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# Roe v. Wade

## *An Engine of Controversy*

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If *Brown v. Board of Education*<sup>1</sup> is America's most hallowed modern Supreme Court decision, *Roe v. Wade*<sup>2</sup> is surely its most controversial. In 1973, *Roe v. Wade* struck down the abortion laws of most of the states in a single opinion, but it did not settle the question of abortion rights in America. Far from it: *Roe* was merely the opening event in a political and legal struggle over reproductive rights that continues to this day. *Roe* energized new social movements that eventually divided the two major political parties over abortion rights and reshaped their respective coalitions. Securing and expanding the right to abortion became a central concern of the women's movement, while opposition to *Roe v. Wade* awakened the sleeping giant of religious conservatives, who in turn helped shape the contemporary Republican Party. In the process, *Roe v. Wade* became a central issue in federal judicial nominations, symbolizing not only the issue of reproductive freedom but also the larger question of the proper role of courts in a democratic society. Attacking and defending the principles and reasoning of *Roe v. Wade* has been a central preoccupation of constitutional theorists ever since it was decided. It is hardly an exaggeration to say that, more than any other Supreme Court decision, *Roe v. Wade* has defined the constitutional jurisprudence and the constitutional debates of the modern era.

### *The State of Abortion Today*

Thirty years after *Roe*, Americans remain divided over abortion rights. Polling data consistently show majority support for some form of abortion

right, and overwhelming majorities favor the legal availability of abortion in cases of rape, incest, or when a woman's life or health would be jeopardized. Nevertheless, many Americans remain ambivalent about giving women too free an access to abortions, and a significant minority of the public are adamantly opposed to abortion except in a small class of cases. The median position appears to be that abortion should be legal but that women should be able to obtain the procedure only for good reasons, with some dispute about what a sufficiently good reason would be. For example, in an ABC News–*Washington Post* poll conducted on the thirtieth anniversary of *Roe v. Wade*, 57 percent of respondents surveyed stated that abortion should be legal in “all or most cases.” Eight in ten agreed that abortions should be available in cases of rape or incest or when the mother's life or health is endangered. At the same time, 57 percent also believed that abortion should be illegal “if the woman is unmarried and does not want the baby.” That might suggest that majorities prefer much stricter regulations of abortion. Nevertheless, 56 percent wanted abortions to be as easy to obtain as they are now (including 14 percent who wanted them even easier to get), while 42 percent wanted abortions to be more difficult to obtain.<sup>3</sup> Finally, although Americans remain uneasy about unhindered access to abortion, a majority also oppose the idea of appointing Justices to the Supreme Court to overturn *Roe*.<sup>4</sup>

These conflicted feelings about abortion have been translated into government policies that maintain the formal legality of abortions but impose many practical and procedural obstacles on women who wish to obtain them. These burdens fall most heavily on poor women and women who live in rural areas.<sup>5</sup> In fact, since 1982, the number of abortion providers in the United States has decreased by 37 percent. In 2000, 87 percent of all U.S. counties lacked an abortion provider; 34 percent of all women between the ages of fifteen and forty-four lived in these counties. By contrast, obstetric and gynecological care is available in half of the nation's counties.<sup>6</sup>

Several different factors have contributed to women's lack of practical access to abortion. Physicians and hospitals have shied away from performing abortions because of repeated protests, harassment, and violence directed against abortion clinics and the doctors and nurses who staff them. Many medical schools no longer provide training in abortions for medical students, further reducing the pool of abortion providers. Consolidation of the health care industry in the late twentieth century and the rise of managed care may have produced subtle economic pressures that

disfavor abortion clinics and have made abortion services in hospitals more costly.

Perhaps equally important, state and local governments have enacted abortion regulations that discourage abortion or make it harder to obtain. Several states refuse to allow abortions to be performed in publicly owned facilities that are the sole (or main) health care providers in some jurisdictions. Following the Supreme Court's 1992 decision in *Casey v. Planned Parenthood of Southeastern Pennsylvania*,<sup>7</sup> states have been free to impose greater restrictions on abortion. As of December 2003, twenty states require that state-directed information or counseling be provided to pregnant women and impose a waiting period (usually twenty-four hours) before women can obtain abortions. Thirty-two states (and the District of Columbia) prohibit Medicaid funding of abortion for poor women unless the woman's life is at risk or the pregnancy results from rape or incest; South Dakota makes an exception only if the woman's life is endangered. Nineteen states require parental consent before a pregnant minor may obtain an abortion, while fourteen require parental notification. Eleven states prohibit coverage of abortions in state employee insurance policies, while four states prevent even private insurers from paying for abortions as part of general health and medical coverage, instead requiring separate insurance policies or riders.<sup>8</sup>

Despite these limitations, more than 39 million legal abortions have been performed in the United States since *Roe v. Wade* was decided in 1973. However, the total number of abortions and the percentage of women of childbearing age obtaining abortions has declined, particularly since 1990. Although legal impediments are one cause, more likely reasons are better knowledge about and access to effective methods of contraception and lower rates of teenage pregnancy.<sup>9</sup> Contraception is key to reducing abortion rates: 47 percent of the 6.3 million unplanned pregnancies that occur each year in the United States occur among the 7 percent of women who do not practice contraception and are at risk of unintended pregnancy. Even so, contraception does not eliminate women's need for access to abortions: 54 percent of women who have had abortions reported that they were using contraceptives during the month they became pregnant. Lack of education about contraceptives and inconsistent or improper use remain major problems, and nonuse is greatest among those who are young, poor, or poorly educated.<sup>10</sup>

Public concern about abortions usually focuses on the later stages of pregnancy, when the fetus is more developed. For example, a recent poll

showed that only 11 percent of Americans believed that abortions should be legal if they are performed in the sixth month or later.<sup>11</sup> In fact, the vast majority (88 percent) of abortions occur in the first twelve weeks of pregnancy. Only 7 percent occur between weeks thirteen and fifteen, and 4 percent between weeks sixteen and twenty. (Twenty weeks is about halfway through a normal pregnancy.) Only 1 percent of abortions occur from week twenty-one on.<sup>12</sup> Viability generally occurs at approximately twenty-four weeks or later. The number of postviability abortions performed in the United States is very small; a 1992 study found that after twenty-six weeks, only about 300 to 600 abortions are performed a year.<sup>13</sup>

### *The Decision in Roe*

The Supreme Court's decision in *Roe* arose out of three different streams of social movement organization. Doctors and public health advocates had pushed for greater access to abortion and contraception for almost three decades before *Roe*. The medical profession, although sympathetic to the plight of pregnant women, was interested primarily in freedom to practice medicine without interference from what they regarded as religiously motivated legislatures. Public health advocates saw abortion as a public health crisis; although affluent women in the United States could obtain abortions, poor women were remitted to unsafe and dangerous methods. Public health advocates denounced the class and race discrimination they saw in existing abortion practices; they argued that poor women and minorities should have the same access to safe methods of abortion as the rich already did.<sup>14</sup> The third stream of politics was the second wave of American feminism in the 1960s, which was at first ambivalent about abortion as a movement issue. However, by 1970, feminists had begun to understand abortion as a basic right of women and began to press for repeal of existing abortion laws.

In 1960, all fifty states and the District of Columbia outlawed abortion except in very limited circumstances. By the early 1970s, public opinion had changed rapidly, a result of the sexual revolution and social movement activism. According to a January 1972 Gallup poll, 57 percent of Americans, and 54 percent of Catholics, believed that the abortion decision should be left to the woman and her doctor.<sup>15</sup> The American Bar Association endorsed the view that abortion should be left to a woman and her doctor up to twenty weeks, about halfway through the pregnancy. A presidential commission on population control reported in March 1972

that it advocated abortion by choice; the only dissenters were the four Catholic members of the commission.<sup>16</sup> Between 1967 and 1972, seventy-five leading national groups, including twenty-eight religious and twenty-one medical organizations, advocated the repeal of all abortion laws. These groups included, among others, the American Jewish Congress, the American Baptist Convention, the American Medical Association, the American Psychiatric Association, the American Council of Obstetricians and Gynecologists, and the YMCA.<sup>17</sup>

In the meantime, the Supreme Court's jurisprudence was also changing. Following the constitutional struggles over the New Deal in the 1930s, the Supreme Court had abandoned the idea of using the Fourteenth Amendment's Due Process Clause, which says that states may not "deprive any person of life, liberty, or property, without due process of law," to strike down labor laws and other economic regulations. The new Justices appointed by Franklin Roosevelt were deeply suspicious of the doctrine of "substantive due process" associated with *Lochner v. New York*,<sup>18</sup> the 1905 decision that struck down a maximum-hour law for bakers on the grounds that it violated employees' freedom to make contracts. The *Lochner* Court believed that it was merely enforcing implied limits on government and defending a long and hallowed tradition of individual liberty. But to its critics in the Progressive Era and the New Deal *Lochner* symbolized the early-twentieth-century Court's attempt to impose laissez-faire economic principles on the country.

Beginning in 1937, the Supreme Court repudiated the *Lochner*-era jurisprudence that protected economic rights through the doctrine of substantive due process. The Court would no longer read controversial economic theories into the Constitution. Instead, it would defer to the political branches in ordinary social and economic legislation. It would intervene only when basic civil rights and civil liberties were imperiled. However, the post-New Deal paradigm of deferring to legislatures in ordinary social and economic legislation, while acting to protect civil rights and liberties, soon proved difficult to maintain. The Supreme Court was repeatedly called on to protect civil rights and civil liberties based on the relatively abstract constitutional guarantees of equal protection and due process. It responded by creating new doctrines that protected blacks, women, children born out of wedlock, and aliens from invidious discrimination. The Court also began to recognize a new class of fundamental rights designed to protect the interests of the poor, such as the right to travel and the right to access to the courts.

In 1965, in *Griswold v. Connecticut*, the Court struck down a Connecticut statute that prohibited the use of contraceptives.<sup>19</sup> Anxious not to follow the logic of *Lochner v. New York*, Justice William O. Douglas, a Roosevelt appointee, argued instead that the statute violated a right of marital privacy that emanated from the penumbras of the textual commitments to liberty in the various parts of the Bill of Rights.<sup>20</sup> Clever as Douglas's penumbra argument was, later decisions did not follow his method. Rather, the Court recognized that it had embarked once again on the determination of which fundamental liberties were protected under the Due Process Clause.<sup>21</sup> The right of privacy was extended in 1971 to the right of single persons to use contraceptives in *Eisenstadt v. Baird*,<sup>22</sup> and extended again to include the right to abortion in *Roe v. Wade*. Although the plaintiffs in *Eisenstadt* specifically disavowed any claim that the right to contraception would lead to a right to abortion, Justice Brennan's plurality opinion in *Eisenstadt* clearly pointed in that general direction: "If the right of privacy means anything," Brennan wrote, "it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>23</sup> Through this dictum, Brennan served notice that the right recognized in the *Griswold* opinion was not merely a right of marital privacy, but extended to single persons as well, and encompassed not only contraception, but the "decision whether to bear or beget a child."

The Supreme Court first heard oral arguments in *Roe* on December 13, 1971. Sarah Weddington argued before the Justices on behalf of Norma McCorvey, who had challenged Texas's 1854 abortion statute under the name Jane Roe. *Roe* was argued together with a companion case, *Doe v. Bolton*, which challenged Georgia's 1968 abortion reform statute, which was based on the American Law Institute's Model Penal Code. Margie Pitts Hames argued the Georgia case on behalf of Sandra Bensing, who brought suit as Mary Doe. Justices Hugo Black and John Marshall Harlan had recently retired, and so the Court had only seven active members. The case was reargued on October 11, 1972, after Justices Lewis Powell and William Rehnquist replaced Black and Harlan.

Justice Harry A. Blackmun, who had been appointed by President Richard Nixon in 1970, wrote the majority opinions in both *Roe* and *Doe*. He argued that the right of privacy recognized in *Griswold* and extended to single persons in *Eisenstadt* "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Denying the right to

choose would impose a “detriment . . . on the pregnant woman,” including possible medical and psychological harm. Child care could tax a woman’s mental and physical health. Blackmun also pointed to “the distress, for all concerned, associated with the unwanted child, and . . . the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it, [as well as] the additional difficulties and continuing stigma of unwed motherhood.”<sup>24</sup>

Nevertheless, the central problem with extending the right of contraception to abortion was that abortion ended the existence of an embryo or fetus. Counsel for Texas argued that human life began at conception, that a fetus was a person under the meaning of the Fourteenth Amendment, and therefore that a fetus had constitutional rights of its own. Blackmun responded that the fetus was not a person within the meaning of the Constitution, pointing out that in many places the Constitution referred to the rights and duties of persons that would make no sense if applied to fetuses.<sup>25</sup> He also noted that abortion was not a felony at common law before “quickening,” the point at which a fetus’s movements could be felt by a pregnant woman, which usually occurred in the fourth or fifth month of pregnancy.<sup>26</sup> Nevertheless, the State of Texas argued, even if the fetus was not a person, the state had a compelling interest in protecting the life of the fetus.<sup>27</sup> That compelling interest could be vindicated only by prohibiting abortion.

Blackmun responded that “We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”<sup>28</sup> Nevertheless, the question simply reemerged in a different way. None of the Justices believed that the right to abortion extended to the very moment of birth. At some stage in the pregnancy, the state’s interest in protecting the fetus became sufficiently compelling that states could proscribe abortion in almost all cases other than when necessary to preserve the woman’s life or health. To determine when that point occurred, Blackmun effectively had to decide when the life of the fetus “began,” at least to the extent of deciding when the state’s interest in protecting the fetus became compelling

Justice Blackmun offered an elaborate trimester framework to solve these problems. Following the medical thinking of the day, he divided the pregnancy into three trimesters. Until the end of the first trimester, “the abortion decision and its effectuation must be left to the medical

judgment of the pregnant woman's attending physician." In the second trimester until the point of viability, the state may "regulate the abortion procedure in ways that are reasonably related to maternal health." After the point of viability (between twenty-four and twenty-eight weeks, around the beginning of the third trimester), states can "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."<sup>29</sup>

The trimester system was actually the result of a compromise among the Justices. Blackmun's original idea was that a woman had the right to an abortion without interference from the state until the end of the first trimester. During the first trimester, the abortion decision was left to "the best medical judgment of the pregnant woman's attending physician." Afterward states could limit legal abortions to "stated reasonable therapeutic categories"—such as the woman's physical or mental health—"that are articulated with sufficient clarity" to give physicians fair warning.<sup>30</sup> The idea was that health regulations were unnecessary until the second trimester because first-trimester abortions were as safe for women as carrying the fetus to term. However, Justices William Brennan and Thurgood Marshall objected that the first trimester didn't give women enough time to discover that they were pregnant, find a doctor, and take the necessary steps to obtain an abortion. Marshall, in particular, was worried about the effect of Blackmun's rule on poor and minority women.<sup>31</sup> Blackmun agreed that the first trimester was an arbitrary point, and he responded by pushing the cutoff point to the moment of viability. However, Blackmun believed that states should still be able to regulate abortions for health reasons after the first trimester. In effect, this produced three different sets of rules for three different trimesters. Brennan responded that the point of viability was imprecise. The Court did not have to specify a specific cutoff point but should leave that question to "medically informed" legislatures in the first instance.<sup>32</sup> However, Blackmun ignored this suggestion, and the result was *Roe's* trimester framework.

During the deliberations over *Roe*, Justice Stewart worried that Blackmun's trimester framework made the decision seem too legislative,<sup>33</sup> a criticism that would be echoed repeatedly in later years. In hindsight, Brennan's suggestion that the Court not draw hard and fast lines but instead wait and see what legislatures would do might have been far wiser. In any event, the Court issued its opinion on January 22, 1973, striking down Texas's virtually total ban on abortions, as well as Georgia's procedural restrictions. Seven Justices joined the opinion, with Justices White

and Rehnquist dissenting. Justice Rehnquist argued that the decision was a throwback to *Lochner v. New York* and had no basis in the original understanding of the Fourteenth Amendment.<sup>34</sup> Justice White objected that “[t]he Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries.”<sup>35</sup>

### *From Roe to Casey*

Given the rapid changes in popular and elite opinion in the late 1960s and early 1970s, the Supreme Court’s 1973 decision in *Roe* was hardly unexpected. As is so often the case in American history, the Supreme Court’s decisions in *Roe* and *Doe* reflected the emerging views of national majorities, and particularly national elites. Nevertheless, those views had not yet crystallized in new state laws liberalizing abortion. When *Roe* was decided, most states were considering some form of abortion reform legislation. However only thirteen states had passed abortion reform statutes, which gave doctors somewhat more discretion to perform abortions, and only four states had passed abortion repeal statutes that viewed abortion as a woman’s right and allowed abortion up to a certain point in the pregnancy. In fact, *Roe* and *Doe* struck down the abortion laws of almost all the states, including abortion reform statutes like Georgia’s 1968 law, which had been based on the American Law Institute’s Model Penal Code. By contrast, when the Supreme Court struck down same-sex sodomy laws in its 2003 decision in *Lawrence v. Texas*,<sup>36</sup> thirty-seven states and the District of Columbia had already decriminalized same-sex sodomy, and in the thirteen states that still made sodomy a crime, the laws were rarely if ever enforced.

Some supporters of abortion rights, including, most prominently, Justice Ruth Bader Ginsburg, have claimed that the *Roe* decision was premature and a political mistake. *Roe v. Wade* “halted a political process that was moving in a reform direction and thereby . . . prolonged divisiveness and deferred stable settlement of the issue.”<sup>37</sup> Opposition to *Roe* helped energize the conservative religious and social movements of the 1970s and 1980s, which argued that an unelected judiciary was imposing its personal (and immoral) views and casting aside those of democratically elected state governments. These conservative social and religious movements eventually found a home in the Republican Party; they helped elect

Ronald Reagan to the presidency and helped many other pro-life candidates gain political office. In the years following *Roe*, both Congress and state legislatures passed a series of laws that repeatedly attempted to water down and limit abortion rights.<sup>38</sup> As *Roe* energized pro-life conservative social movements, it simultaneously demobilized social movement support for abortion rights. Instead of pressing for abortion reform in the states and at the national level, pro-choice advocates were constantly placed on the defensive and repeatedly turned to the courts for protection. Reliance on the courts, in turn, diverted political energy away from forming a mass political movement for abortion rights that could successfully counter the burgeoning pro-life movement.

When *Roe* was first decided, the nation's two major parties were not strongly organized around abortion rights. Although Richard Nixon denounced the *Roe* decision in order to curry favor with the Catholic vote, neither party was strongly identified either with abortion rights or with the pro-life movement. Of the seven Justices in the original *Roe* majority, Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell, Potter Stewart, and William Brennan had been appointed by Republican presidents (although Brennan was a Democrat), and Thurgood Marshall and William O. Douglas had been appointed by Democratic presidents. The two dissenters, William Rehnquist and Byron White, had been appointed by a Republican and a Democratic president, respectively. In the 1976 election, the Republican candidate, President Gerald Ford, was the relatively pro-choice candidate; the Democratic nominee, Jimmy Carter, was an evangelical Protestant who believed that abortion was immoral.

The countermobilizations that *Roe* helped energize changed all of this. The Christian evangelical movement, which had largely stayed out of politics in the decades before the 1960s, saw abortion as a threat to biblical values and began to organize against *Roe*. Members of the Republican Party's New Right, such as Phyllis Schlafly, who opposed the ERA, saw an obvious connection between their goals and those of Christian evangelicals. By the end of the 1970s, the two groups had formed an alliance that would dominate the Republican Party and revolutionize American politics. Ronald Reagan welcomed evangelical and fundamentalist Christian voters into the Republican Party and actively courted pro-life leaders. In the 1980 election, many evangelicals and fundamentalist Christians moved squarely into the Republican camp and became an important part of the party's base of support. The Republican Party became largely a pro-life party, with some moderates still favoring abortion rights, and the more liberal

Democratic Party, with Carter no longer at its helm, became strongly pro-choice. In 1980, the Republican Party platform for the first time included a call for “a constitutional amendment to restore protection of the right to life for unborn children.”<sup>39</sup>

Once in office, Ronald Reagan sought to nominate candidates to the federal judiciary who would roll back liberal judicial decisions and promote his favored constitutional values, which included opposition to abortion. Not entirely coincidentally, the 1984 Republican Party platform “applaud[ed] President Reagan’s fine record of judicial appointments, and . . . reaffirm[ed] [the party’s] support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”<sup>40</sup>

By the time Justice Lewis Powell retired in 1987, the Supreme Court’s original seven-person majority in *Roe* had dwindled to four Justices who supported abortion rights: William Brennan, Thurgood Marshall, Harry Blackmun (the original author of *Roe*), and John Paul Stevens, who had replaced William O. Douglas in 1976. Reagan’s first Supreme Court nominee, Sandra Day O’Connor, replaced Potter Stewart in 1981. O’Connor strongly criticized *Roe*’s trimester framework in her 1983 dissent in *City of Akron v. Akron Center for Reproductive Health*<sup>41</sup> and argued that abortion restrictions should be tested by a more lenient standard: whether they imposed an “undue burden” on women’s ability to obtain abortions. In 1986, Reagan nominated William Rehnquist, one of the original dissenters in *Roe*, to become Chief Justice, replacing Warren Burger, and nominated Antonin Scalia, a vocal opponent of *Roe*, to fill Rehnquist’s position as Associate Justice. These three Justices joined Byron White, the other original dissenter in *Roe*.

To replace Powell, Reagan nominated D.C. Circuit Judge Robert Bork, an outspoken critic of *Roe* who championed the jurisprudence of original intention. The choice of Bork appeared to provide the crucial fifth vote to overturn *Roe v. Wade*. The Bork nomination produced a national controversy, and ultimately the Senate failed to confirm him. Pro-choice groups mobilized to help defeat the nomination.<sup>42</sup> Eventually the Senate confirmed Reagan’s third nominee, Anthony Kennedy, a conservative circuit judge from California who was generally regarded as more moderate than Bork.

In hindsight, the failure of the Bork nomination was a turning point in the constitutional struggles over abortion. It raised the stakes in succeeding Supreme Court nominations and showed that they could be bitter and

politically costly to a president. Bork's defeat also demonstrated that pro-choice forces had considerable muscle that could be harnessed in the political arena if the public thought that abortion rights were truly threatened. It gave notice that Republican politicians might pay more heavily than they had previously believed if they tried to overturn *Roe*.

Despite the failure of the Bork nomination, by the close of 1987 President Reagan had appointed three Supreme Court Justices (O'Connor, Scalia, and Kennedy) who were widely regarded as critics of *Roe*. These Justices, together with the original *Roe* dissenters, Justice White and (now) Chief Justice Rehnquist, represented five votes for cutting *Roe* back drastically or even overturning it. The Supreme Court's decision in *Roe* had helped set off a political chain reaction that now seemed to threaten the decision itself.

In 1989, in *Webster v. Reproductive Health Services*,<sup>43</sup> the Court upheld a series of statutory restrictions on abortion passed by the Missouri legislature, which, among other things, prohibited the use of public employees and facilities to perform or assist abortions and included a declaration that "[t]he life of each human being begins at conception." *Webster* had no majority opinion. Justice Scalia argued forthrightly that *Roe* should be overturned. Chief Justice Rehnquist's plurality opinion, joined by Justices White and Kennedy, argued that *Roe*'s trimester framework should be jettisoned, that abortion was not a fundamental right, and that restrictions on abortion need only pass a test of minimum rationality, the same test that applied to ordinary social and economic legislation.<sup>44</sup> However, Rehnquist was unable to persuade Justice O'Connor, the crucial fifth vote, to join his opinion. She concurred only in the result, arguing that Missouri's law was consistent with previous precedents and did not impose an undue burden on the right to abortion.

*Webster* left *Roe* in a legal limbo. The trimester framework no longer commanded a majority of the Court, but it was unclear what, if any, restrictions on abortion were now prohibited. *Roe*'s fate seemed even bleaker when two of the Court's most liberal Justices, William Brennan and Thurgood Marshall, left the Court due to failing health. Brennan resigned on July 20, 1990, and was replaced by David Souter, a bookish jurist from New Hampshire about whom little was known when he was nominated. President George H. W. Bush, attempting to avoid a replay of the Bork nomination, hoped that Souter would be able to avoid a politically difficult confirmation battle.<sup>45</sup> Thurgood Marshall, the great civil rights lawyer who had argued *Brown v. Board of Education*, announced his

retirement on June 27, 1991. To replace him, President Bush nominated Clarence Thomas, a conservative African American judge on the D.C. Circuit. Thomas was widely believed to be hostile to *Roe v. Wade* but stated at his confirmation hearings that he had never debated it and had no personal opinion on the subject.<sup>46</sup> The Thomas nomination was bitterly contested by senators who doubted Thomas's qualifications and his commitment to civil rights and civil liberties, including the right to abortion. Matters were thrown into an uproar when Thomas was accused of sexual harassment by a former employee at the Equal Employment Opportunity Commission (EEOC), Anita Hill. After weeks of controversy, Thomas was finally confirmed by a 52–48 vote, the narrowest margin in Supreme Court history.

Of the seven Justices who had voted with the majority, only Blackmun, the author of *Roe*, remained on the Court. Brennan, Marshall, Stewart, Douglas, Burger, and Powell were gone, replaced by Souter, Thomas, O'Connor, Stevens, Scalia, and Kennedy, all appointed by Republican presidents and all but Stevens appointed after the Republican Party became the pro-life party. Even if Stevens, whose views on abortion were variable, and Souter, whose views were completely unknown, supported *Roe*, the votes of the remaining Justices, in combination with Justice White and Chief Justice Rehnquist, were more than enough to gut *Roe* or (as most people then believed) to overturn it completely.

The expected vehicle for overturning *Roe* was a challenge to Pennsylvania's 1988 abortion regulation statute. Many of the statute's provisions were passed in fairly open defiance of the Supreme Court's 1986 decision in *Thornburgh v. American College of Obstetricians & Gynecologists*.<sup>47</sup> Among other things, the statute required that women seeking abortions undergo a twenty-four-hour waiting period and listen to a prepared speech detailing the nature of the procedure, the health risks of abortion, the possibility of alternatives to abortion, the likely gestational age of the fetus, and the fact that the father might be liable for child support. It also required that a married woman seeking an abortion sign a statement indicating that she had notified her husband.

On June 29, 1992, the Supreme Court delivered its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>48</sup> Departing from Supreme Court custom, Justices O'Connor, Kennedy, and Souter presented a jointly authored opinion. "Liberty finds no refuge in a jurisprudence of doubt," their opinion began.<sup>49</sup> They noted that the federal government had asked the Court to overrule *Roe* five times in the previous decade. The

see-saw of decisions expanding and contracting reproductive rights in the 1970s and 1980s had continually put the abortion right into question; the fight over abortion politics had only grown fiercer and more bitter with each passing year. It was time, O'Connor, Kennedy, and Souter said, for "the Court's interpretation of the Constitution [to] call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."<sup>50</sup>

The three Justices, all appointed by Republican presidents, understood that their appointments (and those of Justices Scalia and Thomas) would be widely viewed as responsible for overturning *Roe*. This, they believed, would reflect badly on the Supreme Court's authority and the independence of the federal judiciary from politics. Precisely because the fight over *Roe* had been so bitter, the decision could not be easily overruled: "[O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling [*Roe*] was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance," the three Justices explained. "[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."<sup>51</sup>

Although the joint opinion claimed to reaffirm *Roe*, in fact *Casey* significantly limited *Roe* and reformulated its doctrinal basis. In *Casey*, the Supreme Court abandoned the trimester framework. It also changed the permissible reasons for regulation. Essentially, *Casey* divided the pregnancy in two, with different rules before and after viability. Before viability, states could adopt measures designed to "to persuade the woman to choose childbirth over abortion" as long as they did not impose an "undue burden" on the woman's ability to obtain an abortion. Thus, *Casey* adopted the formulation first offered in O'Connor's dissent in *Akron*. The Court defined "undue burden" as a law whose "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Under that standard, the joint opinion upheld Pennsylvania's twenty-four-hour waiting period and prepared-speech requirements (thus effectively overruling the Court's 1986 decision in *Thornburgh*). But the joint opinion struck down the spousal consent requirement. It argued that the latter, but not the former two requirements, imposed an undue burden on women. *Casey* also held that states could pass laws designed to promote maternal health, as long as they did not impose an undue burden. After viability, states could "regulate, and

even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”<sup>52</sup>

One problem with drawing the line at viability is that it is arbitrary and subject to changes in medical technology. In *Casey*, the Court noted that by 1992, developments in neonatal care had pushed the average point of viability back from twenty-eight weeks in 1973 to twenty-three or twenty-four weeks.<sup>53</sup> Nevertheless, the Court retained the viability rule: “[T]here is no line other than viability which is more workable,” the Court argued. Moreover, “viability . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can, in reason and all fairness, be the object of state protection that now overrides the rights of the woman.” Finally, drawing the line at viability “has, as a practical matter, an element of fairness. In some broad sense, it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.”<sup>54</sup>

The Democrats retook the White House in 1992, and President Bill Clinton’s two Supreme Court appointments, Ruth Bader Ginsburg and Stephen Breyer, were widely believed to support the constitutional right to abortion. In 2000, when the Court struck down Nebraska’s ban on so-called partial-birth abortions in *Stenberg v. Cahart*,<sup>55</sup> Ginsburg and Breyer formed part of the five-Justice majority, while Justice Kennedy, one of the authors of the *Casey* joint opinion, joined the four dissenters. *Stenberg* demonstrated that, despite *Casey*, controversies about abortion were far from over; they had merely shifted to a new set of questions. Equally important, however, the opinions in *Stenberg* reaffirmed that the joint opinion in *Casey* was the law of the land. For the time being, at least, the Court had recommitted itself to the preservation of *Roe* and the basic right to abortion.

*Casey*’s call for “the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution” has proved to be little more than wishful thinking. The fight over abortion rights has not gone away. Rather, it continues to be implicated in political struggles over judicial appointments and in a wide range of public policy issues, including regulation of particular medical procedures like partial-birth abortion, abortifacients like RU486, emergency contraceptives and morning-after pills, new reproductive technologies such as human cloning, and the use of embryonic stem cells for medical treatment and scientific research. Although the precise subject matter of

contention has changed over the years, *Roe* and the right to abortion continue to be engines of controversy, much as they have in the past.

### *The Opinions in This Book*

In this book, eleven constitutional scholars have rewritten the opinions in *Roe v. Wade* and *Doe v. Bolton*. I asked the participants to prepare opinions addressing what they believed were the key issues in *Roe v. Wade* and its companion opinion, *Doe v. Bolton*, using only materials available as of January 22, 1973, when the decisions were first handed down. The resulting opinions took a variety of different approaches to answering the question of what *Roe v. Wade* should have said.

Several contributors offered what they believed to be the best arguments for grounding (or rejecting) the abortion right using constitutional materials available in 1973. Some tried to improve (or, in the case of the dissenters, demolish) Justice Blackmun's arguments that abortion was a constitutionally protected liberty. Others decided to ground the abortion right in the Equal Protection Clause, taking advantage of the fact that in 1973 the Court's sex-equality jurisprudence was still relatively unformed and could have been fashioned differently from the way it is today. None of the opinions adopted Justice Blackmun's original trimester framework.

Acting as Chief Justice of this mock Supreme Court, I have issued an opinion announcing the judgment of the Court, which strikes down the Texas and Georgia abortion statutes in *Roe* and *Doe*. It is joined by two other participants, Reva Siegel and Mark Tushnet. Their concurrences mean only that they agree with the basic contours of my opinion; their own opinions address what they consider to be the key issues in *Roe* and *Doe* in importantly different ways.

My opinion argues that abortion statutes violate both women's liberty and their equality. Restrictions on abortion compel women to become mothers, with all of the social expectations and duties that come with motherhood. Whether fairly or not, women in American society still bear most of the responsibility for child care. They are expected to make sacrifices for their children, and they feel most of the brunt of social condemnation if their children are not properly cared for. Moreover, because of the strong social expectations about the duties of motherhood, women suffer stigma and shame if they give their children up for adoption. Where a woman's life or health is not at risk, the right to abortion is the right to

have a reasonable time to decide whether to take on the responsibilities of motherhood. How long women should have to make that decision should be determined by legislatures in the first instance: “[L]egislatures must specify a period of time during pregnancy in which women may obtain medically safe abortions.” After this point, “legislatures may restrict or even completely prohibit abortions, . . . except where an abortion is necessary, in the judgment of medical professionals, to preserve the life or health of the mother.” The basic idea behind this formulation is that the right to abortion has two components: Women have a right to decide whether or not to become parents, so the state must afford them an appropriate period of time in which to make that decision. But women also have a right not to be forced by the state to sacrifice their life or health to bear children, and this right continues throughout the pregnancy. My opinion rejects the rigid trimester system in *Roe*. Instead, courts should let states try out different frameworks for abortion regulation. Over time, courts should then judge the validity of these laws based on whether they give women a reasonable time to decide and a “fair and realistic chance” to end their pregnancy.

Reva Siegel argues that the proper basis of the abortion right is women’s equality and that the Court’s heightened scrutiny for laws that impose sex discrimination should have begun with *Roe v. Wade*. Abortion is a constitutional right necessary to secure women’s equal citizenship. Siegel argues that exemptions in abortion statutes like those in *Roe* and *Doe* demonstrate, often in quite telling ways, that abortion restrictions are deeply tied to stereotypical views about the sexes and about the duties of women: “Whatever respect for unborn life abortion laws express,” Siegel notes, “state criminal laws have never valued unborn life in the way they value born life.” Instead, states “have used the criminal law to coerce and intimidate women into performing the work of motherhood.” “Abortion laws do not treat women as murderers, but as *mothers*—citizens who exist for the purpose of rearing children, citizens who are expected to perform the work of parenting as dependents and nonparticipants in the citizenship activities in which men are engaged.” Siegel bases her opinion on the equality arguments offered in amicus briefs submitted to the Supreme Court by various women’s groups. These briefs grounded the abortion right in what we would today call an antisubordination model of equality law. Siegel’s answer to what *Roe* should have said is to give voice to the lawyers who were part of the legal vanguard of the second wave of American feminism and whose arguments were largely ignored by the courts.

Mark Tushnet interprets the question of what *Roe* should have said differently from all the other participants; he asks what were the best arguments that could have been generated by someone who could plausibly have been a Justice on the Supreme Court in 1973. The men who decided *Roe* (there would not be a woman Justice for almost a decade) did not understand the connection between abortion rights and the Equal Protection Clause. In his view, Justice Douglas's concurrence in *Doe* (which was drafted in conversation with Justice Brennan) was the best that the Court probably could have done under the circumstances, and it forms the model for Tushnet's opinion.

Four other participants, Anita Allen, Robin West, Jed Rubenfeld, and Cass Sunstein, concur in the judgment. This means that although they agree that the Texas and Georgia statutes criminalizing abortion are unconstitutional, they do so for different reasons.

Anita Allen grounds her opinion on women's procreative liberty protected by the Due Process Clause of the Fourteenth Amendment. She argues that, because laws that compel women to abort their pregnancies would clearly be unconstitutional, so too should be laws that prevent abortion: "Like the right to prevent pregnancy, the right to terminate pregnancy is a fundamental right."

Jed Rubenfeld argues that the constitutional right to privacy is part of a more general prohibition against totalitarian policies that take over people's private lives and impose a specific occupation on them by force of law. Restrictions on abortion are unconstitutional because they conscript women against their will and force them "to carry out a specific, sustained, long-term, life-altering and life-occupying course of conduct."

Robin West argues that restrictions on abortion violate both women's liberty and their equality. However, she does not base her argument on either sex discrimination or the right of privacy. Rather, she argues that restrictions on abortion impose duties of good samaritanship on pregnant women that states impose on no other persons. Moreover, restrictions on abortion prevent pregnant women from using self-help to avoid the consequences of pregnancies imposed on them in cases of marital rape and coerced sex. Although West believes that the courts should protect a basic abortion right, courts cannot deal with the larger structural problems of sex inequality in the United States. "Mothering children, as we presently socially construct that work," West argues, "is incompatible with the basic rights and responsibilities of citizenship," and this "incompatibility has constitutional implications." But merely striking down abortion laws is "a

pathetically inadequate remedy.” Emphasizing Congress’s duty to interpret and enforce the Fourteenth Amendment independent of the courts, West argues that Congress is the body best able to pass legislation that protects women’s equality and secures their equal citizenship.

Yet another way of answering the question of what *Roe* should have said focuses not on the best doctrinal or theoretical justifications for *Roe* but on what was the best way for the Court to perform its institutional role. Cass Sunstein has advanced a theory of judicial minimalism; he argues that in courts should usually decide cases on narrow grounds and refrain from offering comprehensive and controversial justifications for their decisions.<sup>56</sup> By leaving things undecided and underspecifying the grounds for decision, courts can act as catalysts for democratic deliberation and avoid provoking an unnecessary political backlash. Without specifying the exact contours of the abortion right, Sunstein decides *Roe* and *Doe* on the ground that the abortion statutes were “overbroad,” that is, that they abridged too much constitutionally protected liberty.

Akhil Amar concurs in part and dissents in part in *Roe* and dissents in *Doe*. He argues that the Texas statute in *Roe* is unconstitutional because it was passed before women gained the right to vote. The Georgia abortion statute in *Doe*, passed in 1968, is another matter entirely, and Amar believes that the Court should have abstained from considering it, leaving the interpretation of the statute to the Georgia courts.

Jeffrey Rosen dissents from both *Roe* and *Doe*. Like Sunstein, Rosen focuses on the Court’s proper institutional role, but he argues that the question of abortion rights should be left to legislatures. He takes up many of the arguments made against *Roe* by John Hart Ely in a famous law review article in 1973.<sup>57</sup> In Rosen’s view, the Court should have stayed out of controversial questions like abortion because the right to privacy has no basis in the constitution’s text, structure, and history and because the Court’s previous precedents do not require extension of the right to privacy to abortion. Instead of holding that abortion was constitutionally protected, the Court should have allowed the political process to work out the issue of abortion rights. Rosen notes that abortion reform was just beginning in the early 1970s, and in his opinion, written from the standpoint of 1973, he predicts that the Court’s hasty and ill-considered intervention will only cause severe political problems both for the protection of abortion rights and for progressive causes generally in the years to come.

Objections to *Roe* generally fall into two categories, procedural and moral. Procedural objections argue that the question of abortion rights

should have been left to the political process. Moral objections argue that the right to abortion is a substantive wrong that should not be elevated to a constitutional right. Rosen's objections to *Roe* are largely procedural. Teresa Stanton Collett and Michael Stokes Paulsen offer the moral case against *Roe*. *Roe*, Collett argues, is the product of a misguided radical individualism that undermines women's liberty and equality. Making abortion freely available will allow men to escape responsibility for sex and parenthood, while "artificial birth control and abortion . . . treat women's bodies as unnatural: something to be altered to conform to the male model." "I refuse to accept," Collett declares, "that women must deny their fertility and slay their children in order to obtain equal access to the marketplace and the public square."

Michael Stokes Paulsen also offers a forthrightly pro-life opinion, arguing that abortion is deeply immoral and that the Court has severely damaged its authority by recognizing it as a fundamental right. "Abortion," he insists, "does not destroy potential life. Abortion kills a living human being." Paulsen writes in a prophetic voice, denouncing the evils of abortion and condemning the Court for having been complicit in the destruction of so many innocent human lives. Paulsen calls on the conscience of Americans to abandon what he regards as the Court's most lawless and immoral opinion, or, as he describes it, "the most awful human atrocity inflicted by the Court in our Nation's history."

### *Conclusion: Could the Court Have Done Better?*

It is hardly surprising that critics of a constitutional right to abortion would find much to criticize in Blackmun's original opinions in *Roe* and *Doe*. But supporters of the abortion right over the years have also found them wanting. Part of the problem stems from Justice Blackmun's altogether too cursory attempts to justify and defend the abortion right, the compromises between the Justices that led to the trimester system, and the Justices' inability to imagine abortion as a question of sex equality as well as a question of liberty.<sup>58</sup> To be sure, Blackmun's opinion in *Roe* does advance from a purely medical model of abortion, which had dominated the conversation for decades. But that conversation was already changing rapidly by 1973, moving in a short space of time from the rights of doctors to the procreative liberty of women to the larger question of women's

equal citizenship. The Justices were simply not able to traverse two revolutions in thought in a single opinion.

Moreover, the question of abortion rights is legally difficult and morally complex, bringing together issues of life and death, humanity, equality, and liberty. The problems the Justices faced in *Roe* were as trying in their own way as any set of questions that come before the courts. Given the legal and moral difficulty of the issues and the inevitable need to make compromises, it was perhaps too much to expect that the Court would get it right the first time, under almost anyone's standards of what "getting it right" might mean. That suggests that Justice Brennan's initial instincts were probably correct and that the Court should have been more reluctant to offer hard and fast rules in *Roe* and *Doe*. It might have developed its ideas more fully over a course of decisions, perhaps in tandem with its sex-equality jurisprudence. That would probably not have prevented the emergence of a powerful pro-life movement or made abortion uncontroversial. But it might have produced a fairer, more flexible, and more democratically acceptable set of legal doctrines.

Finally, although the Justices clearly understood that abortion was a controversial question, they failed to recognize sufficiently, as they had in *Brown v. Board of Education*, that whatever they did would cause a significant upheaval in American politics. In hindsight, they probably should have written the opinions in *Roe* and *Doe* with a much greater degree of care about winning public support and assuaging criticism. Chief Justice Warren's decision in *Brown* is a model of eloquence and understatement, brief and statesmanlike, fully aware of its political context and deliberately designed to avoid confrontation and to conserve the Court's legitimacy. Blackmun's opinions in *Roe* and *Doe*, by contrast, although filled with scholarship and medical history, are long-winded and devote a very significant amount of space to technical legal issues. Warren's opinion in *Brown* was written so that it could be republished in newspapers.<sup>59</sup> Blackmun's opinion in *Roe* was so complicated that Blackmun himself at one point contemplated writing an addendum explaining its meaning.<sup>60</sup>

Perhaps *Roe*'s most important shortcoming was not its failure to "get it right" but its relative inattention to the interactions between courts and politics and to how courts, whether they like it or not, always work in conversation with the political branches in developing constitutional norms. Defenders of constitutional rights often argue that courts exist to protect rights from political interference. But the actual process of constitutional

development is much more complicated. Courts do recognize rights and defend them from legislative abridgement. But those rights also arise out of politics; they are tested by politics, and they are modified by courts as a result of politics. The work of courts, important as it may be, is always an intermediate and intermediary feature of a much longer process of legal development that stretches back into the past and forward into the future. Despite the attention that has been paid to *Roe*, the constitutional right to abortion, as it exists today, is not solely the work of the federal judiciary. Like all important constitutional ideas, it is the work of a dialectical process that engages all of the major institutions of American lawmaking, and it has been fashioned through controversy and strife, through trial and error—and with many mistakes and hesitations along the way—out of the raw materials of American politics.

## NOTES

1. 347 U.S. 483 (1954).
2. 410 U.S. 113 (1973).
3. ABC News–*Washington Post* poll, “Public Support for Abortion Depends on Why It’s Done,” January 21, 2003, available at <http://abcnews.go.com/images/pdf/909a2Abortion.pdf>.
4. CNN/*Time* poll conducted by Harris Interactive, July 17–18, 2001, available at <http://www.pollingreport.com/Court.htm>. According to the poll, 57 percent of respondents opposed and 33 percent favored “the appointment of Supreme Court justices who would overturn *Roe versus Wade*, the Supreme Court decision legalizing abortion.” In the ABC News–*Washington Post* poll described earlier, 54 percent supported the *Roe v. Wade* decision when it was characterized as giving women the ability to get abortions if they want one at any time during the first trimester.
5. Compared to the national average, women with incomes under \$15,000 were twice as likely as women with incomes above that level to seek abortion, but least likely to be able to afford them. See Stanley K. Henshaw and Katheryn Host, “Abortion Patients in 1994–95: Characteristics and Contraceptive Use,” *Family Planning Perspectives* 28:4 (July-Aug. 1996): 140–47, 158 (available at <http://www.agi-usa.org/pubs/journals/2814096.pdf>).
6. These figures are taken from the Alan Guttmacher Institute, “Facts in Brief: Induced Abortion,” available at [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html); Abortion Access Project, “Fact Sheet: The Shortage of Abortion Providers,” available at [http://abortionaccess.org/AAP/publica\\_resources/fact\\_sheets/shortage\\_provider.htm](http://abortionaccess.org/AAP/publica_resources/fact_sheets/shortage_provider.htm); Lawrence B. Finer and Stanley K. Henshaw, “Abor-

tion Incidence and Services in the United States, 2000,” *Family Planning Perspectives* 35:1 (Jan.-Feb. 2003): 6–15 (available at <http://www.agi-usa.org/pubs/journals/3500603.pdf>); Lawrence B. Finer and Stanley K. Henshaw, “The Accessibility of Abortion Services in the United States,” *Family Planning Perspectives* 35:1 (Jan.-Feb. 2003): 16–24 (available at <http://www.agi-usa.org/pubs/journals/3501603.pdf>). See also Marlene Fried, “Abortion in the United States,” *Health and Human Rights* 4 (2000): 174–94; Stanley K. Henshaw, “Factors Hindering Access to Abortion Services,” *Family Planning Perspectives* 27:2 (Mar.-Apr. 1995): 54–59 (available at <http://www.agi-usa.org/pubs/journals/2705495.pdf>).

7. 505 U.S. 833 (1992).

8. Alan Guttmacher Institute, “State Policies in Brief,” at <http://www.guttmacher.org/pubs/spib.html>. See also NARAL Pro-Choice America, *Who Decides? A State-by-State Review of Abortion and Reproductive Rights* (12th ed. 2003). In addition, thirty-one states and the federal government have passed laws that ban so-called partial-birth abortions; the constitutionality of these laws is uncertain. Eighteen states have statutes that restrict postviability abortions in ways that appear to go beyond what is permitted by existing Supreme Court precedents, although the statutes have not been challenged. However, these last two sets of limitations on late-term abortions affect only a very small number of women.

9. Rachel K. Jones, Jacqueline E. Darroch, and Stanley K. Henshaw, “Contraceptive Use among U.S. Women Having Abortions in 2000–2001,” *Perspectives on Sexual and Reproductive Health* 34:6 (2002): 294–303 (available at <http://www.agi-usa.org/pubs/journals/3429402.pdf>).

10. The Alan Guttmacher Institute, “Facts in Brief: Induced Abortion,” available at [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html).

11. ABC News–*Washington Post* poll, “Public Support for Abortion Depends on Why It’s Done,” January 21, 2003, available at <http://abcnews.go.com/images/pdf/909a2Abortion.pdf>.

12. *Id.* In addition, the overwhelming majority of available facilities provide only for early abortions: 97 percent of abortion facilities provide abortion at eight weeks, and 86 percent provide services at twelve weeks, but only 13 percent of providers offer services for abortions at twenty-four weeks.

13. The statistics for late-term abortions provided by the Guttmacher Institute and the Centers for Disease Control are compared and discussed in Janet E. Gans Epner, Ph.D., Harry S. Jonas, M.D., and Daniel L. Seckinger, M.D., “Late-Term Abortion,” *Journal of the American Medical Association* 280 (Aug. 26, 1998): 724–29 (available at <http://eileen.250x.com/Main/PBAinfo/jsc80006.htm>).

14. See Mark Graber, *Rethinking Abortion: Equal Choice, The Constitution, and Reproductive Politics* 41–64 (Princeton: Princeton Univ. Press 1996).

15. David J. Garrow, *Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade* 539 (New York: Macmillan 1994).

16. *Id.*

17. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* 184 (Chicago: University of Chicago Press 1991).
18. 198 U.S. 45 (1905).
19. 381 U.S. 479 (1965).
20. *Id.* at 484.
21. See Justice Stewart's remarks in *Roe*, 410 U.S. at 170 (Stewart, J., concurring).
22. 405 U.S. 438 (1971).
23. *Id.* at 453 (emphasis in original).
24. *Roe v. Wade*, 410 U.S. at 153.
25. *Id.* at 158.
26. *Id.* at 133, 138–39, 161.
27. *Id.* at 160.
28. *Id.*
29. *Id.* at 164–65.
30. David J. Garrow, *Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade* 580–81 (New York: Macmillan 1994).
31. *Id.* at 582–84.
32. *Id.* at 584.
33. *Id.* at 585.
34. 410 U.S. at 173–74 (Rehnquist, J., dissenting).
35. *Id.* at 222 (White, J., dissenting).
36. 539 U.S. 558 (2003).
37. Ruth Bader Ginsburg, "Speaking in a Judicial Voice," 67 *N.Y.U.L. Rev.* 1185, 1208 (1992).
38. See Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 *N.C. L. Rev.* 375, 381–82 (1985) ("Roe ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures. In place of the trend 'toward liberalization of abortion statutes' noted in *Roe*, legislatures adopted measures aimed at minimizing the impact of the 1973 rulings, including notification and consent requirements, prescriptions for the protection of fetal life, and bans on public expenditures for poor women's abortions.").
39. Republican Party platform, available at [http://andrsn.stanford.edu/Abortion/Platform\\_Planks.html](http://andrsn.stanford.edu/Abortion/Platform_Planks.html). See also Barbara Hinkson Craig and David M. O'Brien, *Abortion and American Politics* 166–68 (Chatham, N.J.: Chatham House 1993) (reprinting Republican and Democratic Party platform planks on abortion from 1980 through 1992).
40. Republican Party platform, available at [http://andrsn.stanford.edu/Abortion/Platform\\_Planks.html](http://andrsn.stanford.edu/Abortion/Platform_Planks.html). See also Craig and O'Brien at 166–68.
41. 462 U.S. 416 (1983).

42. For a history, see Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: W. W. Norton, 1989).
43. 492 U.S. 490 (1989).
44. *Id.* at 520.
45. On the politics behind Souter's nomination, see David Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* 191–92 (Chicago: University of Chicago Press 1999); David J. Garrow, "Justice Souter Emerges," *New York Times*, September 25, 1994, Sec. 6, p. 1.
46. See "Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, United States Senate," 102d Cong., 1st Sess. pt. 1, 222–23 (1991).
47. 476 U.S. 747 (1986).
48. 505 U.S. 833 (1992).
49. *Id.* at 844.
50. *Id.* at 867.
51. *Id.*
52. *Id.* at 878–79.
53. *Id.* at 859.
54. *Id.* at 870.
55. 530 U.S. 914 (2000).
56. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard Univ. Press 1999).
57. John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale L.J.* 920 (1973).
58. See, e.g., The Justice Harry A. Blackmun Oral History Project 202 (1995), in which Justice Blackmun argues that *Roe* could not have been decided on equal protection grounds in 1972 and 1973.
59. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 898 (New York: Alfred A. Knopf 1975).
60. Garrow, *Liberty & Sexuality* at 587.