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
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

December 13, 1972

Re: Abortion Cases

Dear Harry:

I have more "ploughing" to do on your memo but one thing that occurs to me is the possible need to deal with whether husbands as such or parents of minors have "rights" in this area. Then, too, since the Court gave "illegitimate fathers" the same rights as a lawful parent, we must face up to that.

I will have some other comments but they may be washed out by suggestions from others.

Regards,

Mr. Justice Blackmun

Copies to the Conference

MSS COPY

70-18

Supreme Court of the United States

Memorandum

1-15, 1973

Harry Can we chat on "Abortion" Cases after session today. Just ring me at 3:00 pm ish

OK

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

January 16, 1973

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

Dear Harry:

I am working over some concurrences in the above cases and will try to have them in your hands and circulated sometime tomorrow. I do not believe they will involve any significant change in what you have written.

I see no reason why we cannot schedule these cases for Monday.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

MSS COPY

70-18

Supreme Court of the United States

Memorandum

1-17, 1923

Harry

Saw WJB memo at noon. Had not occurred to me but precedent is factor. I suspect we'd be better off to simply ignore press cards entirely except as the Head Note can get the printed word to them.

See you after 2:30 WHT

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

1st DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: JAN 18 1973

Recirculated: _____

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.

[February —, 1973]

MR. CHIEF JUSTICE BURGER, concurring.

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of the pregnant women, using the term health in its broadest medical context. See *Vuitch* v. *United States,* 402 U. S. 62, 71–72 (1971). I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts.

In oral argument, counsel for the State of Texas informed the Court that early abortive procedures were routinely permitted in certain exceptional cases, such as nonconsensual pregnancies resulting from rape and incest. In the face of a rigid and narrow statute, such as that of Texas, no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion. Of course,

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

CHAMBERS OF
THE CHIEF JUSTICE

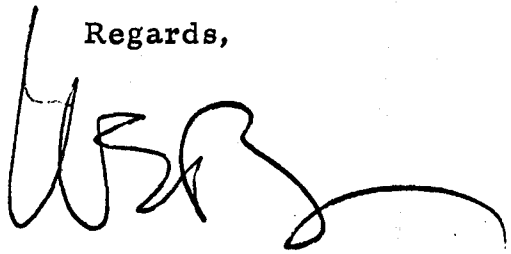
February 2, 1973

MEMORANDUM TO THE CONFERENCE:

In the light of Justice Blackmun's memorandum of January 23 I suggest we request the Clerk to strike the first nine cases (under the "Hold for" category) from the Conference List, page 15, for February 16.

Unless I hear to the contrary I will so instruct the Clerk, requesting that the cases be relisted after the obscenity opinions have been announced.

Regards,



Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 24, 1972

Dear Harry:

Please join me in your Abortion Cases opinions -- No. 70-18 and No. 70-40.

I will probably file a concuring opinion; and a footnote in that opinion will state that I disagree with the dismissal of the Dr. Hallford's complaint, as I still disagree with Younger v. Harris, 401 U.S. 37 and its progeny. But this is a mere fly speck in the total case.

You have done an excellent job.

WILLIAM O. DOUGLAS

Mr. Justice Blackmun

cc: Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 70–18 AND 70–40

11/15/72

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.

[December —, 1972]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add a few words.

The questions presented in the present case go far beyond the issues of vagueness, which we considered in *United States* v. *Vuitch,* 402 U. S. 62. They involve the right of privacy, one aspect of which we considered in *Griswold* v. *Connecticut,* 381 U. S. 479, 484, when we held that various guarantees in the Bill of Rights create zones of privacy.[2]

[1] I disagree with the dismissal of Dr. Hallford's complaint in intervention in *Roe* v. *Wade,* because my disagreement with *Younger* v. *Harris,* 401 U. S. 37, revealed in my dissent in that case, still persists and extends to the progeny of that case.

[2] There is no mention of privacy in our Bill of Rights but our decisions have recognized it as one of the fundamental values those amendments were designed to protect. The fountainhead case is *Boyd* v. *United States,* 116 U. S. 616, holding that a federal statute which authorized a court in tax cases to require a taxpayer to produce his records or to concede the Government's allegations offended the Fourth and Fifth Amendments. Justice Bradley, for the Court, found that the measure unduly intruded

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 11, 1972

Dear Harry:

RE: Abortion Cases

I favor the first trimester, rather than viability.

WOD

William O. Douglas

Mr. Justice Blackmun

cc: Conference

B

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 22, 1972

Dear Harry:

I have your circulations of December 21 in No. 70-18 - Roe v. Wade and No. 70-40 - Doe v. Bolton. Please join me.

W. O. D.

Mr. Justice Blackmun

cc: Conference

3rd Changes Throughout

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

2nd DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

Nos. 70–18 AND 70–40

Circulated: _____

Recirculated: DEC 29 1972

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.

[December —, 1972]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add a few words.

The questions presented in the present case go far beyond the issues of vagueness, which we considered in *United States* v. *Vuitch,* 402 U. S. 62. They involve the right of privacy, one aspect of which we considered in *Griswold* v. *Connecticut,* 381 U. S. 479, 484, when we held that various guarantees in the Bill of Rights create zones of privacy.[2]

[1] I disagree with the dismissal of Dr. Hallford's complaint in intervention in *Roe* v. *Wade,* because my disagreement with *Younger* v. *Harris,* 401 U. S. 37, revealed in my dissent in that case, still persists and extends to the progeny of that case.

[2] There is no mention of privacy in our Bill of Rights but our decisions have recognized it as one of the fundamental values those amendments were designed to protect. The fountainhead case is *Boyd* v. *United States,* 116 U. S. 616, holding that a federal statute which authorized a court in tax cases to require a taxpayer to produce his records or to concede the Government's allegations offended the Fourth and Fifth Amendments. Justice Bradley, for the Court, found that the measure unduly intruded

Changes marked and stylistic changes throughout

3rd DRAFT

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

From: Douglas, J.

Circulated: _____

Recirculated: 1-2-73

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.

[December —, 1972]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court,[1] I add a few words.

The questions presented in the present cases go far beyond the issues of vagueness, which we considered in *United States* v. *Vuitch,* 402 U. S. 62. They involve the right of privacy, one aspect of which we considered in *Griswold* v. *Connecticut,* 381 U. S. 479, 484, when we held that various guarantees in the Bill of Rights create zones of privacy.[2]

[1] I disagree with the dismissal of Dr. Hallford's complaint in intervention in *Roe* v. *Wade,* because my disagreement with *Younger* v. *Harris,* 401 U. S. 37, revealed in my dissent in that case, still persists and extends to the progeny of that case.

[2] There is no mention of privacy in our Bill of Rights but our decisions have recognized it as one of the fundamental values those amendments were designed to protect. The fountainhead case is *Boyd* v. *United States,* 116 U. S. 616, holding that a federal statute which authorized a court in tax cases to require a taxpayer to produce his records or to concede the Government's allegations offended the Fourth and Fifth Amendments. Justice Bradley, for the Court, found that the measure unduly intruded

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 28, 1973

70-18 / 70-40

Dear Harry:

This is a form letter -- 50 coming in this A.M. from Newman Center in Amhurst, Massachusetts.

William O. Douglas

Mr. Justice Blackmun

WD

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 28, 1973

70-18 | 70-40

Dear Harry:

Here is a variation on the form letter.

William O. Douglas

Mr. Justice Blackmun

WD

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 28, 1973

70-18 / 70-40

Dear Harry:

This is one of the three I mentioned.

William O. Douglas

Mr. Justice Blackmun

WD

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 13, 1972

72 18 / 72-40

RE: Abortion Cases

Dear Harry:

While as you know I am in basic agreement with your opinions in these cases, I too welcome your giving second thoughts to the choice of the end of the first trimester as the point beyond which a state may appropriately regulate abortion practices. But if the "cut-off" point is to be moved forward somewhat, I am not sure that the point of "viability" is the appropriate point, at least in a technical sense. I read your proposed opinions as saying, and I agree, that a woman's right of personal privacy includes the abortion decision, subject only to limited regulation necessitated by the compelling state interests you identify. Moreover, I read the opinions to say that the state's initial interests (at least in point of time if not also in terms of importance) are in safeguarding the health of the woman and in maintaining medical standards. If this be the case, is the choice of "viability" as the point where a state may begin to regulate abortions appropriate? For if we identify the state's initial interests as the health of the woman and the maintenance of medical standards, the selection of "viability" (i.e., the point in time where the fetus is capable of living outside of the woman) as the point where a state may begin to regulate in consequence of these interests seems to me to be technically inconsistent.

"Viability," I have thought, is a concept that focuses upon the fetus rather than the woman. As the opinions point out, there may be some point in pregnancy where the state's interest in protecting potential life becomes sufficiently compelling to sustain regulation of abortions for that reason alone. At this point, however, the state is asserting its interest in the life of the child, as opposed only to

WJD

the health of the woman and the maintenance of medical standards, and thus considerations of "viability" -- the interest in the life of the child -- arise at a point in time after the state has asserted its interests in safeguarding the health of the woman and in maintaining medical standards. It seems to me, therefore, that the selection of the term "viability" to designate the initial point where state regulation is permissible does not coincide with the state interests which your opinions recognize as occurring first in point of time.

Lest I be misunderstood, I have no objection to moving the "cut-off" point (the point where regulation first becomes permissible) from the end of the first trimester (12 weeks) as it now appears to a point more closely approximating the point of viability (20 to 28 weeks), but I think our designation of such a "cut-off" point should be articulated in such a way as to coincide with the reasons (i. e., the asserted state interests) for creating such a "cut-off" point. Thus, the opinions recognize that the danger to the health of the woman who undergoes an abortion tends to increase as the period of pregnancy advances. In fact, I am told (correct me if I am wrong) that at an early stage of pregnancy, prior to 18 or 20 weeks for example, relatively simple and safe abortion procedures such as the suction method or the D and C are available to the physician; but thereafter the abortion methods are medically more complex (i. e., induced labor or Caesarean section) and the danger to the health of the woman increases accordingly as does the required medical facilities and expertise. I read the opinions as saying, and I agree, that these medical considerations are the factors which initially give rise to permissible state regulation of abortions. As such, can we not simply articulate the "cut-off" point in terms which correspond with the factors which give rise to the "cut-off" point in the first place? For example, rather than using a somewhat arbitrary point such as the end of the first trimester or a somewhat imprecise and technically inconsistent point such as "viability," could 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 interests of safeguarding the health of the woman and of maintaining medical standards -- becomes permissible. 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 at 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.

I do not mean to add confusion to such an admittedly complex problem, but I offer these suggestions with the thought that logically -- from both a medical and a legal standpoint -- they might complement the excellent medical and legal discussion which you have put together in the opinions. 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 interests which allow the states to select a "cut-off" point, and I repeat that I question whether the term "viability" identifies a point in time which is definitionally related to the state interests which can properly be asserted first in time.

I venture two other very minor and unrelated suggestions. First, does not your opinion in the Georgia case cut the heart out of the Georgia statute? If so, should we leave other portions of the statute in tact, as I think you do? Is this a desirable result, particularly during the interval between our decision and the enactment of a new, constitutionally permissible statute by the Georgia Legislature? There may be nothing of substance here, so I leave this to your own discretion.

The second suggestion relates to our discussion of Shapiro v. Thompson on page 19 of the Georgia opinion. Since Shapiro v. Thompson is not relied upon to invalidate the Georgia statute's residency requirement, does not the statement "We see in the statute no undue restrictions on the travel right as such" and the sentence which follows inferentially decide issues which the Court need not decide in this case?

Sincerely,

Bill

Mr. Justice Blackmun

B

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 27, 1972

Box 98 file 4 7-11
(4, 5, 6 n/c)

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

Dear Harry:

I agree with your circulation of December 21.

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.

January 17, 1973

RE: Abortion Cases

Dear Harry:

I think your proposed announcement in the Abortion Cases is indeed very well done. I have very definite reservations, however, about your suggestion that it be distributed to the press. 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.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 27, 1972

Re: No. 70-18, Jane Roe v. Henry Wade
No. 70-40, Mary Doe v. Arthur K. Bolton

Dear Harry,

You have done an admirably thorough job in these two cases, and I am in basic agreement with the results you reach. I shall perhaps write separately in concurrence.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

/ fm

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 14, 1972

Re: Abortion Cases

Dear Harry,

This is in response to your memorandum of December 11. One of my concerns with your opinion as presently written is the specificity of its dictum--particularly in its fixing of the end of the first trimester as the critical point for valid state action. I appreciate the inevitability and indeed wisdom of dicta in the Court's opinion, but I wonder about the desirability of the dicta being quite so inflexibly "legislative."

My present inclination would be to allow the States more latitude to make policy judgments between the alternatives mentioned in your memorandum, and perhaps others. I had hoped to prepare a tentative concurring opinion by now. I shall certainly get something written and circulated during the Christmas recess.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

B
N

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 27, 1972

Re: Abortion Cases

Dear Harry,

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, and I was again greatly impressed with the thoroughness and care with which you have accomplished a very difficult job.

I have now decided to discard the rather lengthy concurring opinion on which I have been working, and to file instead a brief monograph on substantive due process, joining your opinions. My short concurring statement will, I hope, be circulated before the end of this week.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

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

2nd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

No. 70-18

Circulated: DEC 28 1972

Recirculated: _____

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

[January —, 1973]

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in *Ferguson* v. *Skrupa*, 372 U. S. 726, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.*, at 730.[1]

Barely two years later, in *Griswold* v. *Connecticut*, 381 U. S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution.[2] So it was clear

[1] Only Mr. Justice Harlan failed to join the Court's opinion, 372 U. S., at 733.

[2] There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of

[redacted]

MSS COPY

70-18

Supreme Court of the United States

Memorandum

1-12, 1973

Harry -

What are the chances, do you think, of Roe, Doe etc. being announced Sometime next week?

P.S.

MSS COPY

70-18

Supreme Court of the United States

Memorandum

1-16, 1973

Harry -

Are Doe, Roe, etc. going to be announced tomorrow?

P.S.

MSS COPY

70-18

Supreme Court of the United States

Memorandum

1-16, 1923

Harry -

I think your proposed Doe, Roe etc. memo an issue of sufficient importance to make desirable a brief conference this afternoon if the announcements are to be tomorrow. P.S.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 1, 1972

Re: Abortion Cases

Dear Harry:

I have been struggling with these cases. I shall probably end up concurring in part and dissenting in part.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

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.

SUPREME COURT OF THE UNITED STATES

Circulated: 1-11-73

Recirculated: _____

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.

[January —, 1973]

MR. JUSTICE WHITE, dissenting.

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are nevertheless unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect

53 — 1

2, 3

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

2nd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Nos. 70–18 AND 70–40

Recirculated: 1-13-73

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.

[January —, 1973]

MR. JUSTICE WHITE, dissenting.

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are nevertheless unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect

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

3rd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 1-16-73

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.

[January 17, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are nevertheless unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 12, 1972

Re: Abortion Cases

Dear Harry:

I am inclined to agree that drawing the line at viability accommodates the interests at stake better than drawing it at the end of the first trimester. Given the difficulties which many women may have in believing that they are pregnant and in deciding to seek an abortion, I fear that the earlier date may not in practice serve the interests of those women, which your opinion does seek to serve.

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

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

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

Sincerely,

T.M.

Mr. Justice Blackmun
cc: Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 26, 1972

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

Dear Harry:

Please join me in your memoranda of December 21 in the subject cases.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: Conference

MSS COPY

November 21, 1972

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

Dear Bill:

In that portion of this proposed opinion that deals with abortion history I have referred to the development of the canon law and to the position of the Catholic Church. I personally would very much appreciate your paying particular attention to these passages. I believe they are accurate factually, but I do not want them to be offensive or capable of being regarded as unduly critical by any reader. Your judgment as to this will be most helpful.

Sincerely,

HAB

Mr. Justice Brennan

B

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 21, 1972

MEMORANDUM TO THE CONFERENCE

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

Herewith is a memorandum (1972 fall edition) on the Texas abortion case.

This has proved for me to be both difficult and elusive. 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 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.

I have attempted to preserve Vuitch in its entirety. You will recall that the attack on the Vuitch statute was restricted to the issue of vagueness. 402 U. S. at 73. I would dislike to have to undergo another assault on the District of Columbia statute based, this time, on privacy grounds. I, for one, am willing to continue the approval of the Vuitch-type statute on privacy as well as on vagueness. The summary here attempts to do just that. You may not agree.

I apologize for the rambling character of the memorandum and for its undue length. It has been an interesting assignment. As I stated in conference, the decision, however made, will probably result in the Court's being severely criticized.

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

2nd DRAFT

From: Blackmun, J.

Circulated: 11/22/72

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.

[December —, 1972]

MR. JUSTICE BLACKMUN, Memorandum.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton, post* ——, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

November 27, 1972

Re: Abortion Cases

Dear Bill:

I think that my answers to the two questions you raise in your note of November 24 are as follows:

1. I would have conceptual difficulty in invalidating the Texas statute only as applied to a litigant within the first trimester. I am not now prepared to say that immediately after the first trimester a very restrictive statute of this kind would pass constitutional muster. Part of my difficulty, of course, may be due to the approach I originally preferred to the Texas statute. You may recall that in the "Spring Edition" I would have struck the statute on vagueness grounds. I still think it is vague and could not withstand careful analysis. I do not know, and I doubt if any physician can know, what is meant when the statute speaks of "the purpose of saving the life of the mother." We sustained the D. C. statute in Vuitch only because it also related to "health." My vagueness approach, however, did not find favor. Byron disagreed with it, and most of the others preferred to get to what they called the "core issue." Thus, this time around, I used the Texas case as the primary one and did not reach the issue of vagueness.

2. The answer to your second question is definitely in the affirmative. I agree that after the first trimester a state is entitled to more latitude procedurally as well as substantively.

Sincerely,

HAB?

Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 4, 1972

Re: Abortion Cases

Dear Lewis:

I appreciate your letter of November 29 with its suggestions.

I cannot know, of course, where we shall end up. I have not had any intimation of violent disagreement, but I am informed that Byron and Bill Rehnquist will dissent at least in part. Bill Douglas' dissent seems to be confined to his footnote 1 and the Younger v. Harris issue. Bill Brennan has indicated that he also is concerned about Younger because of his posture in that case when it was decided.

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

I could go along with viability if it could command a court. By that time the state's interest has grown large indeed. I suspect that my preference, however, is to stay with the end of the first trimester for the following reasons: (1) It is more likely to command a court. (2) A state is still free to make its decision on the liberal side and fix a later point in the abortion statutes it enacts. (3) I may be wrong, but I have the impression that many physicians are concerned about facilities and, for example, the need of hospitalization,

after the first trimester. I would like to leave the states free to draw their own medical conclusions with respect to the period after three months and until viability. The states' judgment of the health needs of the mother, I feel, ought, on balance, to be honored.

I would be willing to state, either in the opinion or in a footnote, what is essentially the obvious--namely, that a state is free to leave the decision to the attending physician and to regulate at a later date than the end of the first trimester.

These are just passing thoughts.

Bearing somewhat on this is correspondence that has passed between Bill Rehnquist and me. I enclose copies of it for your information.

Sincerely,

Harry

Mr. Justice Powell

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 11, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

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

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

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

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

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

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

May I have your reactions to this suggestion?

Sincerely,

Harry

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 15, 1972

MEMORANDUM TO THE CONFERENCE:

Re: Abortion Cases

I appreciate the helpful suggestions that have come to me in response to my memorandum of December 11. I now feel somewhat optimistic that the issues are in focus and that an agreement in some general areas may be in prospect.

With your permission, I would like the opportunity to revise the proposed opinions in the light of these suggestions. I have in mind associating the end of the first trimester with an emphasis on health, and associating viability with an emphasis on the State's interest in potential life. The period between the two points would be treated with flexibility. I shall try to do this revision next week and circulate another draft before the end of the year. It is my earnest hope, as you know, that on this sensitive issue we may avoid excessive fractionation of the Court, and that the cases may come down no later than the week of January 15 to tie in with the convening of most state legislatures.

Sincerely,

H. A. B.

B

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 21, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

Herewith are revised drafts of the Texas and Georgia memoranda.

I have endeavored to accommodate the various views expressed to me orally or by letter. The principal change in the Texas memorandum is at page 47 et seq. Here 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.

The Chief has expressed concern about the rights of the father. I have mentioned these in footnote 67. This will not be very satisfying, but I am somewhat reluctant to try to cover the point in cases where the father's rights, if any, are not at issue. I suspect there will be other aspects of abortion that will have to be dealt with at a future time.

Sincerely,

H. A. B.

pp. 33, 34, 35, 38, 39
40, 41, 43, 44, 47
48, 49, 50

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

From: Blackmun, J.

Circulated:

Recirculated: 12/21/72

3rd DRAFT

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.

[December —, 1972]

MR. JUSTICE BLACKMUN, Memorandum.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton, post* ——, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

MSS COPY

70-18

Supreme Court of the United States

Memorandum

1-16, 1973

Potter

Who knows? I doubt now that they will be announced tomorrow. He says he may write. I hope for Monday, the 22nd at the latest.

They must come down

I wholeheartedly agree.

P.S.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 16, 1973

MEMORANDUM TO THE CONFERENCE:

Re: Abortion Cases

I anticipate the headlines that will be produced over the country when the abortion decisions are announced.

Accordingly, I have typed out what I propose as the announcement from the bench in these two cases. I enclose a copy of it for your review and advice. Please note the penultimate paragraph.

I suggest that copies of this be given to Mr. Whittington for distribution to the press if any reporters desire it. It will in effect be a transcript of what I shall say, and there should be at least some reason for the press not going all the way off the deep end.

Sincerely,

H. A. B.

B M
pp. 1, 10, 34, 40, 41

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

4th DRAFT

From: Blackmun, J.

Circulated: _____

Recirculated: 1/12/73

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.

[December —, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton, post* ——, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

LAH

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 23, 1973

MEMORANDUM TO THE CONFERENCE:

Re: Abortion Holds

The Clerk has supplied me with a list of cases being held for the abortion decisions. Presumably, these will appear on a supplemental list for the Conference of February 19. I have chosen to review these holds now, while abortion is fresh in the minds of all of us, rather than immediately before the February Conference.

The following cases do not concern the basic abortion issue. One or more of them are being held, not only for Abortion but for Obscenity. In any event, I am inclined to hold all of them further for obscenity:

No. 70-1 - Grove Press Inc. v. Flask

No. 70-10 - Florida Ex. Rel. Faircloth v. M & W Theatres, Inc.

No. 70-23 - Thompson v. United Artists Theatre Circuit, Inc.

No. 70-24 - Grove Press, Inc. v. Bailey

November 29, 1972

Abortion Cases

Dear Harry:

As I have said, I am enthusiastic about your abortion opinions. They reflect impressive scholarship and analysis, and I have no doubt that they will command a court.

In view of the complexity and delicacy of the subject and the issue involved, I suppose there will be - however - some suggestions and reservations before the votes are finally in.

I write at this time to inquire whether you view your choice of "the first trimester" as essential to your decision. In your covering memorandum of November 21 you suggest that this in an "arbitrary" time, but that any other selected point might be equally arbitrary.

I have wondered whether drawing the line at "viability" - if we conclude to designate a particular point of time - would not be more defensible in logic and biologically than perhaps any other single time. I have reread Judge Newman's opinion in Abele v. Markel (concurred in by Ed Lumbard). In addressing this issue, he says:

> ". . . the state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than the interest in preventing the abortion of a fetus that is not viable. The issue might well turn on whether the time period selected could be shown to permit survival of the fetus in a generally

> accepted sense, rather than for the brief span of hours and under the abnormal conditions illustrated by some of the state's evidence. As to the latter situation, the nature of the state's interest might well not be generally accepted. Finally, and most important, such a statute would not be a direct abridgement of the woman's constitutional right, but at most a limitation on the time when her right could be exercised."

I rather agree with the view that the interest of the state is clearly identifiable, in a manner which would be generally understood, when the fetus becomes viable. At any point in time prior thereto, it is more difficult to justify a cutoff date.

Of course, it is not essential that we express an opinion as to such a date. Judge Newman did not do this explicitly. In holding the Connecticut statute unconstitutional, he pointed the way generally toward "viability" without making this an explicit ruling.

I am not sending a copy of this letter to other members of the Court. No doubt we will discuss your opinion in Conference, and I thought it might be helpful - to you and certainly to me - if you had the opportunity in advance to consider my reservation as above expressed.

Sincerely,

Mr. Justice Blackmun

lfp/ss

bc: Larry

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 5, 1972

Abortion Cases

Dear Harry:

As I have said to you, I am generally in accord with your fine opinions in these cases.

I may have a few suggestions, but expect to concur in due time.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

MSS COPY

70-18

12-11-72

Supreme Court of the United States

Memorandum

----------, 19----

Harry – I will go in your present opinion and so I leave entirely to you whether to address the "viability" issue. It does seem to me that viability is a more logical & supportable time, but there is not a critical issue with me.

If you decide to raise the issue, your memo. is fine.

L.F.P.

We are not certain the original of this letter was ever sent to J. Blackmun or circulated to the Conference -

December 13, 1972

Abortion Cases

Dear Harry:

This refers to your memorandum inviting expressions as to a choice between the "first trimester" and "viability."

Once we take the major step of affirming a woman's constitutional right, it seems to me that viability is a more logical and defensible time for identifying the point at which the state's overriding right to protect potential life becomes evident.

There are other reasons, mentioned in your memorandum, which also lead me to the same conclusion. My guess is that older women, married women and others who are experienced or sophisticated will know when they are pregnant and be willing to acknowledge it. They also will know where abortions can be obtained (e.g. in New York), and how to go about arranging for them. But the women who most need the benefit of liberalized abortion laws are likely to be young, inexperienced, unsure, frightened and perhaps unmarried. It may well be that many in this category either would not know enough to be sure of pregnancy in the early weeks, or be too embarrassed to seek medical advice prior to the expiration of the first trimester. If there is a constitutional right to an abortion, there is much to be said for making it effective where and when it may well be needed most.

As I believe I mentioned at Conference, I was favorably impressed by the CA 2 opinion (Judges Newman and Lumbard) in Abele which identified viability as the critical time from the viewpoint of the state.

Sincerely,

Mr. Justice Blackmum

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 4, 1973

Abortion Cases

Dear Harry:

I had the opportunity over the "holidays" to review more carefully your circulations of December 21, and I am happy with the revisions.

I commend you on the exceptional scholarship of the opinions.

Please join me.

Sincerely,

L.F.P.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 16, 1973

Abortion Cases

Dear Harry:

I think your proposed announcement is excellent, and will contribute to the understanding of the Court's decision.

Sincerely,

L. Lewis

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 24, 1972

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

Dear Harry:

I have read your "fall" editions in the above-entitled cases, and although I am still in significant disagreement with parts of them, I have to take my hat off to you for marshalling as well as I think could be done the arguments on your side. I think I will probably still file a dissent, although more limited than I had contemplated after the Conference discussion; therefore, this inquiry should be viewed as one coming from a potentially adverse party, rather than from an ally.

I have the feeling that the position that you, I, the Chief, and Lewis at least in part have been adhering to in the Gooding type cases would limit the concept of "overbreadth" even in the First Amendment area. If I am right in this, ought not your Texas opinion to invalidate the Texas abortion statute only as applied to a litigant who seeks abortion within the first "trimester", rather than, as I understand you to do, invalidating it in toto?

Second, would you permit any more latitude to Georgia in her procedural requirements after the first trimester, when apparently she is to be accorded greater latitude in the substantive determination of the circumstances under which an abortion may be had?

Sincerely,

Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 4, 1972

Re: Abortion Cases

Dear Harry:

I am about where Byron said he was with respect to these cases; I will probably concur in part and dissent in part.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

(3) M

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 11, 1973

Re: Abortion Cases

Dear Byron:

Please join me in your dissenting opinion in these cases.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

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

1st DRAFT

From: Rehnquist, J.

Circulated: 1/11/73

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.

[January —, 1973]

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While its opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it which invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. *Moose Lodge* v. *Irvis,* 407 U. S. 163 (1972); *Sierra Club* v. *Morton,* 405 U. S. 727 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abor-

3

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

2nd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 11/22/72

No. 70–40

Recirculated: _____

Mary Doe et al., Appellants,
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.

[November —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

In this appeal the criminal abortion statutes recently enacted in Georgia are challenged on constitutional grounds. The statutes are §§ 26–1201 through 26–1203 of the State's Criminal Code, formulated by Georgia Laws, 1968 Session, 1249, 1277–1280. In *Roe* v. *Wade, ante* —, we today have struck down, as constitutionally defective, the Texas criminal abortion statutes that are representative of provisions long in effect in a majority of our States. The Georgia legislation, however, is different and merits separate consideration.

I

The statutes in question are reproduced as Appendix A, *post* —.[1] As the appellants acknowledge,[2] the 1968 statutes are patterned upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962), reproduced as Appendix B, *post* —. The ALI proposal has served as the model for recent legislation in approximately one-fourth of our States.[3] The new

[1] The portions italicized in Appendix A are those held unconstitutional by the District Court.

[2] Appellants' Brief 25 n. 5; Tr. of Oral Arg. 9.

[3] See *Roe* v. *Wade, ante* — n. 37.

P.P. 2, 14, 15, 19

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

From: Blackmun, J.

3rd DRAFT

Circulated: _____

Recirculated: 12/21/72

SUPREME COURT OF THE UNITED STATES

No. 70-40

Mary Doe et al., Appellants, *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.

[November —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

In this appeal the criminal abortion statutes recently enacted in Georgia are challenged on constitutional grounds. The statutes are §§ 26–1201 through 26–1203 of the State's Criminal Code, formulated by Georgia Laws, 1968 Session, 1249, 1277–1280. In *Roe* v. *Wade*, *ante* —, we today have struck down, as constitutionally defective, the Texas criminal abortion statutes that are representative of provisions long in effect in a majority of our States. The Georgia legislation, however, is different and merits separate consideration.

I

The statutes in question are reproduced as Appendix A, *post* —.[1] As the appellants acknowledge,[2] the 1968 statutes are patterned upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962), reproduced as Appendix B, *post* —. The ALI proposal has served as the model for recent legislation in approximately one-fourth of our States.[3] The new

[1] The portions italicized in Appendix A are those held unconstitutional by the District Court.

[2] Appellants' Brief 25 n. 5; Tr. of Oral Arg. 9.

[3] See *Roe* v. *Wade*, *ante* — n. 37.

8

pp. 1, 9

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

From: Blackmun, J.

4th DRAFT

Circulated: _____

Recirculated: 1/16/73

SUPREME COURT OF THE UNITED STATES

No. 70–40

Mary Doe et al., Appellants, *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.

[November —, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this appeal the criminal abortion statutes recently enacted in Georgia are challenged on constitutional grounds. The statutes are §§ 26–1201 through 26–1203 of the State's Criminal Code, formulated by Georgia Laws, 1968 Session, 1249, 1277–1280. In *Roe* v. *Wade, ante* —, we today have struck down, as constitutionally defective, the Texas criminal abortion statutes that are representative of provisions long in effect in a majority of our States. The Georgia legislation, however, is different and merits separate consideration.

I

The statutes in question are reproduced as Appendix A, *post* —.[1] As the appellants acknowledge,[2] the 1968 statutes are patterned upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962), reproduced as Appendix B, *post* —. The ALI proposal has served as the model for recent legislation in approximately one-fourth of our States.[3] The new

[1] The portions italicized in Appendix A are those held unconstitutional by the District Court.

[2] Appellants' Brief 25 n. 5; Tr. of Oral Arg. 9.

[3] See *Roe* v. *Wade, ante* — n. 37.

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

1st DRAFT

From: Rehnquist, J.

Circulated: 1/11/73

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70–40

Mary Doe et al., Appellants, *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.

[January —, 1973]

MR. JUSTICE REHNQUIST, dissenting.

The holding in *Roe* v. *Wade, ante,* that state abortion laws can withstand constitutional scrutiny only if the States can demonstrate a compelling state interest apparently compels the Court's close scrutiny of the various provisions in Georgia's abortion statute. Since, as indicated by my dissent in *Wade,* I view the compelling state interest standard as an inappropriate measure of the constitutionality of state abortion laws, I respectfully dissent from the majority's holding.