case. It appeared that Justice Blackmun was working on a set of tracks parallel to, but not intersecting with, those he traveled in *Roe* and its progeny. It was as if Justice Blackmun was starting anew, working with a new question of law and interpretation, uncluttered by the analytical apparatus of regulation within trimesters, *Bowers* was his clean slate.

The production of opinions in *Bowers* lacked the dramatic interplay, modification, and pacification that had become the norm in abortion cases. While Justice Stevens tried briefly to get Justice Powell to reconsider his switch, beyond that, opinions circulated without eliciting much written comment.²⁵⁹ For the majority, Justice White chose to frame the issue as purely one of regulating behavior: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”²⁶⁰ Confining the privacy right to familial and procreative matters, Justice White had little difficulty sustaining the statute as an exercise of the police power.

Justice Blackmun’s opinion circulated twice, but with no significant changes.²⁶¹ It brushed Justice White’s “fundamental right to . . . sodomy” argument to the side at the outset and grounded its analysis in “‘the most comprehensive of rights and the right most valued by civilized men,’ namely,

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

261. Blackmun Papers, Box 451.

‘the right to be let alone.’”²⁶² After a brief critique of Justice White’s opinion, Justice Blackmun, in section II of his opinion, turns to his justification for including private sexual conduct within the umbrella of the constitutional privacy right. He argued that:

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.” *Thornburgh v. American College of Obstetricians & Gynecologists* (1986). In construing the right to privacy, the Court has proceeded along two somewhat distinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain decisions that are properly for the individual to make. E.g., *Roe v. Wade*, (1973); *Pierce v. Society of Sisters* (1925). Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged. E.g., *United States v. Karo* (1984); *Payton v. New York* (1980); *Rios v. United States* (1960). The case before us implicates both the decisional and the spatial aspects of the right to privacy.²⁶³

After framing the “decisional and spatial” dimensions of the privacy right, Justice Blackmun proceeded to unfold this right in five pages of analysis of precedents – a stark contrast with the four fragmented paragraphs of constitutional “analysis” in *Roe*.²⁶⁴ Although absent from his conference discussion, the abortion cases were present in his analysis here, along with examination of decisions grounded in the First Amendment’s religion, expression, and association rights, the Fourth Amendment’s search and seizure clause, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.²⁶⁵ Section III pointedly applied the requirements of the right framed in Section II to the facts of this case and found the Georgia statute lacking.²⁶⁶ In section IV, Justice Blackmun concluded his discussion with a call for reconsideration and a rhetorical jab that traces its lineage to his dissents in abortion cases:

It took but three years for the Court to see the error in its analysis in *Minersville School District v. Gobitis*, and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. See *West Virginia Board of Education v.*

262. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United State*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

263. *Id.* at 203-04.

264. *See id.* at 208-13.

265. *See id.*

266. *Id.*

Barnette (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.²⁶⁷

At the urging of Pamela Karlan, one of his clerks that year, he read the dissent from the bench.²⁶⁸ Justice Blackmun resolutely asserted to the end that his *Bowers* dissent would be the law some day; "a bedrock opinion in my own view."²⁶⁹ However, in 1986, it was merely the dissent of a man whose most prominent success was on the verge of reversal.

B. Abortion Cases in Blackmun's Later Terms

After *Bowers*, Justice Blackmun reverted to form and did not write opinions in privacy/autonomy cases other than those raising the issue of abortion.²⁷⁰ With his advancing age, his engagement even in these cases seemed to wane. By the time the Court heard *Webster v. Reproductive Health Services*,²⁷¹ Justice Stevens took the lead in spearheading the defense of *Roe*. In *Webster*, Chief Justice Rehnquist circulated his first draft opinion on May 25.²⁷² It treated *Roe* off-handedly and concluded, "to the extent indicated in our opinion, we modify and narrow *Roe* and succeeding cases."²⁷³ Its effect would have been to over-

267. *Id.* at 204 (citing *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

268. In his interview with Koh, Justice Blackmun credited Karlan with doing "a lot of very effective writing, and [owing] a lot to her and her ability in getting that dissent out." KOH, *supra* note 15, at 370.

269. *Id.* at 370-71.

270. He joined Justice Stevens's partial concurrence in the prison marriage case, *Turner v. Safley*, 482 U.S. 78 (1987) (Stevens, J., concurring in part and dissenting in part), and Justice Brennan's dissenting opinion asserting a constitutional "right to die" in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 301-30 (1990) (Brennan, J., dissenting). Both opinions were broad constructions of the privacy/autonomy concept, but Blackmun contributed nothing in writing to the circulation of these drafts. In fact, Blackmun seemed to be growing increasingly detached from his work on the Court by this time. One of his clerks consistently sent him memos on the development of Brennan's *Cruzan* opinion and wrote him on May 23, 1990 that "it covers all the points I think are important (I worked fairly closely with J. Brennan's clerk in drafting this). I do not really know what your views are on this case, but I can see not reason not to join this" Blackmun Papers, Box 549 (emphasis added).

271. 492 U.S. 490 (1989).

272. Blackmun Papers, Box 536.

273. *Id.*

rule *Roe sub silentio*. The next day, Justice Blackmun simply informed the conference that, "I shall be writing something in this case."²⁷⁴

It was Justice Stevens who stepped up on May 30, writing Chief Justice Rehnquist that he had problems with his "somewhat gratuitous rejections of the trimester approach" and concluding "as you know, I am not in favor of overruling *Roe v. Wade*, but if the deed is to be done I would rather see the Court give the case a decent burial instead of tossing it out the window of a fast-moving caboose."²⁷⁵ The memo traffic in Justices Marshall and Blackmun's papers suggests that Justice Stevens first approached Justice O'Connor, after the circulation of the first draft of her concurring opinion indicated she was not ready to reverse *Roe*, and sought to further separate her and the Rehnquist cohort.²⁷⁶ He joined the mootness portion of her opinion and her contention that there was no "necessity to reexamine *Roe v. Wade*" in upholding the statute.²⁷⁷ Following the advice of one of his clerks, Justice Blackmun followed suit.²⁷⁸ Sparing Justice O'Connor any of the shots he fired at Chief Justice Rehnquist and Justice Scalia, Blackmun then circulated a second draft of his dissenting opinion.²⁷⁹ Justice Blackmun had gone after Justice Powell in the late 1970s and early 1980s with Justice Brennan, he now teamed with Justice Stevens in hunting Justice O'Connor.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* The mootness point was one on which Justice O'Connor and the Rehnquist plurality disagreed.

278. *Id.*

279. In fact, Blackmun praised O'Connor for her newly added footnotes 1, 6, and 9. *Id.* Blackmun's papers suggest that his law clerk, Edward Lazarus, did the bulk of the work in drafting this opinion. The first draft of Blackmun's dissent circulated on June 21, and there is a June 16 memo from Lazarus saying, in part,

Attached is the first part of the dissent. Although I have not had the benefit of my co-clerks' editing, I have tried to polish the writing myself. At the end, I also included a brief outline of what remains to be done. I should have the stare decisis section done before dinner tonight. I do not think that the other two sections will take very long to draft, perhaps all of Saturday, but not much more.

Id. This is not to say that Blackmun had nothing to do with the content of the opinion. He surely gave Lazarus guidance about logic, direction, and tone, but moreover he edited it. In some areas, he toned down its rhetoric, changing "a bare majority of this Court perpetrates a *fraud*" to "perpetrates a disservice." In others, Blackmun personalized and sharpened the rhetorical edge, adding "I rue the lost of public esteem for the Court that will ensue" to the end of the introductory section. Finally, Blackmun tailored the fine points of the analysis his way. In one instance, this led him to insert the dependent clause "with her responsible physician" in between "a woman's right" and "to choose whether or not to terminate a pregnancy." *Id.*

Justice Blackmun's opinion was not wanting for rhetorical fire. He combined signal phrases of alarm – "I fear for the future" and "[f]or today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."²⁸⁰ – with sarcasm in addressing Justice Scalia and Chief Justice Rehnquist without reservation. The opinion was not merely a heavy-handed rebuke of the plurality, but it further showed evidence of taking elements of *Bowers* and building on them. By forcing Justice Blackmun to push the logic of his *Roe* line of opinions back to the assumptions that had previously undergirded them in silence, *Bowers* fundamentally altered the way he explained (and, perhaps, understood) his approach to abortion issues.²⁸¹ His *Webster* dissent manifests this transformation:

With respect to the *Roe* framework, the general constitutional principle, indeed the fundamental constitutional right, for which it was developed is the right to privacy, a species of "liberty" protected by the Due Process Clause, which under our past decisions safeguards the right of women to exercise some control over their own role in procreation [F]ew decisions are more basic to individual dignity and autonomy or more appropriate to that certain private sphere of individual liberty that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate, and self-defining decision whether to end a pregnancy. It is this general principle, the "moral fact that a person belongs to himself and not others nor to society as a whole," that is found in the Constitution. The trimester framework simply defines and limits that right to privacy in the abortion context to accommodate, not destroy, a State's legitimate interest in protecting the health of pregnant women and in preserving potential human life. Fashioning such accommodations between individual rights and the legitimate interests of government, establishing benchmarks and standards with which to evaluate the competing claims of individuals and government, lies at the very heart of constitutional adjudication. To the extent that the trimester framework is useful in this enterprise, it is not only consistent with constitutional interpretation, but necessary to

280. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 538, 560 (1989).

281. *Thornburgh* and *Bowers* were argued and decided in the same Court term (1985). *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (argued Nov. 5, 1985; decided June 11, 1986); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (argued Mar. 31, 1986; decided June 30, 1986). Even though their formal construction overlapped, *Thornburgh* did not take on the rhetorical and analytical heft of *Bowers*. The parallels in logic between *Bowers* and *Webster* are more pronounced.

the wise and just exercise of this Court's paramount authority to define the scope of constitutional rights.²⁸²

Sixteen years after he wrote *Roe*, and informed by his *Bowers* dissent, Justice Blackmun finally articulated an analytical base for its right by embedding it in a developed concept of privacy. However, he was too late to save – if he could have saved – *Roe*'s trimester analysis, because the personnel on the Court would not support it. *Roe* had slipped the bit of change, but just barely.

With a full complement of Reagan appointees on the Court, the *Roe* proponents' action in abortion cases focused intensively on creating cracks in the budding majority. For example, in *Hodgson v. Minnesota*²⁸³ and *City of Akron v. Akron Center for Reproductive Health*,²⁸⁴ the Court wrestled again with consent statutes directed toward minors seeking abortions. While the traction of this issue was moving the Court away from Justice Blackmun, but Justice O'Connor – fresh off her opinion in *Webster* and possibly still stinging from the barbs of Justice Scalia's concurrence, aimed wholly at her – remained between the two camps. Although Chief Justice Rehnquist assigned the *Hodgson* opinion to her, Justice O'Connor informed the conference on December 8 that "John's views are close to my own in these two cases, and, if I understand his approach correctly, I think I can agree with it. This leads me to change my vote to reverse in 88-1125 and still to affirm in 88-1309."²⁸⁵ On the Ohio statute, she was likewise conflicted but announced the same day that she could sustain it in its entirety.²⁸⁶ According to one of Blackmun's clerks, Justice Kennedy also had second thoughts about Minnesota's "two-parent requirement" but in the end, upheld both statutes, and the lobbying focused on Justice O'Connor.²⁸⁷ Once again. Justice Stevens took the lead. In relaying this information to him, Blackmun's clerk noted that "as we have discussed, JPS is probably the only one who could succeed in reaching SOC. I see no need to castigate him if he can get SOC to strike down any statute that has the word 'abortion' in it."²⁸⁸ Justice Brennan, in a note to Justice Stevens, sent the same message: "I realize that you are walking a tightrope in this one."²⁸⁹ In the end, Justice O'Connor voted, for the first time, to strike a portion of an abortion statute.²⁹⁰

282. *Webster*, 492 U.S. 548-49 (citations and quotations omitted).

283. 497 U.S. 417 (1990).

284. 462 U.S. 416 (1983).

285. Blackmun Papers, Box 545.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Hodgson v. Minnesota*, 497 U.S. 417 (1990). It is striking not only that Stevens emerged during this period as the point man in saving *Roe*, but also how completely Blackmun and Brennan seemed to be relying on their clerks to carry on their strategic maneuvering. Both men were well into their 80s at this point, and Stevens was a comparatively young 70. Still, especially in comparison to the hands-on approach that

Akron II and *Hodgson*, then, looked much like the hair-splitting efforts that characterized much of the post-*Roe* Court deliberations in abortion cases'. Here the focus was on what kinds of restrictions "unduly burdened" the abortion decision rather than what state interests were sufficiently compelling to justify second trimester regulations, but the tenor of the give-and-take was much the same.²⁹¹ There was no searching examination of what a privacy right would require in this area. Instead, the Justices kibitzed about what consent regimens were impermissibly burdensome.²⁹² The fraying of nerves and the rhetorical nuclear option were further reminiscent.

Although not as personally engaged in the memoranda exchange as in the past, Justice Blackmun was attending to them. In fact, his files contain the core of his draft dissent written in his hand. In the second circulated draft of this dissent, Justice Blackmun attacked Justice Kennedy's plurality opinion, stating:

A plurality then concludes, in Part V of the primary opinion, with hyperbole that can have but one purpose: to further incite an American press, public, and pulpit already inflamed by the pronouncement made by a plurality of this Court last term in *Webster*.²⁹³

The following day, a wounded Justice Kennedy sent Justice Blackmun a two-page, hand-written note.

After much hesitation, I decided it best for our collegial relation and, I hope, mutual respect to tell you that I harbor deep resentment at your paragraph on page 17 You say my hyperbole is

Blackmun and Brennan took to strategizing *Roe's* protection in the late 1970s and through much of the 1980s, the decline in memoranda between the two of them – and the increasing prominence of and reliance on clerks – in these cases is striking.

To get a sense of the "clerk network," note the following memo from one of Blackmun's clerks to him in *Akron II*:

I have read JUSTICE KENNEDY's draft in this case and have discussed it with other clerks. JUSTICE STEVENS' clerk has recommended that he not join the circulating draft until some changes are made in the burden of proof section and in the physician notification section. JUSTICE O'Connor's clerk has told me (strictly in confidence) that JUSTICE O'CONNOR is writing a letter to JUSTICE KENNEDY requesting some changes to the physician notification section (adding a sentence that an as applied challenge may be brought) and the burden of proof section (she thinks that it sounds mandatory as written). She is also not sure what to do about Part III. Part III is puzzling to me also, and I will be interested to see what the other Justices (like BRW) think about that section.

Blackmun Papers, Box 544, January 12.

291. Blackmun Papers, Box 545.

292. *Id.*

293. *Id.*, *Webster* draft 2, at 17.

to incite an inflamed public. To write with that purpose would be a violation of my judicial duty.

I am still struggling with the whole abortion issue and thought it proper to convey this in what I wrote. . . .

I do not question the depth of your compassion and understanding, but neither do I yield to the charge that my own is somehow a mask for some improper purpose.

. . . I thought you would want to hear this; and perhaps it will prompt you to reconsider what is a most unfair attribution of motives not consonant with the conscientious discharge of my office²⁹⁴

Justice Blackmun changed the language and sent Justice Kennedy a curt note: "In the thought that it will help to assuage your feelings, I shall change the word 'purpose' . . . to 'result.' This should help, but, of course, I do not know whether it will."²⁹⁵ No further paper was exchanged on the matter.

Amidst the ramping rhetoric and singed feelings, *Webster*, *Hodgson*, and *Ohio* demonstrated that Justice O'Connor's position was clearly different from that of Chief Justice Rehnquist and Justice Scalia, and that Justice Kennedy might also be moveable. If this gave Justice Blackmun some reason for optimism, Justice Brennan's retirement and subsequent replacement by Souter likely dampened it. Gone was his trusted ally and certain vote in support of *Roe*, and as an appointee of a president who opposed *Roe*, Souter would likely bring bad tidings. At conference in *Rust v. Sullivan*²⁹⁶ – a speech case involving abortion counseling – Justice Blackmun's fear heightened, as Justice Souter voted with the Rehnquist bloc to allow a "gag rule."²⁹⁷ However, Justice Stevens was not as quick to write Justice Souter off immediately. He noted "I think it may be poor strategy to assume that either Sandra and David – and certainly not both – are prepared to overrule *Roe v. Wade*. Your last paragraph implies that one who joins the majority opinion has that objective ultimately in mind."²⁹⁸ Justice Stevens's words proved prescient, a line in his next paragraph must have reminded Justice Blackmun of the difference between Justices Stevens and Brennan: "Moreover, I really think that the opinion does not do quite that much damage because, at least for the woman who can afford medical treatment, the right remains intact."²⁹⁹ In contrast to Justices Brennan, Stevens and Blackmun were on opposite sides in the state

294. Blackmun Papers, Box 544.

295. *Id.*

296. 500 U.S. 173 (1991).

297. Blackmun Papers, Box 568.

298. *Id.*, Feb. 7.

299. *Id.*

Medicaid funding decisions. Justice Blackmun, aging and soon to lose his ally Justice Marshall as well, was increasingly alone.

It is in this context that the Court handed down *Planned Parenthood v. Casey*.³⁰⁰ The thrust of the opinion was that *Roe* survived, though “modified” by the “unduly burdensome” test.³⁰¹ Justice Scalia’s venomous opinion seemed to support the prevailing sense that the decision left the *Roe* right largely intact, a conclusion supported by Justice Blackmun’s description of the controlling opinion as “an act of personal courage and constitutional principle.”³⁰² Yet, the opinion formally discarded the trimester architecture of *Roe* for once and for all and upheld all of the provisions of the Pennsylvania statute save for its spousal notification requirement. The “right” created by *Roe* survived *Casey*, but with its breadth severely curtailed. As his separate opinion would have struck down all contested provisions of the statute, Justice Blackmun understood this; however, for strategic reasons, he emphasized the more *Roe*-friendly aspects of the troika’s opinion. Faced with a whole-scale reversal of *Roe*, keeping at least the core of the right was a plausible fallback position.

When Justice Blackmun’s papers opened to the public, scholars made much of Justice Kennedy’s May 29 note to Blackmun, inviting him to chat about the case:

I need to see you as soon as you have a few free moments. I want to tell you about some developments in *Planned Parenthood v. Casey*, and at least part of what I say should come as welcome news³⁰³

The note presents a compelling story. The aged author of *Roe* called to speak with a younger one-time critic about its partial salvation. However, Justice Kennedy was not *consulting* with Justice Blackmun, but *informing* him of a decision over which he had no control. Justice Kennedy did not begin negotiations about what the troika would say but rather made a courtesy call on a respected senior jurist about a precedent dear to him. Beyond his authorship of the “right” that *Casey* loosely preserved, Justice Blackmun was not a player in the resolution worked by the troika. He was informed, but marginalized. His vote in favor of the continuing constitutional status of the abortion right counted, but it was a vote for what he knew was a pale representation of the right he had championed. He had completely lost control of *Roe*.

This is not to say that that Justice Blackmun was irrelevant to the outcome of *Casey*. Without the votes of him and Justice Stevens, the troika would not have been able to rework the abortion right. While the clerk net-

300. 505 U.S. 833 (1992). Contemporary news reports stressed the overarching theme of O’Connor, Kennedy, and Souter’s introductory sentence: “Liberty finds no refuge in a jurisprudence of doubt.” *Id.* at 844.

301. *Id.* at 874.

302. *Id.* at 923 (Blackmun, J., concurring in part and dissenting in part).

303. Blackmun Papers, Boxes 601-02.

work kept Justice Blackmun informed of the rumblings in other chambers, Justice Stevens was clearly the contact man between the past and present versions of the abortion right. Though copied on most of the communications Justice Stevens had with the troika, Justice Blackmun was a by-stander and his days of influence were gone. A rueful memo from one of Blackmun's clerks as *Casey's* announcement drew near noted the wane of his influence over shaping the right. Perhaps jealous of Justice Stevens's centrality in negotiations over the final form of the joint opinion, the clerk wrote:

I can also understand why JPS has done is best to form an alliance with the SOC/AK/DHS group (although I do not agree with his decision to uphold provisions in this case which he previously has struck down) . . . I cannot help but be disappointed with JPS . . . [H]e [has] reversed without explanation his position on some of the issues in this case. . . I can't help but think that JPS sees that there's power in the middle, and therefore that's where he's moving. In short, I think JPS is taking for granted that you will always be here to make the principled argument, so he's free to go off and build coalitions in the middle.³⁰⁴

Justice Blackmun's opinion in *Casey* continued broadening Blackmun's initial analysis from his *Webster* opinion.³⁰⁵ His critique of Chief Justice Rehnquist's opinion for the no-*Roe*-four was at points shrill, but ranged over a broad landscape of autonomy cases and made a strong case for a privacy synthesis.³⁰⁶ Yet, given the plurality's disposition of the case, this was too little, too late. His final section, retained in his final draft over the objection of Justice Stevens³⁰⁷ noted as much.

In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and JUSTICE SCALIA. And yet, in another sense, the distance between the two approaches is short -- the distance is but a single vote. . . I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.³⁰⁸

304. June 26, Blackmun Papers, Boxes 601-02. If one was needed, this served as another reminder that Justice Stevens was not Justice Brennan, and that Blackmun was increasingly isolated on the Court.

305. In sections II and III, Justice Blackmun revisited the *Roe*-read-through-*Bowers* argument to which he came late in his career. *Casey*, 505 U.S. at 926-44.

306. *Id.* at 922-44.

307. June 27, Blackmun Papers, Box 602.

308. *Casey*, 505 U.S. at 943.

Roe – his *Roe* – was gone. Soon, he would be, too. His legacy seemed lost.

V. A LEGACY BEYOND *ROE*: AN (EVENTUAL) TRIUMPH OF PRINCIPLE

The conventional wisdom encompassing Justice Blackmun's career often sums to one word: *Roe*. According to it, the legacy of Harry Blackmun is *his* abortion right. A more refined version of this wisdom is expressed in hyphenation: *Roe-Casey*, which acknowledges that although *Roe*'s trimester analysis did not survive the concerted onslaught of the Reagan and Bush appointees, the survival of a woman's right to secure an abortion free of state-imposed "undue burdens" is Justice Blackmun's enduring legacy. Under either vision, abortion is the sigma of Blackmun's career.

In point of fact, it is not... at least not as commonly understood.

Serious analysis of Justice Blackmun's years on the Court *must* begin with *Roe*. It rightly serves as the springboard for the conventional wisdom because its impact was enormous. Leaning on a form of "substantive due process," *Roe* extended the constitutional right to privacy and ignited enormous controversy. In its jurisprudential wake came a political response that helped cement the control of the Republican Party over the south. Further, it gave Blackmun a public profile seldom achieved by an Associate Justice. Renown as the father of *Roe*, Justice Blackmun both rebelled from and reveled in this parentage, "carry it, in a way, to my grave."³⁰⁹ And he did. On his death at the age of 90, every story – five years after he left the Court – carried this lead.³¹⁰ In the public mind, *Roe* was the polar star of his career. The popular picture of Justice Blackman is a portrait of *Roe*.

And yet, *Roe* was a seriously flawed opinion.³¹¹ Assigned, over the dissent of the longest serving Justice in the history of the Court, by a scheming Chief Justice to his old pre-school friend and best man, *Roe* and *Do* got off to a rocky start. Blackmun's status as the most junior Justice, and the ghost-

309. KOH, *supra* note 15, at 485. This was not the first time he used this expression: "We all pick up tags. I'll carry this one to my grave." Associated Press, *Blackmun Accepts Aftermath of Writing Abortion Opinion*, N.Y. TIMES, Jan. 18, 1983, at A20.

310. For example, note these headlines: Linda Greenhouse, *Justice Blackmun, Author of Abortion Right, Dies*, N.Y. TIMES, Mar. 5, 1999, at A1; Steve McGongle & David Jackson, *Justice Who Wrote Roe Decision Dies*, DALLAS MORNING NEWS, Mar. 5, 1999, at 1A; Glen Elsass, *Justice Harry A. Blackmun, 1908-1999: His Controversial Opinion in Roe vs. Wade Echoes Still*, CHI. TRIB., Mar. 5, 1999, at 1N. The *Washington Post* did not mention *Roe* in its headline – *Justice Blackmun Dies, Leaves Legacy of Rights*, but Supreme Court correspondent Joan Biskupic had it in her lead: "Retired Justice Harry A. Blackmun, author of the historic *Roe v. Wade* decision that made abortion legal and radically transformed American society and politics, died yesterday." Biskupic, *supra* note 4, at A01.

311. It *may* have been an instance of post-Warren judicial overreach, but even if it was just that it could have been a more graceful overreach.

ing images of his appellate career, cramped his completion of the canvas he had been given. The rescheduling of the cases for the next term heightened the suspicion and anxiety of the rest of the Court. When the cases were finally argued, the votes taken, and the opinion drafts circulated, the joy among the majority Justices blinded any critical judgment of the justification for the right. Instead of focusing on background, the majority added detail to a still wet image, creating lines that failed to remain distinct when subjected to storms of controversy. Thus, Justice Blackmun began a long running restoration project, and managed it with mixed success. As the members of the court changed, his capacity to direct their efforts lessened, and in the end, Justice Blackmun was a foreman without a willing crew. While the new crew kept the old canvass, it painted over it such that only a shadow of the image once there could still be seen.

If *Casey-Roe* were all that Justice Blackmun contributed to this area, then his legacy would be rendered with a thin paint. *Roe* was a poorly crafted opinion that did not tap into a rich constitutional vein at the outset. Muddied in subsequent applications, by definitional minutia without a strongly principled base to which to appeal for clarity, *Roe* gave succeeding decisions the feel of *ad hoc* efforts to find proximate solutions to the problems at hand. Without a strong jurisprudential base, Justices were free to range broadly, and range they did which combined with shifts in personnel, further added to the seemingly arbitrary nature of the Court's decisions.³¹² In *Akron I*, Justice O'Connor correctly stated that *Roe* was always "on a collision course with itself";³¹³ however, it was not because of its trimester logic. *Roe* was on a collision course with itself because it was inadequately moored in constitutional analysis and thus had no core, fixed meaning. *Roe*'s thin paint ran in the storms to which it was subjected. *Casey* was the result, and *Casey* is as close to a rejection of *Roe* as one can get without actually overturning it.

However, Justice Blackmun left more than merely *Roe*. With *Bowers*, Justice Blackmun washed the brushes clean and outlined a concept of personal autonomy anew. Wized by 15 years service on the Court, toughened by the battering he took with *Roe*, and freed from the coalition-building constraints imposed by writing for a majority, Justice Blackmun fashioned an unfinished major work of legal art.³¹⁴ Without question, *Bowers* self-consciously drew upon pre-established traditions and precedents. It was no slap-dash sketch consisting of cursory strokes of constitutional "analysis"

312. Realistically, it always takes the votes of five justices to make a majority, and there will always be differences in how different justices interpret the law, especially constitutional law, but clarity in interpretive base and standards minimize the appearance of arbitrariness.

313. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 458 (1983). This was not because of *Roe*'s trimester logic.

314. Like all art, its appreciation depends on the person viewing it. *Bowers* may be good art or it may be bad art, depending on the perspective from which it is viewed.

buried 37 pages into the opinion. *Bowers* was an effort to craft by pointed and sustained legal analysis the constitutional basis for a privacy right which encompasses sexual autonomy. No one – even those who despise its style, boldness, and abstractions – can deny its status as a significant piece hanging in the interpretive halls of the Marble Palace. By the time Justice Blackmun generated this opinion, he could not capture a majority for it or successfully copy it over to the abortion canvas.

Artists depart, but what they created lives on. When Justice Blackmun left the Court, his *Bowers* opinion was simply a dissent. However, ten years later the Court turned again to homosexuality, this time in a context of political discrimination. Justice Kennedy, joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer, struck down a state constitutional amendment prohibiting any governmental action protecting people based on their sexual orientation. The Court held that this denied homosexuals the equal protection of the laws. Nowhere in its opinion did it mention *Bowers*. Dissenting, though, Justice Scalia did: "In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick*."³¹⁵ Using *Bowers*' rational basis test, Chief Justice Rehnquist and Justice Scalia and Thomas would have sustained the amendment. Implicitly – even though *Bowers* involved a statute aimed at sexual acts, a ground clearly distinguishable from the facts in *Romer* – he charged that the majority was either ignoring or silently overruling *Bowers*. Because the majority did not address *Bowers*, it is difficult to know for sure how it viewed it.

However, 17 years after *Bowers*, the Court overruled *Bowers*.³¹⁶ Again Justice Kennedy wrote for the majority and,³¹⁷ although he cited Justice Blackmun only once, his conclusion rested on the constitutional right to privacy Blackmun introduced, in a more developed fashion, in *Bowers*.

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no

315. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

316. *Lawrence v. Texas*, 539 U.S. 558 (2003).

317. Justice O'Connor was in the majority on the holding but not the reasoning. She would have struck the Texas sodomy statute on equal protection grounds. *Id.* at 579 (O'Connor, J., concurring).

legitimate state interest which can justify its intrusion into the personal and private life of the individual.³¹⁸

Justice Blackmun had been off the Court for two years when it decided *Romer*; he had been dead for four when it brought down *Lawrence*. Even though he was not present to participate in these decisions, the majority played from his score. Time will tell if this legacy will endure, but for now his late career conceptualization of privacy commands a majority of the Court.

For personal and contextual reasons, even as he was writing opinions nominally grounded the privacy right, Justice Harry A. Blackmun never really controlled the development of it. However, his *Bowers* analysis ultimately provided the Court the logical basis reinvigorating the privacy right after Justice Blackmun left the Court. He crafted this dimension of his legal legacy, only apparent largely in dissent. In a way, four years after his death, Justice Blackmun's relationship to the privacy doctrine is analogous to that of Oliver Wendell Holmes to the "clear and present danger" doctrine – a progenitor whose vision did not hold sway until after he left the bench. On matters of personal privacy and autonomy, Justice Blackmun's real imprint did not come in *Casey*, but in *Romer* and *Lawrence*. However, just as Justice Holmes' full judicial legacy is not confined to freedom of speech issues, Justice Blackmun's should not be wholly defined by abortion or privacy.

318. *Id.* at 525-26 (citations omitted).