The Burger Court Opinion Writing Database

Whalen v. Roe

429 U.S. 589 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

December 28, 1976

Re: 75-839 Whalen v. Roe

Dear John:

I regret that on several counts too fundamental to expect you to change, I cannot join your opinion. I will probably concur in the judgment, and I may write if no one else is disturbed by the substantive due process approach.

Regards,

WEB

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 15, 1977

Re: 75-839 Whalen v. Roe

Dear John:

I join.

Regards,

WEB

Mr. Justice Stevens

cc: The Conference

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

From: Mr. Justice Brennan

Circulated: 12-21-76

Recirculated:

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al.

On Appeal from the United States District Court for the Southern District of New York.

[January —, 1977]

MR. JUSTICE BRENNAN, concurring in the result.

I concur in the result reached by the Court, and agree with what I understand to be the essence of its reasoning.

The New York statute under attack requires doctors to disclose to the State information about prescriptions for certain drugs with a high potential for abuse, and provides for the storage of that information in a central computer file. The Court recognizes that an individual's "interest in avoiding disclosure of personal matters" is an aspect of the right of privacy that has been recognized in numerous decisions, *ante,* at 11, and nn. 27-29, but holds that in this case, any such interest has not been seriously enough invaded by the State to require a showing that its program was indispensable to the State's effort to control drug abuse.

The information disclosed by the physician under this program is made available only to a small number of public health officials with a legitimate interest in the information. As the record makes clear, New York has long required doctors to make this information available to its officials on request, and that practice is not challenged here. Such limited reporting requirements in the medical field are familiar, *ante,* at n. 32, and are not generally regarded as an invasion of privacy. Broad dissemination of state officials

J

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 5, 1977

RE: No. 75-839 Whalen v. Roe

Dear John:

Thurgood's return suggests a basis for a Court opinion built on your first circulation that I think I could join.

As suggested in my pending circulation, I am in substantial agreement with the comments Harry expressed in his letter of December 14. Like him, I think that Part I of the opinion is unnecessary to the result, and may be somewhat overbroad. The discussion of Lochner would be less troubling to me, however, if it did not suggest that the district court here followed it. The district court's only error was its holding, reversed in your Part II, that the New York statute deprived the plaintiffs of privacy.

In other respects, too, I prefer your first draft to your second. I agree with Thurgood, for example, that Part IV of the first draft allays concern about potential abuses of this sort of statute much more effectively than the corresponding language in the second. For similar reasons, I find the reasoning in Part II of the first draft more persuasive than as changed in the second, although, again with Harry, I would as soon omit the first paragraph, and the first two sentences of the second paragraph.

In short, I think I could join you if you returned to your original opinion, modified along the lines suggested in Harry's letter.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White

no substantive changes

3rd
~~2nd~~ DRAFT

3/3/77

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al.	On Appeal from the United States District Court for the Southern District of New York.

[February —, 1977]

MR. JUSTICE BRENNAN, concurring in the result.

I concur in the result reached by the Court, and agree with what I understand to be the essence of its reasoning.

The New York statute under attack requires doctors to disclose to the State information about prescriptions for certain drugs with a high potential for abuse, and provides for the storage of that information in a central computer file. The Court recognizes that an individual's "interest in avoiding disclosure of personal matters" is an aspect of the right of privacy that has been recognized in numerous decisions, *ante,* at 10, and nn. 24-25, but holds that in this case, any such interest has not been seriously enough invaded by the State to require a showing that its program was indispensable to the State's effort to control drug abuse.

The information disclosed by the physician under this program is made available only to a small number of public health officials with a legitimate interest in the information. As the record makes clear, New York has long required doctors to make this information available to its officials on request, and that practice is not challenged here. Such limited reporting requirements in the medical field are familiar, *ante,* at n. 29, and are not generally regarded as an invasion of privacy. Broad dissemination by state officials

V, p. 1

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

From: Mr Justice Brennan

4th DRAFT

Circulated:

Recirculated 2/14/77

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al.	On Appeal from the United States District Court for the Southern District of New York.

[February —, 1977]

MR. JUSTICE BRENNAN, concurring.

I write only to express my understanding of the opinion of the Court, which I join.

The New York statute under attack requires doctors to disclose to the State information about prescriptions for certain drugs with a high potential for abuse, and provides for the storage of that information in a central computer file. The Court recognizes that an individual's "interest in avoiding disclosure of personal matters" is an aspect of the right of privacy that has been recognized in numerous decisions, *ante,* at 10, and nn. 24-25, but holds that in this case, any such interest has not been seriously enough invaded by the State to require a showing that its program was indispensable to the State's effort to control drug abuse.

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

From: Mr. Justice Brennan

Circulated: 2/17/77

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al. | On Appeal from the United States District Court for the Southern District of New York.

[February —, 1977]

MR. JUSTICE BRENNAN, concurring.

I write only to express my understanding of the opinion of the Court, which I join.

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The information disclosed by the physician under this program is made available only to a small number of public health officials with a legitimate interest in the information. As the record makes clear, New York has long required doctors to make this information available to its officials on request, and that practice is not challenged here. Such limited reporting requirements in the medical field are

*My Brother STEWART, in attempting to refute this proposition, treats it as if it were peculiarly my own. But the statement with which he takes issue is essentially a direct quotation from the opinion of the Court, *ante*, at 9–10.

✓

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

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-839

Recirculated 2/16/77

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al.

On Appeal from the United States District Court for the Southern District of New York.

[February —, 1977]

MR. JUSTICE BRENNAN, concurring.

I write only to express my understanding of the opinion of the Court, which I join.

The New York statute under attack requires doctors to disclose to the State information about prescriptions for certain drugs with a high potential for abuse, and provides for the storage of that information in a central computer file. The Court recognizes that an individual's "interest in avoiding disclosure of personal matters" is an aspect of the right of privacy, *ante,* at 9–10, and nn. 24–25, but holds that in this case, any such interest has not been seriously enough invaded by the State to require a showing that its program was indispensable to the State's effort to control drug abuse.

The information disclosed by the physician under this program is made available only to a small number of public health officials with a legitimate interest in the information. As the record makes clear, New York has long required doctors to make this information available to its officials on request, and that practice is not challenged here. Such limited reporting requirements in the medical field are familiar, *ante,* at n. 29, and are not generally regarded as an invasion of privacy. Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably

footnote omitted

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al. | On Appeal from the United States District Court for the Southern District of New York.

[January —, 1977]

MR. JUSTICE STEWART, concurring in the judgment.

Although agreeing with much of what is said in the opinion of the Court, I concur only in its judgment.

The conclusion that the New York law does not infringe upon any constitutionally protected privacy interests is most easily justified, I think, by reference to our decision in *Katz* v. *United States*, 389 U. S. 347. The Court there made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters,[1] there is no "general constitutional 'right to

[1] See *Katz*, *supra*, at 350 n. 5:

"The First Amendment, for example, imposes limitations upon governmental abridgement of 'freedom to associate and privacy in one's association.' *NAACP* v. *Alabama*, 357 U. S. 449, 462. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too 'reflects the Constitution's concern for . . .' ". . . the right of each individual 'to a private enclave where he may lead a private life.' " *Tehan* v. *Shott*, 382 U. S. 406, 416. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution."

See also *ante*, at 15–16, n. 35.

As the Court notes, *ante*, at 11, and n. 29, there is also a line of authority, often characterized as involving "privacy," affording constitu-

P 3

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: JAN 7 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al.

On Appeal from the United States District Court for the Southern District of New York.

[January —, 1977]

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

From: Mr. Justice Stewart

Circulated: JAN 18 1977

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al. | On Appeal from the United States District Court for the Southern District of New York.

[January —, 1977]

MR. JUSTICE STEWART, concurring.

In *Katz* v. *United States,* 389 U. S. 347, the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters,* there is no "general constitutional 'right to privacy.' . . . [T]he protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left

*See *Katz, supra,* at 350 n. 5:

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As the Court notes, *ante,* at 10, and n. 26, there is also a line of authority, often characterized as involving "privacy," affording constitutional protection to the autonomy of an individual or a family unit in making decisions generally relating to marriage, procreation, and raising children.

pp. 2-3

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

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Mr. Justice Stewart

No. 75-839

Circulated: 1/6

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al.	On Appeal from the United States District Court for the Southern District of New York.

[January —, 1977]

MR. JUSTICE STEWART, concurring.

In *Katz* v. *United States*, 389 U. S. 347, the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters,* there is no "general constitutional 'right to privacy.' . . . [T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left

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V

P. 2

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

From: Mr. Justice Stewart

5th DRAFT

Circulated: _____

Recirculated: FEB 17 1977

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al. | On Appeal from the United States District Court for the Southern District of New York.

[January —, 1977]

MR. JUSTICE STEWART, concurring.

In *Katz* v. *United States*, 389 U. S. 347, the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters,* there is no "general constitutional 'right to privacy.' . . . [T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left

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As the Court notes, *ante,* at 10, and n. 26, there is also a line of authority, often characterized as involving "privacy," affording constitutional protection to the autonomy of an individual or a family unit in making decisions generally relating to marriage, procreation, and raising children.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 20, 1976

Re: No. 75-839 - Whalen v. Roe

Dear John:

Please join me in your circulation of December 16, 1976.

Sincerely,

Mr. Justice Stevens

Copies to Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 21, 1977

Re: No. 75-839 - Whalen v. Roe

Dear John:

I am still with you.

Sincerely,

Byron

Mr. Justice Stevens

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 4, 1977

Re: No. 75-839 -- Whalen v. Roe

Dear John:

I have read the exchange between you and Rehnquist. I had considered writing a short dissent, but as of now, will not do so.

I could be persuaded to join your opinion if you return to the language in Part IV of your original circulation.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 11, 1977

Re: No. 75-839, Whalen v. Roe

Dear John:

I am pleased to be able to join the fifth draft of your opinion. I congratulate you on your heroic efforts to forge a majority in this difficult case.

As I indicated to you in my letter of January 4, I would have much preferred that you return to the language in Part IV in your original circulation. I appreciate the difficulty you have encountered in finding language with which we all could agree, and hesitate to raise this issue again. But as the opinion is now written it says that "in some circumstance that duty [i.e. to avoid unwarranted disclosures of information which is personal in character] arguably has its roots in the Constitution." Read literally, this means that in other circumstances, it is not even arguable that there is a constitutional duty to avoid unwarranted disclosure of private information. This strikes me as an unfortunate suggestion. Would it be possible to rewrite the sentence to avoid this possible interpretation?

In any event, I am with you -- whether or not.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

HAB

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 14, 1976

Re: No. 75-839 - Whalen v. Roe

Dear John:

I have one or two minor problems with your proposed opinion. If it remains in its present form, I shall probably write along the lines of the enclosure. It may well be that you can accommodate my concerns, so, for the moment, I shall not have this printed.

Sincerely,

Harry

WHR called to say he agrees emphatically 12-14-76

Mr. Justice Stevens

cc: The Conference

No. 75-839 - Whalen v. Roe

MR. JUSTICE BLACKMUN, concurring in part.

I join the Court in its judgment, and, with the exceptions hereinafter noted, I join the Court's opinion.

1. I find it unnecessary in this case to expose specifically, as the Court seeks to do, the roots of constitutionally protected privacy interests and thereby to engage in the old controversy surrounding substantive due process. I am quite content, instead, to rest on what the Court carefully said in Roe v. Wade, 410 U.S. 113, 152-153 (1973), */ for I feel that everything the Court now says following the first two paragraphs of Part II of its opinion, ante 9-10, flows with equal vigor without indulging in a qualitative analysis of privacy.

2. Neither am I persuaded that the broad sweep of Part I of the Court's opinion is indicated for this case. All I would find it necessary to say in Part I is that the statute is a reasonable exercise of the police power of the State of New York, that the District Court placed too high a burden of proof on the State, and that the statute is to be upheld unless the constitutional right of privacy is impermissibly infringed. Since no such infringement was proved here, as the Court's opinion demonstrates, I agree with the result the Court reaches.

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*/ See, however, the exchange in Roe v. Wade between Mr. Justice Stewart, concurring, 410 U.S., at 167-168, and Mr. Justice Douglas, concurring, id., at 212 n. 4.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 31, 1977

Re: No. 75-839 - Whalen v. Roe

Dear Thurgood:

We talked about this case by telephone the other day. Enclosed is a copy of my letter to John Stevens. This, I guess, speaks for itself.

Sincerely,

Harry

Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 31, 1977

Re: No. 75-839 - Whalen v. Roe

Dear John:

You are close now to having a court for your revised opinion, and I shall do my best to come along too. I set forth the following as suggested changes in your recirculation of January 12. I hesitate to go into detail this much but, as is evident from the correspondence that has circulated, the case is seemingly a close one and of concern to the members of the Court.

1. I would prefer to delete the last paragraph of the text on page 6. I think it is not necessary to substitute anything, since the opinion speaks for itself. If you feel some substitute material is desirable, I could go along with the following:

> "Since we decide that the New York program does not invade any constitutionally protected privacy zone, we need not determine whether the Constitution affords protection to the doctor-patient relationship." [I believe this incorporates the change Potter has suggested at this point.]

2. I feel rather strongly that, in the fourth line from the bottom of the text on page 7, the word "express" should be eliminated. I think the use of the word "express" makes the statement inconsistent with Roe v. Wade where the right to privacy was not tied to a specific and express provision of the Constitution. My joining you will be contingent on the elimination of the word.

3. I would feel more comfortable if the last sentence of Part I, near the top of page 9, were changed to read "Thus, we conclude that the Legislature's enactment of the patient identification requirement was a reasonable exercise of New York's broad police powers, and it must be upheld unless it invades constitutionally protected privacy interests."

4. What do you think of expanding the first full paragraph on page 11, now consisting only of two lines, to read as follows:

> "We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation."

5. I am somewhat concerned by the material on page 16 beginning with the end of the third line and running through the eleventh line. It seems to me that this material, as well as the formulation in the earlier draft, raises problems that need not be in the case. The whole point of your Part IV is that the Court is not deciding such issues. I suggest the following as a substitute:

> "Since New York's statutory scheme, and its implementing administrative procedures do not invade the individual's privacy, we need not, and do not, decide any question which . . . "

This then would tie into the material beginning with the twelfth line on page 16.

I appreciate your patience with all this. If these suggestions meet with your approval, I, of course, shall be able to join you.

Sincerely,

Mr. Justice Stevens

√ √

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 2, 1977

Re: No. 75-839 - Whalen v. Roe

Dear John:

Please join me in your recirculation of February 1.

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 7, 1977

No. 75-839 Whalen v. Roe

Dear John:

As you may surmise from my silence, I have had some considerable indecision as to what to do about your opinion. The case is far from easy to analyze or to write.

Despite some continuing doubts, I am with Bill Brennan in thinking I could join your first draft if you find Harry's suggestions acceptable. Although I agree with much of what you say in Part I, I agree that it is not necessary to the opinion.

I owe you an apology for waiting so long to comment on your circulations.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 27, 1977

No. 75-839 Whalen v. Roe

Dear John:

Please join me in Parts II, III and IV of your opinion, and add the following at the end:

"MR. JUSTICE POWELL, concurring.

I concur in Parts II, III, and IV of the Court's opinion. In my view, the analysis in those parts fully supports the result reached in this case."

I appreciate that this case was almost impossible to write in a way acceptable to all of us. I think you have done extremely well.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

January 28, 1977

No. 75-839 Whalen v. Roe

Dear John:

You certainly do not "presume" on my "good nature" by continuing our dialogue on the above case. I will always welcome and respect your views.

On further reflection, however, I think I will adhere to the position stated in my letter of January 27. I confess that it is not easy to pinpoint my uneasiness about Part I. As indicated in my concurring opinion in California Bankers (cited in your note 25), I am concerned - as we all are - with government disclosure where there is a legitimate expectation of privacy. I do think I am closer to you than to Bill Brennan and Thurgood, but I suppose the truth is I am neither comfortable nor at rest in this general area.

It seems to me that Parts II, III and IV constitute the major portions of your opinion, and I am happy to join them.

With my appreciation.

Sincerely,

Mr. Justice Stevens

lfp/ss

✓ ✓

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 14, 1977

No. 75-839 Whalen v. Roe

Dear John:

In view of changes you have made to accommodate many divergent views - and with admiration for your patience - I now join your opinion.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 3, 1977

Re: No. 75-839 - Whalen v. Roe

Dear John:

As I understand the thrust of your opinion, Part II analyzes the asserted privacy interests against a three-part test, which you describe as involving the following considerations:

> "First, that the specific interest is sufficiently important to merit constitutional protection; second, that the invasion of the interest is sufficiently grievous to constitute a deprivation; and finally, that the deprivation occurred without due process of law." (p. 11.

You assume, without deciding, parts one and three of this test, leaving "open the question whether the impact of the statute on those interests is sufficiently grievous to effect a deprivation." (p. 11).

I have some difficulty with the substance of your test, and also some difficulty with the omission in this part of the opinion to discuss more of our recent opinions bearing on the subject generally.

My difficulty with the three part test is that it seems to make the inquiry a quantitative one, rather than a qualitative one. I realize that this line is not easy to draw, and that maybe in the last analysis the decisional trends tend to be based on quantitative factors, rather than qualitative ones. Nonetheless, particularly with respect to the part of the test that inquires whether "the invasion of the interest is sufficiently grievous to constitute a deprivation", I think the door is opened to considerable subjectivity as to what individual judges may view as especially objectionable to their own sensibilities. Though not cognate cases in every respect, I think the thrust of last Term's decisions in Paul v. Davis, Meachum v. Fano, and in your Bishop v. Wood was to opt for a qualitative analysis, and to eschew the "grievous loss" concept as itself an indication of whether there had been a constitutional violation.

With respect to recent case authority on privacy, it seems to me that Lewis' opinion in United States v. Miller last Term is quite closely in point. There, in the context of information which was to be used for a criminal prosecution, and where any claim of privacy would presumably be given at least as serious consideration as in a civil context like the present one, we held that the fact that the customer made the information available to the bank prevented him from having any "privacy" claim which he could assert when the government sought to obtain the information from the bank. It seems to me that the present privacy contention is not all that dissimilar from the one advanced in Miller, and can and should be resolved without reliance on a "grievous loss" concept. There was no suggestion in Miller that if the injury to the customer had occurred in the same way but had been more "grievous", the result would have been different.

Finally, in Part IV of Paul v. Davis, which I wrote last Term, and which Bill Brennan says is his favorite case, we discussed the privacy cases described in Roe v. Wade, and characterized them as dealing with "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the states' power to substantively regulate conduct." 44 L.W. 4343. But here, as in Paul, the privacy claim of non-disclosure is not based "upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be private." Id. (Insofar as the petitioners are claiming a right to decide independently on medication, you point out that there is no interference at all.)

My overall impression with respect to your Part II is that it goes much further than any of these cases in suggesting there is a generalized "right to privacy" in the substantive Due Process aspect of the Fourteenth Amendment to the Constitution. Even though in the language quoted from your opinion at the beginning of this letter you merely assume without deciding, I think the tenor of this part gives more support to that idea than I believe the Constitution or our cases warrant.

I realize this is a rather amorphous and very probably unhelpful criticism of Part II of your opinion. I also realize that if you make changes in it to accommodate me, you may lose other potential adherents. But I do not feel I can join the opinion as now written, and have done the best I can to tell you why.

Sincerely,

WSM

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 13, 1977

Re: No. 75-839 - Whalen v. Roe

Dear John:

I think your third draft is an admirable effort to write an opinion which will attract a majority of the Court. From my own point of view, I still agree more with Potter's analysis in his concurring opinion than I do with your proposed majority opinion, but I think it sufficiently desirable to have a Court opinion in this case that I am now happy to join you.

Sincerely,

WHR

Mr. Justice Stevens

Copies to the Conference

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: Mr. Justice Stevens

Circulated: NOV 30 '76

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al.	On Appeal from the United States District Court for the Southern District of New York.

[December —, 1976]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and unlawful market.

The District Court enjoined enforcement of the portions of the New York State Controlled Substances Act of 1972[1] which require such recording on the ground that they violate appellees' constitutionally protected rights of privacy.[2] We noted probable jurisdiction of the appeal by the Commissioner of Health, — U. S. —, and now reverse.[3]

Many drugs have both legitimate and illegitimate uses.

[1] 1972 N. Y. Laws, c. 878; N. Y. Pub. Health Laws § 3300 *et seq.* (McKinney, Vol. 44 (1975–1976 Supp.)).

[2] *Roe* v. *Ingraham*, 403 F. Supp. 931 (SDNY 1975). Earlier the District Court had dismissed the complaint for want of a substantial federal question. *Roe* v. *Ingraham*, 357 F. Supp. 1217 (1973). The Court of Appeals reversed, holding that a substantial constitutional question was presented and therefore a three-judge court was required. *Roe* v. *Ingraham*, 480 F. 2d 102 (CA2 1973).

[3] Jurisdiction is conferred by 28 U. S. C. §§ 1253 and 2101 (b).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 15, 1976

Re: 75-839 - Whalen v. Roe

Dear Harry:

Many thanks for your suggestions. I will try my hand at some revisions which may satisfy both your concern and some questions which other members of the Court have raised. I hope to recirculate it in the next couple of days.

Respectfully,

John

Mr. Justice Blackmun

Copies to the Conference

pp. 4-5, 9-11, 17

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: Mr. Justice Stevens

Circulated: _____

Recirculated: 12/16/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al.

On Appeal from the United States District Court for the Southern District of New York.

[December —, 1976]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market.

The District Court enjoined enforcement of the portions of the New York State Controlled Substances Act of 1972[1] which require such recording on the ground that they violate appellees' constitutionally protected rights of privacy.[2] We noted probable jurisdiction of the appeal by the Commissioner of Health, — U. S. —, and now reverse.[3]

Many drugs have both legitimate and illegitimate uses.

[1] 1972 N. Y. Laws, c. 878; N. Y. Pub. Health Laws § 3300 *et seq.* (McKinney, Vol. 44 (1975–1976 Supp.)).

[2] *Roe* v. *Ingraham*, 403 F. Supp. 931 (SDNY 1975). Earlier the District Court had dismissed the complaint for want of a substantial federal question. *Roe* v. *Ingraham*, 357 F. Supp. 1217 (1973). The Court of Appeals reversed, holding that a substantial constitutional question was presented and therefore a three-judge court was required. *Roe* v. *Ingraham*, 480 F. 2d 102 (CA2 1973).

[3] Jurisdiction is conferred by 28 U. S. C. §§ 1253 and 2101 (b).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 4, 1977

Re: No. 75-839 Whalen v. Roe

Dear Bill:

Many thanks for your thoughtful letter. I recall talking to Potter about this case after Conference--and before the opinion was assigned to me--and remarking that the Conference discussion had left me somewhat unclear about the rationale that would command five votes. Against that background, when I started to write, I tried to place decision on the narrowest possible ground to minimize the likelihood of a badly fractionated Court. Although it is apparent that I have not been very successful, perhaps a few informal observations may be helpful.

Unless we were to overrule Pierce v. Society of Sisters, Meyer v. Nebraska, and Roe v. Wade, I think we must start from the premise that there is a substantive due process concept that is viable. Nothing which either Justice Holmes or Justice Brandeis ever said in dissent is inconsistent with this premise. However, the concept is one which we have a special obligation to apply with the greatest restraint. Part I of my proposed draft is intended to make that point.

The three elements which must be present in order to establish a violation of the Due Process Clause are, I believe, dictated by the language of the cause itself. The first and third elements are qualitative; only the second is quantitative. Its source, as I am sure you recognize, is Lewis's analysis in dissent in Goss v. Lopez, 419 U.S. at 588, relying on the Chief's opinion in Morrissey and Justice Frankfurter's concurrence in Joint Anti-Fascist. I thought that an explicit identi-

fication of the deprivation as a separate element of the constitutional claim would serve to contain, rather than to enlarge, the substantive Due Process concept. I also thought that placing the decision expressly on the failure to establish a deprivation could avoid a sharp division in the Court.

Under the approach adopted in the draft, it is unnecessary to try to define the limits of the concept of liberty. For that reason--as well as the hope that the dissenters might join--I thought that it was not appropriate to cite Paul v. Davis or Miller. Moreover, I am not sure that the word "liberty" in the Due Process Clause should be equated with "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." Within that list there remains a great deal of latitude for judicial selectivity in identifying what is, and what is not, an aspect of liberty. Indeed, in this very case, one of the claims is that the effect of disclosure would be to harm the education of hyperactive and emotionally disturbed children--in other words "child rearing and education" are arguably implicated.

I am, of course, willing to make revisions in an attempt to have an opinion which a majority can join. I sense that you and the Chief are probably satisfied with Part I and that Bill Brennan and Harry are satisfied with at least the substance of Part II. Perhaps additional comments will enable me to work out revisions in both parts that will command a majority--or possibly we have another Murgia. In any event, thanks for your letter and for reviving interest in the case.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 12, 1977

Re: 75-839 - Whalen v. Roe

MEMORANDUM TO THE CONFERENCE

It is my hope that the omission of the most controversial portions of the draft will make it possible for almost everyone to join, perhaps with supplemental writing to emphasize additional points of view.

I seriously considered omitting everything in Part I, but concluded that we must deal directly with the District Court's finding of no necessity.

Needless to say, I continue to welcome suggestions in the hope that we can get an opinion of the Court.

Respectfully,

John

pp. 5-7, 9-14, 16

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: Mr. Justice Stevens

3rd DRAFT

Circulated: _____

Recirculated: JAN 12 1977

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al.	On Appeal from the United States District Court for the Southern District of New York.

[~~December~~ January —, ~~1976~~ 1977]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market.

The District Court enjoined enforcement of the portions of the New York State Controlled Substances Act of 1972[1] which require such recording on the ground that they violate appellees' constitutionally protected rights of privacy.[2] We noted probable jurisdiction of the appeal by the Commissioner of Health, — U. S. —, and now reverse.[3]

Many drugs have both legitimate and illegitimate uses.

---

[1] 1972 N. Y. Laws, c. 878; N. Y. Pub. Health Laws § 3300 *et seq.* (McKinney, Vol. 44 (1975–1976 Supp.)).

[2] *Roe* v. *Ingraham,* 403 F. Supp. 931 (SDNY 1975). Earlier the District Court had dismissed the complaint for want of a substantial federal question. *Roe* v. *Ingraham,* 357 F. Supp. 1217 (1973). The Court of Appeals reversed, holding that a substantial constitutional question was presented and therefore a three-judge court was required. *Roe* v. *Ingraham,* 480 F. 2d 102 (CA2 1973).

[3] Jurisdiction is conferred by 28 U. S. C. §§ 1253 and 2101 (b).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 17, 1977

MEMORANDUM TO THE CONFERENCE

Re: 75-839 - Whalen v. Roe

The typed changes indicated on pages 6, 14 and 16 have been made at the suggestion of Mr. Justice Stewart.

Respectfully,

John P.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Personal

January 27, 1977

Re: 75-839 - Whalen v. Roe

Dear Lewis:

Thank you for your kind note about Whalen. I want to presume on your good nature by making one more effort to see if there is any possibility of modifying Part I to make it possible for you to join it. Would you still find it objectionable if I were to make these two changes:

1) Revise the first sentence of the second paragraph on page 7 to read:

> "The standard of necessity applied by the District Court is reminiscent of this Court's opinion in Lochner v. New York, 198 U.S. 45."

2) Eliminate the last sentence in Part I (page 9) and substitute the following:

> "It follows that the legislature's enactment of the patient identification requirement was a reasonable exercise of New York's broad police powers. The District Court's finding that the necessity for the requirement had not been proved is not therefore a sufficient reason for holding the statutory requirement unconstitutional."

I should explain that there are two reasons why I consider it important to refer to Lochner in this case. First, the reference provides an acceptable method of responding to the District Court's finding that the statute raises an unnecessary invasion of privacy. Second, and of greater importance, I believe the reference to Lochner in a "privacy" case will serve as a reminder that the Court recognizes the

same obligation of judicial restraint in this area of constitutional law as it does in the more familiar substantive due process area. This point may be helpful to you in the abortion cases in which you will impose important limits on the privacy concept as developed in Harry's earlier abortion opinions.

Of course, if your objection to Part I is not merely a question of style or semantics, but rather is based on the view--that I believe Bill Brennan, Thurgood, and Harry share--that the Court has much greater latitude in the privacy area than it does in the substantive due process area, then I would agree that you definitely should not join Part I. I only presume to raise the question again with you because it has been my impression that our views are very close in this area of constitutional interpretation.

There is no need for you to respond to this note. I just want you to know that I will give the most serious consideration to any suggestion that you might advance if you can see your way clear to join Part I without asking me to eliminate entirely the reference to the Lochner standard of necessity.

Sincerely,

John

Mr. Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 31, 1977

Re: 75-839 - Whalen v. Roe

Dear Harry:

Many thanks for the suggestions in your letter of January 31. This is the kind of constructive criticism that I particularly welcome. Let me respond to each of your five points in order:

1. I agree that the last paragraph of the text on page 6 is unnecessary, and that the opinion will be improved by simply deleting it. I propose to do so.

2. I also agree that the word "express" at the bottom of the text on page 7 is potentially misleading. I do not intend any inconsistency with Roe v. Wade, but agree that any doubt should be avoided. I therefore propose to revise the sentence to read as follows:

> "For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern."

3. I also agree that the last sentence in Part I, on page 9, needs to be revised. I propose the following substitute:

> "It follows that the legislature's enactment of the patient identification requirement was a reasonable exercise of New York's broad police powers. The District Court's finding that the necessity for the requirement had not been proved is not, therefore, a sufficient reason for holding the statutory requirement unconstitutional."

As a matter of style, I would prefer not to use the second clause in the revision you suggested simply because the privacy concept is mentioned in the first sentence of the following paragraph.

1/31/77

4. Your suggested change for the first full paragraph on page 11 is an improvement and I will simply adopt it.

5. Part IV presents me with something of a dilemma. My principal reason for including it in the original draft was the hope that it might forestall a dissent by Thurgood. It is my impression that if I eliminate it entirely, or even make your substitute, the change will provoke a dissent that may otherwise be avoided. Frankly, I would be willing to eliminate all or any portion of Part IV if he is going to dissent anyway. Perhaps I can just wait and see what he actually decides to do before reacting one way or another to your suggestion. I gather that your concern about this section is not strong enough to prevent you from joining if the other changes that you have proposed are all made. What I would like to do, therefore, is to make the changes that I have described above, have the draft reprinted and recirculated, and await developments. In the meantime, do not feel committed to join because I may be asked to make some other revisions that you would want to review before finally committing yourself.

Thanks again for your most constructive letter.

Sincerely,

JM

Mr. Justice Blackmun

pp. 6-9, 11, 14, 16

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: Mr. Justice Stevens

Circulated: FEB 1 1977

Recirculated: FEB 1 1977

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al. | On Appeal from the United States District Court for the Southern District of New York.

[February —, 1977]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market.

The District Court enjoined enforcement of the portions of the New York State Controlled Substances Act of 1972[1] which require such recording on the ground that they violate appellees' constitutionally protected rights of privacy.[2] We noted probable jurisdiction of the appeal by the Commissioner of Health, — U. S. —, and now reverse.[3]

Many drugs have both legitimate and illegitimate uses.

[1] 1972 N. Y. Laws, c. 878; N. Y. Pub. Health Laws § 3300 *et seq.* (McKinney, Vol. 44 (1975-1976 Supp.)).

[2] *Roe* v. *Ingraham*, 403 F. Supp. 931 (SDNY 1975). Earlier the District Court had dismissed the complaint for want of a substantial federal question. *Roe* v. *Ingraham*, 357 F. Supp. 1217 (1973). The Court of Appeals reversed, holding that a substantial constitutional question was presented and therefore a three-judge court was required. *Roe* v. *Ingraham*, 480 F. 2d 102 (CA2 1973).

[3] Jurisdiction is conferred by 28 U. S. C. §§ 1253 and 2101 (b).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 10, 1977

Re: 75-839 - Whalen v. Roe

Dear Bill:

The changes in Part I were made at Thurgood's suggestion.

Sincerely,

JPS

Mr. Justice Brennan

pp. 6, 7, 12, 13, 16

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: Mr. Justice Stevens

Circulated: _____

Recirculated: 2/10/77

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-839

Robert P. Whalen, as Commissioner of Health of New York, Appellant, *v.* Richard Roe, an infant by Robert Roe, his parent, et al. | On Appeal from the United States District Court for the Southern District of New York.

[February —, 1977]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market.

The District Court enjoined enforcement of the portions of the New York State Controlled Substances Act of 1972[1] which require such recording on the ground that they violate appellees' constitutionally protected rights of privacy.[2] We noted probable jurisdiction of the appeal by the Commissioner of Health, — U. S. —, and now reverse.[3]

Many drugs have both legitimate and illegitimate uses.

[1] 1972 N. Y. Laws, c. 878; N. Y. Pub. Health Laws § 3300 *et seq.* (McKinney, Vol. 44 (1975–1976 Supp.)).

[2] *Roe* v. *Ingraham*, 403 F. Supp. 931 (SDNY 1975). Earlier the District Court had dismissed the complaint for want of a substantial federal question. *Roe* v. *Ingraham*, 357 F. Supp. 1217 (1973). The Court of Appeals reversed, holding that a substantial constitutional question was presented and therefore a three-judge court was required. *Roe* v. *Ingraham*, 480 F. 2d 102 (CA2 1973).

[3] Jurisdiction is conferred by 28 U. S. C. §§ 1253 and 2101 (b).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 14, 1977

Re: 75-839 - Whalen v. Roe

Dear Thurgood:

Many thanks for seeing your way clear to joining the opinion in Whalen. I would like to accommodate you with regard to the language in Part IV, but that specific sentence was the result of a rather difficult compromise with Potter. If I change it, I am afraid I might get back on the merry-go-round.

Respectfully,

Mr. Justice Marshall