The Burger Court Opinion Writing Database

Thornburgh v. American College of Obstetricians and Gynecologists

476 U.S. 747 (1986)

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

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justic

Circulated: MAY 29 198

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June ——, 1986]

CHIEF JUSTICE BURGER, dissenting.

In my concurrence in the companion case to *Roe* v. *Wade* in 1973, I noted that

> I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand. *Doe* v. *Bolton*, 410 U. S. 179, 208 (1973).

Later, in *Mather* v. *Roe*, 432 U. S. 464, 481, I stated my view that

> [t]he Courts holdings in [*Roe*] and [*Doe* v. *Bolton*] . . . simply require that a State not create an absolute barrier to a woman's decision to have an abortion.

I based my concurring statements in *Roe* and *Mather* on the principle expressed in the majority opinion in *Roe* that the right to an abortion "is not unqualified and must be considered against important state interests in regulation." 410 U. S. at 154–155. In short, every member of the *Roe* Court

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justic**

Circulated: MAY 30 [illegible]

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June ——, 1986]

CHIEF JUSTICE BURGER, dissenting.

I agree with much of JUSTICE WHITE's dissent. In my concurrence in the companion case to *Roe* v. *Wade* in 1973, I noted that

> "I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand." *Doe* v. *Bolton*, 410 U. S. 179, 208 (1973).

Later, in *Maher* v. *Roe*, 432 U. S. 464, 481 (1977), I stated my view that

> "[t]he Court's holdings in [*Roe*] and [*Doe* v. *Bolton*] . . . simply require that a State not create an absolute barrier to a woman's decision to have an abortion."

I based my concurring statements in *Roe* and *Mather* on the principle expressed in the majority opinion in *Roe* that the right to an abortion "is not unqualified and must be considered against important state interests in regulation." 410

STYLISTIC CHANGES THROUGHOUT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 11, 1986]

CHIEF JUSTICE BURGER, dissenting.

I agree with much of JUSTICE WHITE's and JUSTICE O'CONNOR's dissents. In my concurrence in the companion case to *Roe* v. *Wade* in 1973, I noted that

> "I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand." *Doe* v. *Bolton*, 410 U. S. 179, 208 (1973).

Later, in *Maher* v. *Roe*, 432 U. S. 464, 481 (1977), I stated my view that

> "[t]he Court's holdings in *Roe* . . . and *Doe* v. *Bolton* . . . simply require that a State not create an absolute barrier to a woman's decision to have an abortion."

I based my concurring statements in *Roe* and *Maher* on the principle expressed in the Court's opinion in *Roe* that the right to an abortion "is not unqualified and must be considered against important state interests in regulation." 410

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 12, 1985

No. 84-495

Thornburgh v. American College of Obstetricians

Dear Chief,

Harry will try his hand at an opinion for the Court in the above case.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 10, 1986

No. 84-495

Thornburgh v. American College of Obstetricians

Dear Harry,

I fully approve the revision of Part V in your proposed opinion in the above.

Sincerely,

Bill

Justice Blackmun

Copies: Justice Marshall

Justice Powell

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 11, 1986

No. 84-495

Thornburgh, et al. v. American College of Obstetricians and Gynecologists, et al.

Dear Harry,

I agree.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

N

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 14, 1985

No. 84-495

Thornburgh, et al. v. American College of Obstetricians and Gynecologists, et al.

Dear John,

I agree.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 18, 1986

84-495 - Thornburgh v. American College of Obstetricians and Gynecologists

Dear Harry,

In due course, I shall circulate a dissent in this case.

Sincerely yours,

Justice Blackmun

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAR 12 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March ——, 1986]

JUSTICE WHITE, dissenting.

Today the Court carries forward the "difficult and continuing venture in substantive due process," *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52 (1976) (WHITE, J., dissenting), that began with the decision in *Roe* v. *Wade*, 410 U. S. 113 (1973), and has led the Court further and further afield in the 13 years since that decision was handed down. I was in dissent in *Roe* v. *Wade*, and I continue to believe that this venture has been fundamentally unsound since its inception. But even accepting *Roe* v. *Wade*, the concerns underlying that decision by no means command or justify the results reached today. Indeed, in my view, our precedents in this area, applied in a manner consistent with sound principles of constitutional adjudication, require reversal of the Court of Appeals on the ground that the provisions before us are facially constitutional. Accordingly, I cannot join the Court's opinion, and I dissent from its judgment.[1]

[1] I shall, for the most part, leave to one side the Court's somewhat extraordinary procedural rulings. I do not strongly disagree with the Court's decision to read a finality requirement into 28 U. S. C. § 1254(2), although I would have thought it incumbent on the Court to provide *some* reasoning in support of this ruling, particularly in view of its departure from the text of the statute and of the disparity thus created between the jurisdictional requirements of subsections (1) and (2) of § 1254. It might

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

From: **Justice White**

Circulated: _____

Recirculated: MAR 17 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March ——, 1986]

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

Today the Court carries forward the "difficult and continuing venture in substantive due process," *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 92 (1976) (WHITE, J., dissenting), that began with the decision in *Roe* v. *Wade*, 410 U. S. 113 (1973), and has led the Court further and further afield in the 13 years since that decision was handed down. I was in dissent in *Roe* v. *Wade*, and I continue to believe that this venture has been fundamentally unsound since its inception. But even accepting *Roe* v. *Wade*, the concerns underlying that decision by no means command or justify the results reached today. Indeed, in my view, our precedents in this area, applied in a manner consistent with sound principles of constitutional adjudication, require reversal of the Court of Appeals on the ground that the provisions before us are facially constitutional. Accordingly, I cannot join the Court's opinion, and I dissent from its judgment.[1]

[1] I shall, for the most part, leave to one side the Court's somewhat extraordinary procedural rulings. I do not strongly disagree with the Court's decision to read a finality requirement into 28 U. S. C. § 1254(2), although I would have thought it incumbent on the Court to provide *some* reasoning in support of this ruling, particularly in view of its departure

Pp. 1, Part I new, 11, 16, 19, 23, 25, 26

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: 4/10/86

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[April ——, 1986]

JUSTICE WHITE, dissenting.

Today the Court carries forward the "difficult and continuing venture in substantive due process," *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52 (1976) (WHITE, J., dissenting), that began with the decision in *Roe* v. *Wade*, 410 U. S. 113 (1973), and has led the Court further and further afield in the 13 years since that decision was handed down. I was in dissent in *Roe* v. *Wade* and am in dissent today. In Part I below, I state why I continue to believe that this venture has been fundamentally misguided since its inception. In Part II, I submit that even accepting *Roe* v. *Wade*, the concerns underlying that decision by no means command or justify the results reached today. Indeed, in my view, our precedents in this area, applied in a manner consistent with sound principles of constitutional adjudication, require reversal of the Court of Appeals on the ground that the provisions before us are facially constitutional.[1]

[1] I shall, for the most part, leave to one side the Court's somewhat extraordinary procedural rulings. I do not strongly disagree with the Court's decision to read a finality requirement into 28 U. S. C. § 1254(2), although I would have thought it incumbent on the Court to provide *some* reasoning in support of this ruling, particularly in view of its departure from the text of the statute and of the disparity thus created between the jurisdictional requirements of subsections (1) and (2) of § 1254. It might

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

pp. 6, 7, 8, 9, 10, 11, 12, 13

Circulated: _____

Recirculated: MAY 27 1986

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[May ——, 1986]

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

Today the Court carries forward the "difficult and continuing venture in substantive due process," *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52 (1976) (WHITE, J., dissenting), that began with the decision in *Roe* v. *Wade*, 410 U. S. 113 (1973), and has led the Court further and further afield in the 13 years since that decision was handed down. I was in dissent in *Roe* v. *Wade* and am in dissent today. In Part I below, I state why I continue to believe that this venture has been fundamentally misguided since its inception. In Part II, I submit that even accepting *Roe* v. *Wade*, the concerns underlying that decision by no means command or justify the results reached today. Indeed, in my view, our precedents in this area, applied in a manner consistent with sound principles of constitutional adjudication, require reversal of the Court of Appeals on the ground that the provisions before us are facially constitutional.[1]

[1] I shall, for the most part, leave to one side the Court's somewhat extraordinary procedural rulings. I do not strongly disagree with the Court's decision to read a finality requirement into 28 U. S. C. § 1254(2), although I would have thought it incumbent on the Court to provide *some* reasoning in support of this ruling, particularly in view of its departure from the text of the statute and of the disparity thus created between the

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

- SUBSTANTIVE CHANGE AT 1 -

Circulated: _____

Recirculated: JUN 6 1986

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June ——, 1986]

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

Today the Court carries forward the "difficult and continuing venture in substantive due process," *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52 (1976) (WHITE, J., dissenting), that began with the decision in *Roe* v. *Wade*, 410 U. S. 113 (1973), and has led the Court further and further afield in the 13 years since that decision was handed down. I was in dissent in *Roe* v. *Wade* and am in dissent today. In Part I below, I state why I continue to believe that this venture has been fundamentally misguided since its inception. In Part II, I submit that even accepting *Roe* v. *Wade*, the concerns underlying that decision by no means command or justify the results reached today. Indeed, in my view, our precedents in this area, applied in a manner consistent with sound principles of constitutional adjudication, require reversal of the Court of Appeals on the ground that the provisions before us are facially constitutional.[1]

[1] I shall, for the most part, leave to one side the Court's somewhat extraordinary procedural rulings. I do not strongly disagree with the Court's decision to read a finality requirement into 28 U. S. C. § 1254(2), although I would have thought it incumbent on the Court to explain why the Court of Appeals' judgment as to the statutory provisions before us today, which represents a definitive ruling on their constitutionality, is not

I dissent

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 12, 1986

Re: No. 84-495-Thornburgh v. American College of Obstetricians and Gynecologists

Dear Harry:

Please join me.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 19, 1985

Re: No. 84-495-Thornburgh v. American College of Obstetricians and Gynecologists et al.

Dear John:

I agree with your Per Curiam.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

Ltr circ to me informally by H.A.B. on 2/5/86. See my letter of 2/6 commenting on this draft.

W.J.B. 2/5/86 File

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: _____

Recirculated: _____

§ 3214(a) & (h) [reporting] + § 3211(a) [determination of viability] - 16-18. This draft invalidates on basis of public exposure & deterring effect of such exposure. I agree. But required report by physician (P16) is detailed & intrusive. Is not this a further reason for invalidation? Does forth said reasonable reporting is OK.

10 23 § viability.

23 verbal changes 22 I would not criticize the SG personally

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[February —, 1986]

Discuss with Cabell the treatment of my op in Ashcroft as to providing for a "second physician" & my reading that under Mo. statute an exception existed in an emergency — p 21

JUSTICE BLACKMUN delivered the opinion of the Court.

This is an appeal from a judgment of the United States Court of Appeals for the Third Circuit reviewing the District Court's rulings upon a motion for a preliminary injunction. The Court of Appeals held unconstitutional several provisions of Pennsylvania's current Abortion Control Act, 1982 Pa. Laws, Act No. 138, now codified as 18 Pa. Cons. Stat. § 3201 *et seq.* (1983) (Act).[1] Among the provisions ruled invalid by the Court of Appeals were portions of § 3205, relating to "informed consent"; § 3208, concerning "printed information"; §§ 3210(b) and (c), having to do with postviability abortions; and § 3211(a) and §§ 3214(a) and (h), regarding reporting requirements.[2]

---

[1] The District Court had held invalid and had enjoined preliminarily only the requirement of § 3205(a)(2) that at least 24 hours must elapse between a woman's receipt of specified information and the performance of her abortion. 552 F. Supp. 791, 797–798, 811 (ED Pa. 1982).

[2] The Court of Appeals also held § 3215(e) invalid. That section requires health-care insurers to make available, at a lesser premium, policies expressly excluding coverage "for abortion services not necessary to avert the death of the woman or to terminate pregnancies caused by rape or incest." This ruling on § 3215(e) is not before us.

84-495

February 7, 1986

Dear John:

Here is the proposed revision of Part V. What do you think?

Sincerely,

HAB

Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 7, 1986

Re: No. 84-495, Thornburgh v. American College of Obstetricians

Dear Thurgood:

I have been in touch with Lewis and John. John had some concerns about Part V. Lewis shared some of those concerns. I am proposing a revision of Part V and am sending a copy of it to John by Federal Express today. I hope he will go along with it. Lewis has given me his approval.

I enclose a copy of that revision for you. If you disagree with any part of it, please let me know.

Sincerely,

Justice Marshall

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 10, 1986

Personal

Re: No. 84-495, Thornburgh v. Amer. College of Obstetricians

Dear John:

Herewith, for your information, is a copy of the revised Part V of Thornburgh. Your suggestions, I feel, have been excellent. The proposed opinion will go to the Duplicating Unit today.

Sincerely,

Harry

Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 10, 1986

Personal

Re: No. 84-495, Thornburgh v. Amer. College of Obstetricians

Dear Bill, Thurgood, and Lewis:

I have been in communication with John by telephone several times this weekend. As you know, he had some reservations about Part V in its original form. Lewis shared some of those reservations.

I now enclose a revision of Part V which, I believe, has John's full approval. Actually, he made some positive suggestions about it which, I think, have strengthened it. The proposed opinion will go to the Duplicating Unit today with Part V in this form. I very much appreciate the assistance all of you have rendered.

Sincerely,

Harry

Justice Brennan
Justice Marshall ✓
Justice Powell

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: FEB 11 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[February ——, 1986]

JUSTICE BLACKMUN delivered the opinion of the Court.

This is an appeal from a judgment of the United States Court of Appeals for the Third Circuit reviewing the District Court's rulings upon a motion for a preliminary injunction. The Court of Appeals held unconstitutional several provisions of Pennsylvania's current Abortion Control Act, 1982 Pa. Laws, Act No. 138, now codified as 18 Pa. Cons. Stat. § 3201 *et seq.* (1983) (Act).[1] Among the provisions ruled invalid by the Court of Appeals were portions of § 3205, relating to "informed consent"; § 3208, concerning "printed information"; §§ 3210(b) and (c), having to do with postviability abortions; and § 3211(a) and §§ 3214(a) and (h), regarding reporting requirements.[2]

---

[1] The District Court had held invalid and had enjoined preliminarily only the requirement of § 3205(a)(2) that at least 24 hours must elapse between a woman's receipt of specified information and the performance of her abortion. 552 F. Supp. 791, 797–798, 811 (ED Pa. 1982).

[2] The Court of Appeals also held § 3215(e) invalid. That section requires health-care insurers to make available, at a lesser premium, policies expressly excluding coverage "for abortion services not necessary to avert the death of the woman or to terminate pregnancies caused by rape or incest." This ruling on § 3215(e) is not before us.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 14, 1985

Re: No. 84-495, Thornburgh v. American College of Obstetricians and Gynecologists

Dear John:

Please join me in your per curiam.

Sincerely,

Harry

Justice Stevens

cc: The Conference

STYLISTIC CHANGES
+ pp. 5, 6, 16, 17

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 04 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June ——, 1986]

JUSTICE BLACKMUN delivered the opinion of the Court.

This is an appeal from a judgment of the United States Court of Appeals for the Third Circuit reviewing the District Court's rulings upon a motion for a preliminary injunction. The Court of Appeals held unconstitutional several provisions of Pennsylvania's current Abortion Control Act, 1982 Pa. Laws, Act No. 138, now codified as 18 Pa. Cons. Stat. § 3201 *et seq.* (1983) (Act).[1] Among the provisions ruled invalid by the Court of Appeals were portions of § 3205, relating to "informed consent"; § 3208, concerning "printed information"; §§ 3210(b) and (c), having to do with postviability abortions; and § 3211(a) and §§ 3214(a) and (h), regarding reporting requirements.[2]

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[2] The Court of Appeals also held § 3215(e) invalid. That section requires health-care insurers to make available, at a lesser premium, policies expressly excluding coverage "for abortion services not necessary to avert the death of the woman or to terminate pregnancies caused by rape or incest." This ruling on § 3215(e) is not before us.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Hold for No. 84-495, Thornburgh
v. American College of Obstetricians

One case is held for Thornburgh. It is No. 85-673, Hartigan v. Zbaraz, an appeal from CA7. It concerns the Illinois Parental Notification Act of 1983.* Two interrelated provisions are at issue: a judicial proceeding to obtain waiver of the parental-notice requirement, and a mandatory 24-hour waiting period following actual notice to both parents. In Thornburgh, the sections of the Pennsylvania parental-notification provision had been remanded by CA3 to the Pennsylvania Supreme Court for promulgation of rules, and this Court therefore did not consider the issue. See slip op. 9, n. 9. After the appeal in Thornburgh was docketed here, the Pennsylvania Supreme Court promulgated the rules. This Court declined to consider these rules, concluding that they should be reviewed by the DC in the first instance.

The DC (ND Ill.) (Will, J.) found both provisions of the Illinois Act unconstitutional. The State appealed to CA7 (Bauer; Coffey [diss]; Brown [Sr DC]). As to the procedure for waiver of notice, under which a minor may seek judicial waiver of the parental-notice requirement, CA7 noted that the Act provides simply that an expedited, confidential process is to be available as provided by rules to be promulgated by the Illinois Supreme Court. CA7 enjoined enforcement of the Act until the Illinois Sup. Ct. promulgated the rules; in so doing, CA7 relied on similar procedure under the Pennsylvania statute by CA3 in Thornburgh. 737 F.2d 283, 297 (CA3 1984).

CA7 acknowledged that in Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476 (1983), this Court upheld the Missouri parental-consent statute prior to promulgation of rules. The Missouri

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*In No. 84-1379, Diamond v. Charles, the question before the Court concerned the 1979 Illinois Abortion Law. When that statute was challenged in DC, the court enjoined a number of provisions, including a parental-consent provision. The doctors challenging the 1979 Law appealed as to four sections that the DC had refused to enjoin. Thus, when appeal was taken to this Court, the parental-notification provision was not at issue. In any event, the Court did not reach the merits in Diamond, because the State of Illinois had absented itself from the litigation. In this case, the State of Illinois filed the jurisdictional statement. App. to Pet. for Cert. 89.

November 7, 1985

84-495 Thornburgh v. American College
84-1479 Diamond v. Charles

Dear Chief:

At the time the Court took these cases, I thought we had jurisdiction and voted to affirm in both.

Following the oral argument and a more careful look at the briefs, I have concluded that we can dismiss both, and this will be my vote.

As it may be of some help, I enclose a copy of a memorandum prepared by my clerk, Cabell Chinnis, following the arguments on yesterday. In a word, I think we would have to overrule Slaker v. O'Connor to take jurisdiction in Thornburgh, and clearly there is no standing by the Intervenors to raise the constitutional question in Diamond.

It would be a good thing for this Court institutionally not to review routinely abortion cases where states accept the validity of our constitutional cases. In both of these cases, the state purports to follow our decisions. Where a state gets out of line egregiously, we should review. Here, however, both courts below have made decisions that will require the legislatures to reexamine the statutes.

Sincerely,

The Chief Justice
lfp/ss
Enc.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 7, 1985

PERSONAL

84-495 Thornburgh v. American College
84-1379 Diamond v. Charles

Dear Bill:

In accord with our conversation, I have taken a further look - with the assistance of my clerk, Cabell Chinnis - and I conclude that we have no jurisdiction in Thornburgh unless we want to overrule Slaker v. O'Connor. Nor do the intervenors in Diamond have standing.

It would be a good thing for this Court institutionally not to review routinely abortion cases where states accept the validity of our constitutional cases. In both of these cases, the state purports to follow our decisions. Where a state gets out of line egregiously, we should review. Here, however, both courts below have made decisions that will require the legislatures to reexamine the statutes.

Sincerely,

L. Lewis

Justice Brennan

lfp/ss
Enc.

February 6, 1986

84-495 Thornburgh v. American College

Dear Harry:

Thank you for the opportunity to have a prior look at the draft of your opinion.

My general impression is that it is excellent. I have one minor clarifying suggestion. It may not be entirely clear that a woman's constitutional right to make the abortion decision is usually unfettered only during the first trimester, the period prior to viability. I find this ambiguity, for example, in the last sentence of the last full paragraph on page 23. It may also exist at other points in the opinion.

You asked particularly for my opinion as to Part V. I agree that it is indeed "unusual" for the Solicitor General, as an amicus curiae, to ask us to overrule major constitutional decisions. I would prefer, however, for the Court not to criticize the Solicitor General specifically. My judgment is that even those who will applaud your decision will find the reaffirmation of Roe v. Wade that is implicit throughout your opinion and explicit on page 10 to be sufficient. Also, we have already rebuffed the Solicitor General to some extent by denying his request to argue orally.

The substance of what you have said in Part V could be retained - I hope without reference specifically to the Solicitor General. There is at least one other amicus brief that urges us to overrule Roe v. Wade. You could omit the paragraph on p. 22, and commence Part V along the following lines:

> "Although appellants challenge the merits of the Third Circuit's decision solely on the ground that the Court of Appeals misapplied Roe v. Wade and its successors, various parties appearing as amici curiae in support of appellants have urged us to take this occa-

sion to overrule those cases entirely. We decline the invitation."

A few stylistic changes in the last full paragraph on page 23 would also be necessary to keep the generality of the reference to these amici curiae.

I would like to add in closing that I particularly like your reference to the fact that honorable persons can disagree on this issue. I also think your paragraph that begins near the bottom of page 23 - your final substantive paragraph - is excellent.

Again, my thanks for the opportunity of prior review. I look forward to joining your opinion.

Sincerely,

Justice Blackmun

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 12, 1986

84-495 Thornburgh v. American College

Dear Harry:

Please join me.

Sincerely,

Lewis

Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 10, 1985

Re: No. 84-495 Thornburg v. American College, Et Al.

Dear John,

It seems to me that the reasons you state in your Per Curiam for dismissing the appeal in this case are not reasons which fall within any of the traditional categories under which we have dismissed appeals in the past: "not a proper appeal," "no jurisdiction" and the like. The "policies disfavoring piecemeal appellate review and premature adjudication of constitutional question" to which you refer on page 2 of the Per Curiam are supported by citations to an appeal from a state court which was dismissed for lack of a substantial record, Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, a writ of certiorari to a state court which was dismissed, Minnick v. California Department of Corrections, 452 U.S. 105, and an appeal from the Court of Appeals to the Fifth Circuit which was decided on the merits, New Orleans v. Dukes, 427 U.S. 297 (1976). Whatever may be the jurisprudential considerations that counsel against piecemeal review or avoidance of constitutional questions, I would think that Congress has finally answered this question when it gave these particular appellants the right to appeal under §1254(2). I am going to continue to vote to note probable jurisidction.

Sincerely,

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 12, 1986

Re: No. 84-495 Thornburgh v. American College

Dear Byron,

Please join me in your dissent in this case.

Sincerely,

WHR

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 14, 1986

Re: 84-495 - Thornburgh v. American College of Obstetricians

Dear Byron:

Please rejoin me in your dissent.

Sincerely,

WHR

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 7, 1986

Re: No. 84-495 Thornburgh v. Am. College of Obstetricians and Gynecologists

Dear Sandra,

Please join me in your dissent in this case.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 12, 1986

Re: 84-495 - Thornburg v. American College of Obstetricians and Gynecologists, et al.

Dear Harry:

Please join me.

Respectfully,

Justice Blackmun

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: 4/30/86

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[May ——, 1986]

JUSTICE STEVENS, concurring.

The scope of the individual interest in liberty that is given protection by the Due Process Clause of the Fourteenth Amendment is a matter about which conscientious judges have long disagreed. Although I believe that that interest is significantly broader than JUSTICE WHITE does,[1] I have always had the highest respect for his views on this subject.[2] In this case, although our ultimate conclusions differ, it may be useful to emphasize some of our areas of agreement in order to minimize the risk that the clarity of certain fundamental propositions not be obscured by his forceful rhetoric.

Let me begin with a reference to *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), the case holding that a state may not totally forbid the use of birth control devices. Although the Court's opinion relied on a "right of marital privacy" within the "penumbra" of the Bill of Rights, *id.*, at 481–486, JUSTICE WHITE's concurring opinion went right to the heart of the issue. He wrote:

---

[1] Compare *e. g.*, his opinion for the Court in *Meachum* v. *Fano*, 427 U. S. 215 (1976) with my dissent in that case, *id.* at 229.

[2] See *e. g.*, Stevens, Judicial Restraint, 22 San Diego L. Rev. 437, 449–450 (1985).

STYLISTIC CHANGES THROUGHOUT
SEE PAGES:

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: 5/7/86

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[May ——, 1986]

JUSTICE STEVENS, concurring.

The scope of the individual interest in liberty that is given protection by the Due Process Clause of the Fourteenth Amendment is a matter about which conscientious judges have long disagreed. Although I believe that that interest is significantly broader than JUSTICE WHITE does,[1] I have always had the highest respect for his views on this subject.[2] In this case, although our ultimate conclusions differ, it may be useful to emphasize some of our areas of agreement in order to minimize the risk that the clarity of certain fundamental propositions not be obscured by his forceful rhetoric.

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STYLISTIC CHANGES THROUGHOUT.
PP. PAGES: 8

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June ——, 1986]

JUSTICE STEVENS, concurring.

The scope of the individual interest in liberty that is given protection by the Due Process Clause of the Fourteenth Amendment is a matter about which conscientious judges have long disagreed. Although I believe that that interest is significantly broader than JUSTICE WHITE does,[1] I have always had the highest respect for his views on this subject.[2] In this case, although our ultimate conclusions differ, it may be useful to emphasize some of our areas of agreement in order to minimize the risk that the clarity of certain fundamental propositions not be obscured by his forceful rhetoric.

Let me begin with a reference to *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), the case holding that a State may not totally forbid the use of birth control devices. Although the Court's opinion relied on a "right of marital privacy" within the "penumbra" of the Bill of Rights, *id.*, at 481–486, JUSTICE WHITE's concurring opinion went right to the heart of the issue. He wrote:

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[2] See *e. g.*, Stevens, Judicial Restraint, 22 San Diego L. Rev. 437, 449–450 (1985).

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JUN 4 1986

Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June ——, 1986]

JUSTICE STEVENS, concurring.

The scope of the individual interest in liberty that is given protection by the Due Process Clause of the Fourteenth Amendment is a matter about which conscientious judges have long disagreed. Although I believe that that interest is significantly broader than JUSTICE WHITE does,[1] I have always had the highest respect for his views on this subject.[2] In this case, although our ultimate conclusions differ, it may be useful to emphasize some of our areas of agreement in order to ensure that the clarity of certain fundamental propositions not be obscured by his forceful rhetoric.

Let me begin with a reference to *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), the case holding that a State may not totally forbid the use of birth control devices. Although the Court's opinion relied on a "right of marital privacy" within the "penumbra" of the Bill of Rights, *id.*, at 481–486, JUSTICE WHITE's concurring opinion went right to the heart of the issue. He wrote:

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[2] See *e. g.*, Stevens, Judicial Restraint, 22 San Diego L. Rev. 437, 449–450 (1985).

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 18, 1986

No. 84-495 Thornburgh v. American College of Obstetricians and Gynecologists

Dear Harry,

I will await further writing in this case.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 14, 1986

No. 84-495 Thornburgh v. American College of Obstetricians & Gynecologists

Dear Harry,

Although I agree with much of Byron's dissent, I have decided to write something in addition. It may take me a while, but I will certainly try not to hold you up too long.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 10, 1985

No. 84-495 Thornburgh v. American College of Obstetricians and Gynecologists

Dear Bill,

Please join me in your dissent.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

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

From: **Justice O'Connor**

Circulated: MAY 6 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[May ——, 1986]

JUSTICE O'CONNOR, dissenting.

This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 452 (1983) (O'CONNOR, J., dissenting). Today's decision goes farther, and makes it painfully clear that no legal rule or doctrine is safe from *ad hoc* nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it. See *Heckler* v. *Chaney*, —— U. S. ——, —— (1985) (slip op. 16); *id.*, at ——, n. 2 (BRENNAN, J., concurring) (differences over the validity of the death penalty under the Eighth Amendment should not influence the Court's consideration of a question of statutory administrative law). That the Court's unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court was not designed for, and is not suited to, the expansive role it has claimed for itself in

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

pp. 1, 11

Stylistic Changes Throughout

From: **Justice O'Connor**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[May ——, 1986]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, dissenting.

This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 452 (1983) (O'CONNOR, J., dissenting). Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it. See *Heckler* v. *Chaney*, 470 U. S. ——, —— (1985) (slip op. 16); *id.*, at ——, n. 2 (BRENNAN, J., concurring) (differences over the validity of the death penalty under the Eighth Amendment should not influence the Court's consideration of a question of statutory administrative law). That the Court's unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court is not suited to the expan-

p. 19

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

From: **Justice O'Connor**

Circulated: _____

Recirculated: JUN 6 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 11, 1986]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, dissenting.

This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 452 (1983) (O'CONNOR, J., dissenting). Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it. See *Heckler* v. *Chaney*, 470 U. S. ——, —— (1985) (slip op. 16); *id.*, at ——, n. 2 (BRENNAN, J., concurring) (differences over the validity of the death penalty under the Eighth Amendment should not influence the Court's consideration of a question of statutory administrative law). That the Court's unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court is not suited to the expan-