The Burger Court Opinion Writing Database

Roe v. Wade

410 U.S. 113 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
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b

Supreme Court of the United States
Washington, D. C. 20543

70-1840

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

I have had a great many problems with these cases from the outset. They are not as simple for me as they appear to be for others. The states have, I should think, as much concern in this area as in any within their province; federal power has only that which can be traced to a specific provision of the Constitution.

Perhaps my problem arises from the mediocre to poor help from counsel. On reargument, I would propose we appoint amici for both sides, but that can wait. 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.

Hence, I vote to reargue early in the next Term.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 27, 1972

PERSONAL

CONFIDENTIAL

Re: No. 70-18 -- Roe v. Wade
No. 70-40 -- Doe v. Bolton

Dear Bill:

Since we completed the Special Term I have been preoccupied with accumulated and pressing problems on personnel, the "chambers project," the lighting project and a host of others that have been waiting for attention since May when I had to lay such matters aside. Reviewing your note advising that the impressions of the Brethren concerning your dissent in the abortion cases was a misunderstanding, I am impelled to send this memo simply to keep the record straight. There are a number of factual errors in the printed dissent, now withdrawn, that should not be allowed to stand uncorrected. With the circulation of at least 18 copies of what was labeled "6th Draft," there was an obvious risk that the subject would, as it did, get outside the security of the Court, albeit in a garbled form. That being so, something akin to "due process" suggests that the facts be clarified of record.

1. It is not accurate, as you state, that "The Chief Justice represented the minority view in the Conference" on the abortion cases, unless you add that there was no majority for any firm position. On the Texas case there was a consensus, if not unanimity, that the Texas statute had to fall. There were varying views as to the basis. No one's notes are controlling nor likely to be comprehensive, or even precisely accurate. Mine are "final disposition to wait on writing and grounds" as to both cases.

My notes show, and my recollection is the same, that on the Georgia case there was no "majority" in the sense of identifying the assigning author. It is not in accord with my records of the Conference or my recollection that "out of the seven there were four who initially took a majority view," as you state. There simply was no majority for any clear-cut disposition on all issues or even the basic issues, and that is not at all unusual in a case of this kind. Some of us saw one aspect of infirmity in the Georgia statute; others saw different weaknesses. The discussion was extended and positions altered in the course of it -- which is also not unusual. You are correct that you were not "in the majority," primarily because no "majority" could be spelled out. I would not try to characterize affirmatively any Justice's position on all the facets of the Georgia case, but my notes reflect that Bill Brennan and Potter Stewart were very near each other but they were not fully joined by others.

Any implication that Bill Brennan or Potter would have had the assignment is not supported by my recollection or notes and if either of them entertained that thought, at the time or since, they have never mentioned it to me -- as I surely would welcome their doing if they agreed with your recital of facts.

That leaves Byron as next in line. His position does not suggest -- nor has it ever -- that he should have made the assignment. Moreover, at this point it is obvious as a matter of arithmetic that Bryon, or any one junior to him, was in any "majority." Nor did Thurgood's position suggest to him or others that he was senior of some "majority" -- also by this stage mathematically impossible. Thurgood has never suggested he should have assigned the case for writing.

2. The correct evaluation of the Conference discussion, as I see it, was made by at least three Justices during the Conference, when they said their final position, in the Georgia case particularly, would "depend on how it is written".

3. I agree entirely the assignment function is "not merely a matter of protocol". On the contrary, it is a most arduous and time consuming operation and an important one. Hughes had attributed to him the statement that it was one of the most difficult of his tasks.

4. Of course, your footnote 2, reference to Hughes' statement is correct that "It is not the practice . . . to postpone voting until an opinion is brought in" but his very expression shows that sometimes that is precisely what is done. In my three years this has occurred at least a dozen times. Moreover, you have on occasion stated that your vote would "depend on the writing" as it properly must in some cases.

5. It is not unusual for an assignment to go awry -- a case may be assigned to a Justice and it develops he cannot write a Court opinion. One example is found in S&E Contractors this Term, a most difficult and close question. At Conference I voted with Bill Brennan's view and there were five who shared that position; Bill Brennan was assigned to write a majority opinion. You wrote a dissent that persuaded me and I shifted and voted with you, making your "dissent" the Court's opinion. My change had no impact on the assignment since either result called for assignment by me. Another example was Argersinger, which I assigned to you after a majority, including my vote, supported the position articulated at Conference by you and others that counsel was mandatory only if the penalty was more than six months imprisonment. You then circulated an opinion on a totally different theory. When this did not command additional votes, you again changed theory and came

out with a third position --"No counsel, no confinement" -- that the Court adopted. I mention these two episodes not to suggest there was anything "wrong" about what happened but as illustrating that Justices, unlike computers, do not react automatically or always "stay put," as S&E Contractors graphically demonstrated.

Your unprecedented proposed dissenting statement, now withdrawn, seems to imply bad faith if positions are not firm, fixed and final when a Conference adjourns. If a single member of the Court would endorse your view on this, I would be astonished. The record, which I reexamined in detail after the surprising statements of your dissent, shows that I have never undertaken to assign from a minority position. Thus there is not the slightest basis for your statement. I would be interested in having you identify the cases in which you think that happened.

To return to the abortion cases, in which you acknowledge you were not in the majority, you suggested, after the initial Conference, that I should not have assigned them to Harry because his view would not command a majority. I do not recall that anyone joined you in your expression. Subsequently, Harry did not undertake to submit an opinion but only a memorandum accompanied by his expression for reargument. Your analysis of Harry's position would appear somewhat faulty by your own prompt endorsement of his preliminary memorandum in these cases. Parenthetically I may add that in large part I agree with his memo. That first drafts are not always final positions, however, is very pointedly illustrated by the various positions you took in writing Argersinger, none of which was the one you articulated at Conference. Again this is not "wrong" -- it is the way difficult cases sometimes evolve. It would not occur to me to charge you with bad faith because of your shift on Argersinger, and if anyone made such a charge, I would challenge it as unwarranted.

Your statement that the Texas and Georgia cases with a 7-man Court had "five votes" must be coupled -- as you do not couple it -- with the action of a majority of the Court to reargue these cases. That action speaks for itself. Brewster had a majority of the 7-man Court, but even though I was in the majority I urged that we reargue and the Court so voted. Crucial constitutional issues should not be resolved by four of a 7-man Court when there are nine Justices at the time the case comes down.

I appreciate your subsequent longhand notes, but with respect to your position on the abortion cases I write you now, as I said, to keep the record straight, and to allow any future scholar who may peruse the current press accounts or papers of Justices to have the "due process" benefit of all the facts in context, as I have tried to place them fairly. I believe, if you "sort out" the sequence of events, you will agree the foregoing is a fair statement of the situation. The abortion issues, like obscenity and others, are problems of extraordinary difficulty and we will need our best effort to achieve a reasonably satisfactory result.

Vera joins in wishing you and Cathy a good summer and that Cathy will recover promptly from her virus in the clear, clean air of your mountain.

Regards,

WOD

Mr. Justice Douglas

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 19, 1972

Dear Harry:

In No. 70-18 - Roe v. Wade, my notes confirm what Bill Brennan wrote yesterday in his memo to you - that abortion statutes were invalid save as they required that an abortion be performed by a licensed physician within a limited time after conception.

That was the clear view of a majority of the seven who heard the argument. My notes also indicate that the Chief had the opposed view, which made it puzzling as to why he made the assignment at all except that he indicated he might affirm on vagueness. My notes indicate that Byron was not firmly settled and that you might join the majority of four.

So I think we should meet what Bill Brennan calls the "core issue."

I believe I gave you, some time back, my draft opinion in the Georgia case. I see no reason for reargument on that case.

It always seemed to me to be an easier case than Texas.

W. O. D.

Mr. Justice Blackmun

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 25, 1972

Dear Harry:

Re: No. 70-18 - Roe v. Wade

Please join me in your Memorandum circulated May 18.

I had once thought this case should be remanded in light of the Georgia case. But I now think it best to hand it down as you have written it.

William O. Douglas

Mr. Justice Blackmun

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 31, 1972

Re: Abortion Cases

Dear Harry:

I have your memorandum submitted to the Conference with the suggestion that these cases be reargued.

I feel quite strongly that they should not be reargued. My reasons are as follows.

In the first place, these cases which were argued last October have been as thoroughly worked over and considered as any cases ever before the Court in my time.

I know you have done yeoman service and have written two difficult cases, and you have opinions now for a majority, which is 5.

There are always minor differences in style, one writing differently than another. But those two opinions of yours in Texas and Georgia are creditable jobs of craftsmanship and will, I think, stand the test of time.

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.

In the second place, I have a feeling that where the Court is split 4-4 or 4-2-1 or even in an important constitutional case 4-3, reargument may be desirable. But you have a firm 5 and the firm 5 will be behind you in these two opinions until they come down. It is a difficult field and a difficult subject. But where there is that solid agreement of the majority I think it is important to announce the cases, and let the result be known so that the legislatures can go to work and draft their new laws.

Again, congratulations on a fine job. I hope the 5 can agree to get the cases down this Term, so that we can spend our energies next Term on other matters.

W. O. D.

Mr. Justice Blackmun

cc: Conference

70-18, 40

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June first
1972

Dear Chief:

I have your memo to the Conference dated May 31, 1972 re Abortion Cases.

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.

William O. Douglas

The Chief Justice

CC: The Conference

For Justice Brennan only

6-2-72

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 70–18 AND 70–40

Jane Roe et al., Appellants, 70–18 *v.* Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.
Mary Doe et al., Appellants, 70–40 *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al.	On Appeal from the United States District Court for the Northern District of Georgia.

[June —, 1972]

Memorandum from MR. JUSTICE DOUGLAS.

The problem involving state abortion legislation is not a brand new one to the Court. *United States* v. *Vuitch*, 402 U. S. 62, involved the District of Columbia statute. It was argued January 12, 1971, and decided April 21, 1971. The opinion was written by Mr. Justice Black. The case presented a troublesome question of the jurisdiction of this Court as well as a substantial constitutional question. Yet it was disposed of in shortly over three months after oral argument, Mr. Justice Black writing for the majority.

The present abortion cases involve the statute of Texas and the statute of Georgia. They were put down for argument last Term and were heard December 13, 1971. The Conference on the two cases was held on December 16, 1971.

THE CHIEF JUSTICE represented the minority view in the Conference and forcefully urged his viewpoint on the issues. It was a seven-man Court that heard the cases and voted on them. Out of that seven there were four who took the opposed view. Hence traditionally

Wm. Doyle 6-7-72

Note - to W. Brennan

6th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 70–18 AND 70–40

Jane Roe et al., Appellants, 70–18 *v.* Henry Wade. | On Appeal from the United States District Court for the Northern District of Texas.

Mary Doe et al., Appellants, 70–40 *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al. | On Appeal from the United States District Court for the Northern District of Georgia.

[June —, 1972]

MR. JUSTICE DOUGLAS.

I dissent from the order putting these cases down for reargument.

The problem involving state abortion legislation is not a brand new one to the Court. *United States* v. *Vuitch*, 402 U. S. 62, involved the District of Columbia statute. It was argued January 12, 1971, and decided April 21, 1971. The case presented a troublesome question of the jurisdiction of this Court as well as a substantial constitutional question. Yet it was disposed of in shortly over three months after oral argument, Mr. Justice Black writing for the majority.

The present abortion cases involve the statute of Texas and the statute of Georgia. They were put down for argument last Term and were heard December 13, 1971. The Conference on the two cases was held on December 16, 1971.

THE CHIEF JUSTICE represented the minority view in the Conference and forcefully urged his viewpoint on

the issues. It was a seven-man Court that heard these cases and voted on them. Out of that seven there were four who initially took a majority view. Hence traditionally the senior Justice in the majority—who in this case was not myself—should have made the assignment of the opinion. For the tradition is a longstanding one that the senior Justice in the majority makes the assignment.[1] The cases were, however, assigned by THE CHIEF JUSTICE.

The matter of assignment is not merely a matter of protocol. The main function of the Conference is to find the consensus.[2] When that is known, it is only logical that the majority decide who their spokesman should be; and traditionally the selection has been made after a very informal discussion among the majority.

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[1] Chief Justice Hughes described the opinion assignment process as follows: "After a decision has been reached, the Chief Justice assigns the case for opinion to one of the members of the Court, that is, of course, to one of the majority if there is a division and the Chief Justice is a member of the majority. If he is in a minority, the senior Associate Justice in the majority assigns the case for opinion." C. Hughes, The Supreme Court of the United States 58–59 (1966). See also W. Brennan, Inside View of the High Court, The New York Time Magazine, October 6, 1963, at 35, 102; F. Frankfurter, Chief Justices I Have Known, in A. Westin, An Autobiography of The Supreme Court 211, 231 (1963); J. Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Aust. L. J. 108, 116 (1959); T. Clark, Internal Operation of the United States Supreme Court, 43 J. Am. Jud. Soc. 45, 50–51 (1959).

[2] Chief Justice Hughes said of the Conference: "In the Supreme Court every judge comes to the conference to express his views and to vote, not knowing but that he may have the responsibility of writing the opinion which will accord with the vote. He is thus keenly aware of his responsibility in voting. It is not the practice in the Supreme Court to postpone voting until an opinion has been brought in by one of the judges which may be plausible enough to win the adherence of another judge who has not studied the case carefully." Op. cit., 59.

When that procedure is followed, the majority view is promptly written out and circulated, after which dissents or concurrences may be prepared.

When, however, the minority seeks to control the assignment, there is a destructive force at work in the Court.

Perhaps the purpose of the minority in the *Abortion Cases* is to try to keep control of the merits. If that is the aim, the plan has been unsuccessful. Opinions in these two cases have been circulated and each commands the votes of five members of the Court. The decisions should therefore be announced.[3]

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. That might be achieved of course by death or conceivably retirement. But that kind of strategy dilutes the integrity of the Court.

Historically this institution has been composed of fiercely independent men with fiercely opposed views. There have been—and will always be—clashes of views. The Conference, though deeply disagreeing on legal and constitutional issues, has traditionally been a group marked by good-will. A majority view, no matter how unacceptable to the minority, has been honored as such. The incumbents have honored and revered the institution more than their own view of the public good.

The *Abortion Cases* are symptomatic. This is an election year. Both political parties have made abortion an issue. What the political parties say or do is none of our

[3] Last Fall we all agreed to deny a motion for additional oral argument in spite of counsel's admonition that the issues warranted more extended airing. 404 U. S. 813. And, though we again were advised that the cases were of paramount significance, we nonetheless denied a request by Texas to postpone argument until it could be heard by a full bench. 404 U. S. 981. That should have settled it.

business. We sit here not to make the path of any candidate easier or more difficult. We decide questions only on their constitutional merits. To prolong these *Abortion Cases* into the next election would in the eyes of many be a political gesture unworthy of the Court.

Five members of the Court have agreed on a disposition of the Texas and Georgia *Abortion Cases*. One dissent has already been written. Those opinions should come down forthwith.

A number of abortion cases are being held [4] for the present two cases. The log jam should be broken.

I dissent with the deepest regret that we are allowing the consensus of the Court to be frustrated.

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[4] The cases now being held for the Texas and Georgia *Abortion Cases* are:

Rosen v. *Louisiana State Bd. of Medical Examiners*, 70-42 (La.)
Rodgers v. *Danforth*, 70-89 (Missouri)
Hanrahan v. *Doe*, 70-105 (Illinois)
Heffernan v. *Doe*, 70-106 (Illinois)
Corkey v. *Edwards*, 71-92 (North Carolina)
Thompson v. *Texas*, 71-1200 (Texas)
Doe v. *Rampton*, 71-5666 (Utah)

The State in parenthesis indicates the statute involved.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 30, 1971

70-40

RE: Abortion Cases

Dear Bill:

I gathered from our conversation yesterday that you too think we might better await Harry Blackmun's circulation in the Texas abortion case before circulating one in the Georgia case. I appreciate that some time may pass before we hear from Harry and, like you, therefore write down my comments so that I won't forget them.

First, there would seem to be a number of threshold issues that are of varying difficulty. Some, I think, must be expressly addressed, while others perhaps require no discussion or should be simply finessed. None, in my opinion, forecloses decision on the crucial questions here -- the existence and nature of a right to an abortion. The threshold issues I see are as follows:

1. Was a three-judge district court improperly convened because the complaint failed to make out a case for an injunction? It would seem that this question must be expressly answered, since we postponed jurisdiction in taking the case. The answer may simply be that the complaint

Wm. Dec 72

for an injunction was not so frivolous as to warrant refusal to convene a three-judge court.

2. (a) Is it material that Mary Doe was not proved to be a real person who was pregnant and denied an abortion because of application of the Georgia statute? In declining proof on these matters, the district court presumably found favorably for the plaintiff, a finding that is apparently supported by an affidavit in the record. (b) Since Mary Doe was apparently a resident of Georgia, she seems to lack standing to raise the rights of non-residents vis-a-vis the residency requirement of the Georgia law. Do any other plaintiffs have standing to assert those rights? Although there may well be Shapiro v. Thompson difficulties with the residency requirement, it may be best to finesse that question and the related standing issue. (c) Does Mary Doe have standing to assert the equal protection claims of poor and Black persons? On the one hand, the basis for her complaint seems to have been that she was refused an abortion not because of poverty or race, but because the hospital abortion committee passed unfavorably on her application. On the other hand, after filing her complaint, she evidently was granted the right to an abortion at another hospital, but was unable to afford the costs. In any event, I suggest that it may be unnecessary

to resolve Mary Doe's standing in this regard, because the equal protection claims need not be reached. The gist of those claims is that the Georgia administrative procedures for obtaining an abortion are overly costly. Since I would strike all of those procedures down except for the requirement that the abortion be performed by a licensed physician, the importance of the equal protection claims would seem diminished. Of course, the question would remain whether there is a Boddie v. Connecticut-type right to the cost of the single physician's fee. But that is not the argument pressed here.

3. Is the case moot because Mary Doe is no longer pregnant?

4. Is abstention required?

5. What is the impact of Younger v. Harris and Samuels v. Mackell? I suggest that we make an express holding, if only in a footnote, to the effect that those cases do not apply where there is no State court proceeding pending. I think it would be helpful to nail this point down while we can.

6. Is it material whether class relief was awarded? If so, what was the class?

As for the merits, I read your memorandum to find the following constitutional defects in the Georgia statute:

(1) The statute infringes the right of privacy by refusing abortions where the mother's mental, but not physical health is in jeopardy.

(2) The statute violates procedural due process requirements by denying the woman notice and hearing when her application for an abortion is refused.

(3) The statute infringes a First Amendment right to seek advice on one's health and rely on the physician of one's choice by subjecting the decision of the doctor and patient to the oversight of other physicians.

(4) The statute possibly denies the poor and the Black equal protection of the laws by requiring administrative procedures to which they may, in effect, lack access.

As indicated, I do not think we need touch upon No. 4. Similarly, if the Georgia scheme for oversight of the individual's abortion decision is struck down (which I would do, for reasons explained below, under the right of privacy rather than under the First Amendment), no need would exist for discussing the procedural due process aspects of the scheme, and your No. 2 could be omitted. The abortion decision would become that of the woman alone, except that the operation could be performed only by a licensed practitioner; if one physician refuses to do it, her recourse would simply be to find another doctor.

With respect to No. 1 and No. 3, I am not sure that we have an authoritative interpretation of "health" within the meaning of the Georgia statute. (Appellees' counsel stated at the oral argument that "not judicially but as a matter of practice -- . . . health here includes mental health.") In any case, I believe that the statute infringes the right of privacy not merely because it may restrictively use "health" to mean only the mother's physical well-being, but because it limits abortions to enumerated cases. In other words, I agree with the district court that the state may not limit the number of reasons for which an abortion may be sought, since "such action unduly restricts a decision sheltered by the Constitutional right of privacy."

I guess my most significant departure from your approach is in the development of the right-of-privacy argument. I agree with you that the right is a species of "liberty" (although, as I mentioned yesterday, I think the Ninth Amendment (as in your proposed Papachristou opinion) should be brought into this problem at greater length), but I would identify three groups of fundamental freedoms that "liberty" encompasses: first, freedom from bodily restraint or inspection, freedom to do with one's body as one likes, and freedom to care for one's health and person; second, freedom of choice in the basic decisions of life,

such as marriage, divorce, procreation, contraception, and the education and upbringing of children; and, third, autonomous control over the development and expression of one's intellect and personality.

As to the first group, I would rely on Terry v. Ohio, Meyer v. Nebraska, Jacobson v. Massachusetts, and Union Pacific Ry Co. v. Botsford. In particular, I would stress the positive aspects of Jacobson -- that there is "a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government . . . to interfere with the exercise of that will" -- rather than the holding that compelling public necessity may justify intrusion into bodily freedom.

I would peg the right to care for one's health and person to the right of privacy rather than directly to the First Amendment partly because (1) it would seem to be broader than the right to consult with, and act on the advice of, the physician of one's choice and include, for example, access to nonprescriptive drugs and (2) it identifies the right squarely as that of the individual, not that of the individual together with his doctor. In addition, NAACP v. Button, relied on in the First Amendment analysis of your memorandum, I think was based not on the associational freedom of the lawyer and client, but on the expressional

value of litigation and the associational rights of the NAACP and its members. More important, the First Amendment approach may make it difficult to sustain requirements for consultations with other doctors that should be upheld -- as, for instance, measures to restrain over-eagerness in performing novel operations for the sake of research (or, worse, publicity) rather than for the sake of the patient's health. Although those measures might be validated under a traditional First Amendment "compelling interest" analysis, the First Amendment approach throws a heavy weight on the scales on the side of associational freedom. The right of privacy approach, in contrast, merely states that there is a fundamental interest in the individual's safeguarding his health. Measures that promote health, then, need not be set off and balanced against that interest, but may merely be judged on whether there is a reasonable basis for believing that they, in fact, promote health.

As to the second group, I'd rely on Loving v. Virginia, Boddie v. Connecticut, Skinner v. Oklahoma, my recently circulated Eisenstadt v. Baird, Griswold v. Connecticut, Prince v. Massachusetts, Pierce v. Society of Sisters, and Meyer v. Nebraska. [Incidentally, Eisenstadt in its discussion of Griswold is helpful in addressing the abortion question. If you could find it possibl e to join my proposed Court opinion in Eisenstadt

in addition to filing a separate opinion, I believe that we would have a four-man majority. As it stands now, Brothers Stewart and Marshall have joined, while Brother Blackmun is yet to be heard from.] Finally, as to the third group, I'd rely on Stanley v. Georgia and its quotation from the Brandeis opinion in Olmstead v. United States.

The decision whether to abort a pregnancy obviously fits directly within each of the categories of fundamental freedoms I've identified and, therefore, should be held to involve a basic individual right.

Again like you, I would next emphasize that that conclusion is only the beginning of the problem -- that the crucial question is whether the State has a compelling interest in regulating abortion that is achieved without unnecessarily intruding upon the individual's right. But here I would deal at length not only with the health concern for the well-being of the mother, but with the material interest in the life of the fetus and the moral interest in sanctifying life in general. This would perhaps be the most difficult part of the opinion. I would come out about where Justice Clark does in his Loyola University Law Review article -- that "'moral predilections must not be allowed to influence our minds in settling legal distinctions'" (quoting Holmes) and that "the law deals in reality, not obscurity -- the known rather than the unknown. When

sperm meets egg life may eventually form, but quite often it does not. [Indeed, the brief for the appellants in the Texas abortion case quotes an estimate of the rate of "spontaneous wastage" of 50%]. The law does not deal in speculation. The phenomenon of life takes time to develop, and [only after] it is actually present, it cannot be destroyed." The inconsistent position taken by Georgia in allowing destruction of the fetus in some, but not all cases might also be mentioned. Thus, although I would, of course, find a compelling State interest in requiring abortions to be performed by doctors, I would deny any such interest in the life of the fetus in the early stages of pregnancy. On the other hand, I would leave open the question when life "is actually present" -- whether there is some point in the term before birth at which the interest in the life of the fetus does become subordinating.

Under the foregoing approach the Georgia provisions for (1) overseeing the individual's abortion decision through the requirement for approval by two additional doctors and the hospital abortion committee, (2) limiting the performance of abortions to accredited hospitals, and (3) restricting abortions to cases where the doctor finds "that an abortion is necessary" must fall together with the limitation on the reasons for

abortion that the district court has already declared unconstitutional. First, there is no evidence of any abuse by individual doctors in performing abortions that are unwise from the standpoint of the mother's health. To the contrary, statistics apparently indicate that abortions in the early part of the term are safe, even when performed in clinics rather than hospitals. Secondly, if there is a right to an abortion in the early part of the term, that right cannot be effectively denied through cumbersome and dilatory administrative procedures or requirements. And, finally, the right of privacy in the matter of abortions means that the decision is that of the woman and her alone. The district court was wrong in holding that the State has a legitimate interest in regulating the quality of the decision.

In sum, I would affirm the district court's conclusion that the reasons for an abortion may not be prescribed. I would further hold that the only restraint a State may constitutionally impose upon the woman's individual decision is that the abortion must be performed by a licensed physician. And since the statute, as thus validated, would not limit the right to an abortion by making an early abortion difficult to obtain and since we can presume that Georgia will obey the declaratory

judgment of this Court, I would affirm the denial of an injunction.

Sincerely,

Bill

Mr. Justice Douglas.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 18, 1972

RE: No. 70-18 - Roe v. Wade

Dear Harry:

My recollection of the voting on this and the Georgia case was that a majority of us felt that the Constitution required the invalidation of abortion statutes save to the extent they required that an abortion be performed by a licensed physician within some limited time after conception. I think essentially this was the view shared by Bill, Potter, Thurgood and me. My notes also indicate that you might support this view at least in this Texas case. In the circumstances, I would prefer a disposition of the core constitutional question. Your circulation, however, invalidates the Texas statute only on the vagueness ground. I see no reason for a reargument in the Georgia case. I think we should dispose of both cases on the ground supported by the majority.

This does not mean, however, that I disagree 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.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 31, 1972

RE: No. 70-18 -Roe v. Wade
No. 70-40 - Doe v. Bolton

Dear Harry:

As I suggested, I see no reason to put these cases over for reargument. I say that since, as I understand it, there are five of us (Bill Douglas, Potter, Thurgood, you and I) in substantial agreement with both opinions and in that circumstance I question that reargument would change things.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

like Bill Brennan I too am opposed to reargument of these cases —

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

Circulated: 5-29-72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70–18

Jane Roe et al., Appellants, v. Henry Wade. | On Appeal from the United States District Court for the Northern District of Texas.

[May —, 1972]

MR. JUSTICE WHITE, dissenting.

I dissent from the Court's decision that the Texas abortion statute, which allows abortions only when they are "procured or attempted by medical advice for the purpose of saving the life of the mother," 2A Texas Penal Code Art. 1196, is unconstitutionally vague.

This decision necessarily overrules *United States* v. *Vuitch,* 402 U. S. 62 (1971), decided only last Term, which upheld against vagueness attack D. C. Code Ann. § 22–201 which allowed abortion only when "necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." In that case, a district court had dismissed an indictment on the ground that the statutory standard was unconstitutionally vague, 305 F. Supp. 1032, and the Government appealed directly to this Court, which reversed the District Court's decision. The vagueness discussion in *Vuitch* did not, as the majority asserts, "focus . . . only on the word 'health,'" although the greater part of the discussion in this Court's opinion and in that of the District Court was devoted to parsing that phrase. The lower court had treated the statutory standard as the "preservation-of-life-or-health standard," 305 F. Supp., at 1035, as did this Court, 402 U. S., at 70, 71. Furthermore, the decision that the "preservation-of-life" standard is not impermissibly vague was a necessary part

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 5, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

My view has been that these cases should be reargued, and I still think so.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 31, 1972

Re: No. 18 - Roe v. Wade
No. 40 - Doe v. Bolton

Dear Harry:

Like Bill Brennan, I, too, am opposed to reargument of these cases.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 18, 1972

Dear Chief:

This is in response to your memorandum of January 17 concerning reargurments.

I nominate for reargument the two abortion cases, No. 70-18, Roe v. Wade, and No. 70-40, Doe v. Bolton. It seems to me that the importance of the issues is such that the cases merit full bench treatment.

I think another candidate is No. 70-58, Fein v. Selective Service System.

So far as your nominations are concerned, my reaction is that No. 70-45, United States v. Brewster, because of its fundamental importance and precedent, deserves reargument, and that No. 70-5061, Kirby v. Illinois, should also be reconsidered. Justice White's separate concurrence certainly so indicates.

In summary, I vote to set down for reargument Nos. 70-18 and 70-40, No. 70-45 and No. 70-5061. I shall abide by the Conference's reaction as to No. 70-58.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 18, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-18 - Roe v. Wade

Herewith is a first and tentative draft for this case.

Due to the presence of multiple parties and the existence of issues of standing and of appellate routes, it may be somewhat difficult to obtain a consensus on all aspects. My notes indicate, however, that we were generally in agreement to affirm on the merits. That is where I come out on the theory that the Texas statute, despite its narrowness, is unconstitutionally vague.

I think that this would be all that is necessary for disposition of the case, and that we need not get into the more complex Ninth Amendment issue. This may or may not appeal to you.

In any event, I am still flexible as to results, and I shall do my best to arrive at something which would command a court. Would it be advisable, rather than having numerous concurring and dissenting opinions immediately written, to have each of you express his general views in order to see if we can come together on something?

The Georgia case, yet to come, is more complex. I am still tentatively of the view, as I have been all along, that the Georgia case merits reargument before a full bench. I shall try to produce something, however, so that we may look at it before any decision as to that is made.

Sincerely,

H.A.B.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Blackmun, J.

Circulated: 5/18/72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70–18

Jane Roe et al., Appellants,
v.
Henry Wade.

On Appeal from the United States District Court for the Northern District of Texas.

[May —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

Under constitutional attack here are abortion laws of the State of Texas.[1] 2A Texas Penal Code, Arts.

[1] "Article 1191. Abortion

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

"Art. 1192. Furnishing the means

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

"Art. 1196. By medical advice

"Nothing in this chapter applies to an abortion procured or at-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-18 - Roe v. Wade
No. 70-40 - Doe v. Bolton

Nearly all of you, other than Lewis Powell and Bill Rehnquist, have been in touch with me about these cases. A number of helpful and valid suggestions have been made.

You will recall that when we were canvassing the list for possible candidates for reargument when the bench would be full, I suggested that, although the Texas case perhaps might come down, the Georgia case should go over. This suggestion was not enthusiastically received. It was the consensus, as I recall, that I produce some drafts and we would see what reactions ensued. I have done this and, frankly, I prepared the Texas memorandum the way I did in the hope that we might come near to agreement there irrespective of the disposition of the Georgia case.

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:

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 all the details. Should we make the Georgia case the primary opinion and recast Texas in its light? Should we refrain from emasculation of the Georgia statute and, instead, hold it unconstitutional in its entirety and let the state legislature reconstruct from the beginning? Should we spell out -- although it would then necessarily be largely dictum -- just what aspects are controllable by the State and to what extent? For example, it has been suggested that upholding Georgia's provision as to a licensed hospital should be held unconstitutional, and the Court should approve performance of an abortion in a "licensed medical facility." These are some of the suggestions that have been made and that prompt me to think about a summer's delay.

I therefore conclude, and move, that both cases go over the Term.

Sincerely,

H. A. B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 1, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

The question is whether the abortion cases should be reargued.

In the early weeks of my service on the Court a number of possible candidates for reargument were considered by the Conference. I took the position then, as did Bill Rehnquist, that the other seven Justices were better qualified to make these decisions. I therefore took no part in any of them.

The present question arises in a different context. I have been on the Court for more than half a term. It may be that I now have a duty to participate in this decision, although from a purely personal viewpoint I would be more than happy to leave this one to others. I have not read the briefs; nor have I read either of Harry's opinions. I am too concerned about circulating my own remaining opinions to be studying cases in which I did not participate. I certainly do not know how I would vote if the cases are reargued.

In any event, I have concluded that it is appropriate for me to participate in the pending question. I have read the memoranda circulated, and am persuaded to favor reargument primarily by the fact that Harry Blackmun, the author of the opinions, thinks the cases should be carried over and reargued next fall. His position, based on months of study, suggests enough doubt on an issue of large national importance to justify the few months delay.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

I concur in the views expressed by Lewis Powell in his memorandum to the Conference of June 1st, and therefore vote in favor of reargument.

Sincerely,

WHR