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FORGOTTEN SUPREME COURT ABORTION CASES: DRS. HAWKER & HURWITZ IN THE DOCK & DEFROCKED

Roy Lucas*

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A. INTRODUCTION

In the late 1800's and early 1900's the United States Supreme Court twice upheld the validity and enforcement of state laws denying medical licensure to physicians who had performed abortions that were then

considered unlawful and criminal. The cases were *Hawker v. New York*¹ in 1898 and *Missouri ex rel. Hurwitz v. North*² in 1926. These decisions were indisputably relevant, but were never cited during the litigation that culminated with the abortion cases of 1973.³

It appears that counsel opposing the constitutional decriminalization of abortion⁴ and the dissenting Justices White⁵ and Rehnquist⁶ all overlooked *Hawker* and *Hurwitz*.⁷ The full records, briefs, and arguments of these two early cases are in the Library of Congress, Madison Building, and National Archives in Washington, D.C. and in other major law libraries.⁸

B. DR. HAWKER IN NEW YORK

Allegedly a doctor,⁹ Benjamin Hawker was tried and convicted of felony abortion on March 6, 1878, a decade after the ratification of the Fourteenth Amendment.¹⁰ There was no suggestion in the court's opinion

* The author wrote the first article on abortion and the constitutional right to privacy while he was a law student at New York University School of Law in 1966-67. Subsequently, he published that work as *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730 (1968). At New York University School of Law he was on the Law Review, Order of the Coif, a Root-Tilden Scholar, and a Rotary Foundation Fellow in the United Kingdom from 1965-66. He wrote two briefs in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), and argued *Baird v. Bellotti (I)*, 428 U.S. 132 (1976), and two other cases in the United States Supreme Court. His multidisciplinary careers are described in WHO'S WHO IN AMERICA (MILLENNIUM ED. 2000). He is the author of *The Genesis of Roe v. Wade and Doe v. Bolton: an Inside Story (in progress)*, from which this piece is adapted.

1. *Hawker v. New York*, 170 U.S. 189 (1898).
2. *Hurwitz v. North*, 271 U.S. 40 (1926).
3. The cases best known to the public are *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973).
4. The attorney general of Texas, joined by numerous amici, defended the Texas abortion statute in *Roe v. Wade*. *Roe*, 410 U.S. at 116.
5. See *Doe*, 410 U.S. at 221-22 (White, J., dissenting).
6. See *Roe*, 410 U.S. at 174-77 (Rehnquist, J., dissenting).
7. In their *Roe* and *Doe* dissenting opinions, Justices White and Rehnquist might have noted: (i) the Justices in the *Hawker* and *Hurwitz* decisions took for granted the constitutional validity of the criminal abortion laws at the turn of the 19th century and during the first quarter of the 20th century; (ii) in 1898 and 1926 the participation of a physician in abortions was a felony, indicative of criminal character, and permanently disqualified the physician from the practice of medicine; and (iii) *Hawker* and *North* were fifty years closer to the original passage and the Fourteenth Amendment.
8. To the author's knowledge, only one participating counsel, the author, asserting the constitutional right to abortion, even knew of *Hawker* and *Hurwitz*. Counsel did not raise these precedents for two reasons: (i) the briefs were already lengthy; and (ii) *Hawker* and *Hurwitz* only indirectly endorsed the validity of abortion laws and were marginally relevant.
9. It appears that Dr. Hawker was not actually a licensed or accredited physician. See *People v. Hawker*, 152 N.Y. 234, 241 (1897). These were early years in the organization and regulation of the health care professions. Lister had published his views on aseptic techniques only a decade earlier. See Sir Joseph Lister, *On a New Method of Treating Compound Fractures*, THE LANCET, p. 1, Mar 16, 1867.
10. Congress ratified the Fourteenth Amendment on July 21, 1868, and Dr. Hawker was convicted of felony abortion ten years later in 1878.

that the abortion was necessary to save the woman's life.¹¹ His punishment was a prison term of ten years. The charges did not allege any malpractice or injury to the woman. In 1893, New York enacted a new Public Health Law c. 661, as amended by the laws of 1895 c. 398, §153, making it a crime to practice medicine "after conviction of a felony" whether or not the felon had reestablished his good character.¹² In April 1896, a grand jury indicted Hawker for practicing medicine in violation of §153, based upon his 1878 felony abortion conviction.¹³ Hawker was tried, convicted, and sentenced to pay a fine.¹⁴ The New York courts upheld the conviction,¹⁵ and Hawker appealed to the United States Supreme Court in 1898.

In the Supreme Court Dr. Hawker challenged his conviction for the illegal practice of medicine as being based upon an *ex post facto* law in violation of Article I, §10 of the United States Constitution, which flatly prohibits *ex post facto* laws.¹⁶ Dr. Hawker argued that he had fully served his punishment, even before the 1893 law was passed and that the new law imposed an additional punishment after the fact.¹⁷ By a vote of six to three, the Supreme Court disagreed with Benjamin Hawker.¹⁸ The Court held that a prior felony abortion conviction could be used as *conclusive* evidence of bad character.¹⁹ Justices Harlan, Peckham, and McKenna dissented.²⁰ They stated that the law was invalid because there was no hearing or actual proof of bad character at the time the new law was enforced.²¹

Nothing in the *Hawker* opinion questioned the wisdom or validity of the underlying New York abortion law.²² Not a word was uttered about a constitutional right of privacy, access to health care, or vagueness.²³ Yet the earliest "privacy" cases cited by Justice Blackmun in the *Roe v. Wade*

11. *Hawker*, 152 N.Y. at 238.

12. *Id.* at 238-39.

13. *Id.* at 238. There is no evidence in the opinions that any witnesses were offered as to the good character of Dr. Hawker. *See id.*

14. *Id.*

15. *Id.* at 243. The intermediate appellate court ruled for Dr. Hawker, but the New York Court of Appeals reversed. *Id.* The appellate division noted that there was a total absence of proof of *current* bad character, and would have only allowed the statute to be applied prospectively. *People v. Hawker*, 43 N.Y.S. 516, 523 (App. Div. 1897).

16. *Hawker v. New York*, 170 U.S. 189, 190-91 (1898). *See also* U.S. CONST. article I, § 10.

17. *Hawker*, 170 U.S. at 191.

18. *Id.* at 200, 205.

19. *Id.* at 196.

20. *Id.* at 205.

21. *Id.* at 204.

22. *Id.* at 190-205.

23. *See id.*

opinion were decisions from the same era: *Boyd v. United States* and *Union Pacific Railway Co. v. Botsford*.²⁴

It seems that it was clear to most jurists from the 1870's through the 1890's, that performing abortions was felonious behavior and not a constitutional privacy right protected by the Fourteenth Amendment. At that time, the Court would surely have rejected a contention that abortion was a constitutionally protected right.

C. DR. HURWITZ IN MISSOURI

In 1926, in *Missouri ex rel. Hurwitz v. North*, the United States Supreme Court faced another major case involving a physician and criminal abortion practice.²⁵ This case involved a medical license suspension.²⁶ Dr. Leon Hurwitz was accused of having performed an unlawful abortion upon a woman named Almeda Stewart.²⁷ While criminal charges were pending, the State Board of Health moved to suspend his license to practice medicine for fifteen years.²⁸

Board procedures allowed a physician to develop evidence by sworn depositions that could later be offered at a suspension hearing.²⁹ However, the board process did not allow the doctor to subpoena witnesses; rather a witness's appearance was voluntary.³⁰ Dr. Hurwitz challenged the procedure and process, arguing that it deprived him of due process and equal protection under the Fourteenth Amendment.³¹ Witnesses appeared at the hearing. One witness was a physician from St. John's Hospital in Missouri, who observed the patient afterwards and reported the case to the prosecutor.³² A police detective also testified.³³ He had stationed himself in a room adjacent to Ms. Stewart's and had overheard incriminating statements by Dr. Hurwitz.³⁴

24. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Boyd v. United States*, 116 U.S. 616 (1886); *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891)).

25. 271 U.S. 40 (1926).

26. *Id.* at 40.

27. *State ex rel. Hurwitz v. North*, 264 S.W. 678, 678 (Mo. 1924).

28. *Id.* at 679.

29. *Hurwitz*, 271 U.S. at 41.

30. A likely theory behind this common practice with medical boards is that physician-witnesses are usually too busy seeing patients and should be exempt from appearing physically at hearings and being cross-examined.

31. *Id.* at 41-42.

32. Transcript of Record at 18, *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40 (1926) (No. 209).

33. *Id.*

34. *Id.* at 19. Dr. Hurwitz allegedly said to her:

I told you any time you got to itching and you let these boys scratch it, what would be the result, and you got that way and have no body to blame but yourself, and you came to me yesterday and asked me to get rid of it for you, and I am doing my best, and I have come

Dr. Hurwitz' defense was that another doctor had prescribed medicine to cause the abortion, and that the principal witness to that effect had moved to California.³⁵

In an opinion by Justice Harlan Fiske Stone, a unanimous Supreme Court upheld the Missouri procedures and the lengthy suspension of Dr. Hurwitz's license to practice medicine.³⁶ The Court found that it was reasonable to allow testimony by deposition only, or, in the case of unwilling witnesses, not at all.³⁷ This was before the era of videotaped depositions, and it was well before any heightened sensitivity toward the nuances of procedural due process fairness.³⁸

Modern cases are more realistic about the inherent inadequacies of purely written testimony.³⁹ *Goldberg v. Kelly*,⁴⁰ for example, stresses the pragmatic need for confronting adverse witnesses and notes that, "particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision."⁴¹ This is very true in a complex medical license suspension case, such as *Hurwitz*, where a physician can be deprived of the right to practice for a number of years, or permanently. Live cross-examination of accusers is the hallmark of modern justice in contested cases.

In the 1926 *Hurwitz* case, it seems that no one seriously contested the validity of the underlying criminal abortion statute.⁴² The statute was not considered a violation of an unenumerated constitutional right to privacy or access to health care; the criminality of performing an abortion was not

back to finish my job

Id. at 19(emphasis added).

35. *See id.* at 10.

36. *Hurwitz*, 271 U.S. at 42-43.

37. *Id.*

38. *See, e.g., Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (holding that a Wisconsin statute authorizing the posting of notices in liquor outlets which prohibited distribution of liquor to individuals whose excessive drinking produced exhibited specified traits, such as exposing themselves or their families to want or becoming dangerous to the peace of the community, in the absence of a provision for notice or a hearing prior to such posting, was an unconstitutional denial of procedural due process).

39. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that procedural due process requires holding a pre-termination evidentiary hearing when public assistance payments to a welfare recipient are discontinued, and that procedures followed by the city of New York in terminating public assistance payments to welfare recipients were constitutionally inadequate in failing to grant recipients any notice or an opportunity to be heard).

40. 397 U.S. 254 (1970).

41. *Id.* at 269.

42. *See Hurwitz*, 271 U.S. at 40-43.

questioned.⁴³

The New York and Missouri abortion statutes were essentially the same as the Texas statute involved in *Roe v. Wade*.⁴⁴ When *Roe* was decided, similar statutes were in effect in the majority of other States.

D. THE SUBSEQUENT COURSE OF THE *HAWKER* AND *HURWITZ* CASE LAW

The Supreme Court and lower courts have continued to cite both *Hawker* and *Hurwitz* as authority for one or more points of law. Shepard's shows some 300 cites under *Hawker* and over 200 under *Hurwitz*. These were not one-time decisions. A typical illustration is *Semler v. Oregon State Board of Dental Examiners*:

"The state was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each. We find no basis for the charge of an unconstitutional discrimination. . . ."⁴⁵

E. *HAWKER* AND *HURWITZ*: RELEVANT TO *ROE* & *DOE*

At a minimum, *Hawker* and *Hurwitz* show the Supreme Court upholding significant punishments of physicians for performing abortions in 1898 and 1926, without doubting the validity of the underlying abortion statutes.⁴⁶ Neither case suggested that abortion laws implicate privacy interests or unduly burden any rights of physicians and patients.⁴⁷ There is no evidence in the record that counsel for the physicians explicitly raised such arguments, and the likely reason for such silence speaks volumes. The Supreme Court, from 1868 to at least 1926, surely must have considered restrictions on abortion to be a valid moral and societal concern. Even a total ban on the distribution of contraceptives was unanimously upheld as late as 1938.⁴⁸ That is the next segment of the story.

43. *See id.*

44. *See Roe v. Wade*, 410 U.S. 113 (1973); *Hurwitz*, 271 U.S. at 40; *Hawker v. New York*, 170 U.S. 189 (1898).

45. 294 U.S. 608, 610-11 (1935) (citing *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 43 (1926)).

46. *See Hurwitz*, 271 U.S. at 40; *Hawker*, 170 U.S. at 189.

47. *See id.*

48. *Commonwealth v. Gardner*, 15 N.E.2d 222, 224 (Mass. Sup. Jud. Ct. 1938).

F. RELEVANCE OF THE EARLY CONTRACEPTION CASES

The Supreme Court contraception and abortion cases stand or fall almost hand-in-hand.⁴⁹ If access to abortion is a constitutional right, it follows as night upon day that contraceptive access is constitutionally protected as well.⁵⁰ Similarly, if states may ban aspects of contraceptives, then it also follows that abortion may be limited.⁵¹ Abortion is always the harder case because of additional asserted state interests in the fetus.⁵²

In 1938, the Massachusetts Supreme Judicial Court chronicled the early legislative and judicial activity on the related subject of birth control with its opinion in *Commonwealth v. Gardner*.⁵³ The Connecticut Supreme Court of Errors examined its similar legislative and case law activity in *State v. Nelson*.⁵⁴

The initial Massachusetts trek to the United States Supreme Court began with the 1938 appeal of *Commonwealth v. Gardner*.⁵⁵ This case involved the prosecution of a physician who ran a birth control clinic in Salem, Massachusetts.⁵⁶ The clinic provided contraceptives only to married women.⁵⁷ The Commonwealth high court in *Gardner* unanimously upheld the convictions.⁵⁸ The court rejected any interpretation of the statute that would exempt physicians prescribing contraception for the health and well being of married patients.⁵⁹ The court declined to hold that there were any exceptions.⁶⁰ The Massachusetts high court stated that the legislative purpose of the law was to prevent "sexual immorality."⁶¹ Dr. Gardner appealed to the United States Supreme Court.⁶² The Commonwealth did not

49. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (explaining that both contraception and abortion rights are protected by the due process clause); *Roe*, 410 U.S. at 152 (providing that the right of privacy protects both contraception and abortion).

50. *See Roe*, 410 U.S. at 152.

51. *Id.*

52. *See id.* at 150.

53. *Gardner*, 15 N.E.2d at 222.

54. *State v. Nelson*, 11 A.2d 856, 858-59 (Conn. 1940); *Sturgis v. Attorney General*, 260 N.E.2d 687 (Mass. Sup. Jud. Ct. 1970). This reconfirmed the Massachusetts Court's rejection of challenges to anti-conception laws as late as 1970.

55. *Gardner*, 15 N.E.2d at 222. Massachusetts law prohibited the selling, lending, or giving away any "drug, medicine, instrument or article" to prevent contraception. *Id.*

56. *Id.* at 223.

57. *Id.*

58. *Id.* at 224.

59. *Id.*

60. *Id.*

61. *Id.* at 223.

62. *Gardner v. Massachusetts*, 305 U.S. 559 (1938) (per curiam).

make an appearance in the case, probably due to the fact that the law was so well settled in its official view.⁶³ The actual federal constitutional questions stated were unclear.⁶⁴ No precise federal question was identified and no “substantial” federal question was raised.⁶⁵ This offer of proof was the totality of the constitutional claim: “It is sound and generally accepted medical practice to prescribe contraceptives to protect life or health. Such practice has the backing of the American Medical Association.”⁶⁶

Dr. Gardner relied on the “due process clause of the Fourteenth Amendment” but made no mention of the equal protection clause, which had seen little use in non-race cases at the time.⁶⁷ Dr. Gardner did not explain how the American Medical Association and “accepted medical practice” related to the Fourteenth Amendment.⁶⁸

Without even requesting a response, the Court summarily and unanimously rejected Gardner’s appeal on October 10, 1938.⁶⁹ An unsigned *per curiam* opinion dismissed Gardner’s appeal “for the want of a substantial federal question.”⁷⁰ In support of this decision, the Court cited several cases.⁷¹ There was nothing technical about the dismissal. It was on the merits, and arguably the worst possible outcome.

Gardner thus became a published opinion by the United States Supreme Court on the merits, validating Massachusetts’ complete ban on contraceptives.⁷² The decision rejected claims that physicians should be permitted to prescribe contraceptives to patients in order to save their lives or for their health and well-being.⁷³ *Gardner* was, perhaps, worse than a unanimous multi-page decision on the merits because it was so short and dismissive.

When *Gardner* was decided, the Court consisted of Chief Justice Charles Evan Hughes, and Justices McReynolds, Brandeis, Butler, Harlan

63. *Id.* at 559.

64. See Appellant’s Statement as to Jurisdiction, *Gardner v. Massachusetts*, 305 U.S. 559 (1938) (No. 264) (on file with author).

65. *Id.* at 10; *Gardner*, 305 U.S. at 559 (dismissing the appeal for lack of a substantial federal question).

66. See Appellant’s Statement as to Jurisdiction, *Gardner v. Massachusetts*, 305 U.S. 559 (1938) (No. 264) (on file with author).

67. *Id.* at 11.

68. See *id.* The Constitution is plainly not synonymous with developing standards of accepted medical practices.

69. *Gardner*, 305 U.S. at 559.

70. *Id.*

71. *Powell v. Pennsylvania*, 127 U.S. 678, 685 (1888) (Field, J., dissenting); *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905) (Brewer, J., dissenting); *Graves v. Minnesota*, 272 U.S. 425, 428 (1926); *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) (Sutherland, J., dissenting).

72. See *Gardner*, 305 U.S. at 559.

73. See *Commonwealth v. Gardner*, 15 N.E.2d 222 (Mass. Sup. Jud. Ct. 1938).

Fiske Stone, Roberts, Hugo Black, and Reed. None voiced a dissent.⁷⁴ Given the rejection of contraception rights in *Gardner*, the Court in 1938, would afford no constitutional protection to abortion rights, which were even more taboo.

Gardner cited four cases dating from 1888 to 1926.⁷⁵ Of these cases, *Powell v. Pennsylvania*, upheld by a vote of eight to one, was a precedent fifty years out of date. *Jacobson v. Massachusetts*, approved by a vote of seven to two, a law requiring smallpox vaccination. The Court's rationale for approving the laws was the existence of a compelling public health interest.⁷⁶ *Lambert v. Yellowley*, upheld by a vote of five to four, the 1926 Prohibition Act rule that a physician could prescribe only one pint of liquor every ten days for medicinal purposes.⁷⁷

The Court in *Gardner* opined that a state's power to promote health and morals allowed it to ban all sales and prescriptions of contraceptives, even by physicians for the most urgent life and health reasons.⁷⁸ The same was true of abortion.⁷⁹ Thus in 1938, a unanimous Court permitted both birth control and abortion laws, in the form enacted in the latter half of the 19th century, shortly after ratification of the Fourteenth Amendment.

G. THE EARLY ABORTION-ADVERTISING-INSURANCE CASES

A second line of relevant cases not mentioned in the *Roe* and *Doe* opinions dealt with abortion circulars in the mails, and insurance benefits for women who had died from botched procedures after violating the early abortion laws. The question raised in the insurance cases was whether life insurance policies were enforceable when a woman's death was caused by an illegal act such as abortion, or whether payment under those circumstances was contrary to public policy.⁸⁰ It would seem that if abortion had some constitutionally protected status, the insurance companies could not deny coverage.

74. See *Gardner*, 305 U.S. at 559.

75. *Id.*

76. *Jacobson*, 197 U.S. at 39.

77. *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926).

78. See *Gardner v. Massachusetts*, 305 U.S. 559 (1938) (per curium); *Commonwealth v. Gardner*, 15 N.E.2d 222, 223 (Mass. 1938).

79. Furthermore, the Court may not have wanted to entangle itself in the new subject area of birth control, or the personal views of the Justices may have reflected a discomfort with what it considered increasing promiscuity in the Nation.

80. *Ritter v. Mutual Life Ins. Co.*, 169 U.S. 139, 157 (1898).

Four additional Supreme Court decisions between 1877 and 1902 addressed these policies of American law toward abortion.⁸¹ The first, only nine years after ratification of the Fourteenth Amendment, was the 1877 case of *Ex Parte Jackson*.⁸²

Jackson upheld a law excluding from the mail any circulars or letters concerning “lotteries,” which were then widely considered “to have a demoralizing influence upon the people.”⁸³ The Court’s unanimous decision relied upon the example of “the act of March 3, 1873, in which Congress declared “that no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion . . .” could be carried in the mails.⁸⁴ Such publications were unanimously considered “corrupting.”⁸⁵ Neither the First Amendment nor any unenumerated “privacy” right protected their circulation.⁸⁶

The names of the sitting Justices in the fall of 1877 are all but lost in constitutional history: Chief Justice Waite, Justices Strong, Swayne, Clifford, Hunt, Miller, Bradley, Field, and the first John Marshall Harlan in his initial year on the Court.⁸⁷ None denied that lotteries and abortion were “corrupting” factors in American life.⁸⁸ None suggested that birth control or abortion had any constitutional protection.⁸⁹

A suicide-insurance case from 1898, *Ritter v. Mutual Life Insurance Co.*, was the next case to mention abortion.⁹⁰ *Ritter* was only one year prior to *Hawker*.⁹¹ A unanimous Court in *Ritter* held that life insurance policy benefits need not be paid to the beneficiaries of a person who committed suicide.⁹² The Court relied upon the reasoning of an early Massachusetts insurance-abortion case:

In *Hatch*,⁹³ it appears that a policy of insurance on the life of a married woman provided that ‘if the said person whose life is

81. *Burt v. Union Central Life Ins. Co.*, 187 U.S. 362 (1902); *Ritter*, 169 U.S. 139; *Hawker*, 170 U.S. 189 (Harlan, J., dissenting); *Ex parte Jackson*, 96 U.S. 727 (1877).

82. *Jackson*, 96 U.S. at 727.

83. *Id.* at 736.

84. *Id.*

85. *Id.*

86. *See Ritter*, 169 U.S. at 173-74.

87. *See* 96 U.S. Coverage (1878).

88. *See Jackson*, 96 U.S. at 736.

89. *See id.*

90. *Ritter*, 169 U.S. at 139. A train wreck case from 1893 did concern abortions, but not of pregnant persons. Cows bearing calves were injured in large numbers in the un-memorable diversity case of *New York, Lake Erie & W.R.R. Co. v. Estill*, 147 U.S. 591 (1893).

91. *See Hawker v. New York*, 170 U.S. 189 (1898).

92. *Ritter*, 169 U.S. at 159-60.

93. *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550, 552 (1876).

hereby insured shall die by her own act or hand, whether sane or insane, the policy should be null and void.’ It was in proof that the assured died by reason of a miscarriage produced by an illegal operation performed upon and voluntarily submitted to by her with intent to cause an abortion, and without any justifiable medical reason for such an operation. The court, observing that this voluntary act on the part of the assured was condemned alike by the laws of nature and by the laws of all civilized States, and was known by the assured to be dangerous to life, said: ‘We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this Commonwealth.’⁹⁴

The *Ritter* Court went on to describe abortion as “condemned alike by the laws of nature and by the laws of all civilized States, and . . . known by the assured to be dangerous to life.”⁹⁵ The *Ritter* Court was far from endorsing any notion that abortion was a protected right under the Fourteenth Amendment.⁹⁶ Four years later, in *Burt v. Union Central Life Insurance Co.*,⁹⁷ the Court adhered to *Ritter* and again quoted the rationale from the Massachusetts abortion-insurance case.⁹⁸ Lastly, Justice Holmes in 1915 had no constitutional difficulty with abortion. In *United States v. Holte*,⁹⁹ he explained that “a woman may conspire to procure an abortion upon herself when, under the law, she could not commit the substantive crime.”¹⁰⁰

In sum, *Hawker*, *Hurwitz*, *Ex parte Jackson*, *Holte*, *Ritter*, and *Burt* all condemned abortion in the period between 1877 and 1926, with *Gardner* condemning contraception as recently as 1938 with definitive unanimity.

94. *Ritter*, 169 U.S. at 157.

95. *Id.*

96. *See id.*

97. *Burt v. Union Central Life Ins. Co.*, 187 U.S. 362 (1902).

98. *Id.* at 370.

99. 236 U.S. 140 (1915).

100. *Id.* at 145.

The Court in *Roe v. Wade* did not cite these cases, but instead cited decisions from the same time frame that were arguably less relevant.¹⁰¹

H. THE UNENUMERATED RIGHT OF PRIVACY

Moving 35 years beyond 1938, we fast-forward to January 22, 1973. Justice Blackmun, in Part VIII of the *Roe v. Wade* opinion, explained his sources for a right of privacy as follows:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Botsford*, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), in the Fourth and Fifth Amendments . . . *Katz v. United States*, 389 U.S. 347, 350 (1967), *Boyd v. United States*, 116 U.S. 616 (1886), see *Olmstead v. United States*, 277 U.S. 438, 478 (1928)(Brandeis, J, dissenting), in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484-485, in the Ninth Amendment, *id.*, at 486 (Goldberg, J, concurring), or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942), contraception, *Eisenstadt v. Baird*, 405 U.S. at 453-454, *id.* at 460, 463-465 (White, J., concurring in result), family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923).

* * *

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the

101. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Union Pac. Railroad Co. v. Botsford*, 141 U.S. 250, 251 (1891); *Boyd v. United States*, 116 U.S. 616 (1886)).

Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.¹⁰²

Interestingly, Justice Blackmun and the *Roe* majority did not hesitate to rely upon the 1886 *Boyd* and 1891 *Botsford* decisions, which were decided some years before the 1898 *Hawker* case. Also, Justice Blackmun relied upon *Meyer* (1923) and *Pierce* (1925), both of which were decided shortly before the 1926 *Hurwitz* abortion case. Yet, Justice Blackmun did not cite *Hawker* or *Hurwitz*.¹⁰³

The *Hurwitz*, *Hawker*, and *Ritter* cases specifically addressed the illegality of abortion in their time. *Boyd*, *Botsford*, *Meyer*, and *Pierce* had nothing to do with abortion in any but the most general way of linguistic over inclusion: the broad sweeping dicta of the cited cases was about very different aspects of privacy, education, and the family.

Justice Rehnquist, in his dissent in *Roe*, could find no such right of privacy anywhere in the Constitution or the Fourteenth Amendment.¹⁰⁴ However, according to private papers in the Library of Congress Manuscript Division, Justices Rehnquist and White had come close to concurring in *Roe* and *Doe*.¹⁰⁵

102. *Roe*, 410 U.S. at 152-53.

103. *See id.* at 116-67.

104. *Id.* at 172. Justice Rehnquist at least *appeared* not as rigid as Justice Black might have been. Justice Rehnquist stated:

I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the 'liberty,' against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law.

Id. at 172-73 (Rehnquist, J., concurring in part and dissenting in part). Justice Rehnquist has used the "rational basis" approach to deny any abortion rights, allowing legislatures to enact any regulations and prohibitions that met this test. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

105. Letter from Justice Byron R. White, to Justice Blackmun (December 1, 1972); Letter from Justice William H. Rehnquist, to Justice Blackmun (December 4, 1972) (located in the Collections of the Manuscript Division, Library of Congress and on file with the author). Justice White wrote in a letter to Justice Blackmun: "I have been struggling with these cases. I shall probably end up concurring in part and dissenting in part." *Id.* In fact, in his first year on the Court, Justice Rehnquist wrote a similar letter three days later in which he stated: "I am about where Byron said he was with respect to these cases; I will probably concur in part and dissent in part." *Id.*

I. THE BURDEN OF HISTORICAL CONSIDERATIONS

History is only as relevant as a majority of the Justices make it. Going into *Roe v. Wade*, the historical perspective on abortion was a confusing and interesting mix.

In the *Roe* opinion, Justice Blackmun delves extensively into relevant history, and even into some that might be considered not so relevant,¹⁰⁶ to a constitutional determination. He looked to historical constitutional precedent with privacy language.¹⁰⁷ He examined the common law rulings and attitudes toward abortion.¹⁰⁸ He studied the passage of the 19th century abortion laws in the States.¹⁰⁹

Justice Blackmun ignored, however, the only actual Supreme Court opinions that had anything to do with the enforcement of state abortion laws, *Hawker* and *Hurwitz*. He also ignored *Ritter*, *Burt*, and *Gardner*, the only cases dealing with the public policy of the law toward abortion and contraception.

Justice Blackmun was considered an exceptionally bright man, and appeared to be interested in any history related to abortion. For example, he asked in the *Roe* oral reargument why the historic Hippocratic Oath had not been mentioned in the briefs, and how that ethical prohibition was relevant to the case.¹¹⁰ Serial “okays” came from *Roe*-counsel Sarah Weddington, but not any answer.¹¹¹ She finally said that the Oath “does not pertain,” an arguably ambiguous answer.¹¹²

Noticeably offended, Justice Blackmun said: “[y]ou didn’t even footnote it, because it’s old?”¹¹³ Blackmun was a knowledgeable medical man and a Harvard-educated scholar. He clearly thought the Oath was important, but Ms. Weddington had no direct answer.¹¹⁴ Conversely, *Hawker*, *Hurwitz*, and *Ritter* were much more important than the Hippocratic Oath, but were never mentioned at all in oral argument.

In his dissent for both *Roe* and *Doe*, Justice Rehnquist stated:

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on

106. See *Roe*, 410 U.S. at 152-53 (discussing abortion practices under Greek and Roman law as well as the Hippocratic oath).

107. See *id.*, at 152-53.

108. See *id.* at 130-41, 152-53.

109. See *id.*

110. Transcript of Oral Argument, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) (reargument on Oct. 11, 1972).

111. See *id.*

112. See *id.*

113. See *id.*

114. See *id.*

abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Even today, when society’s views on abortion are changing, the very existence of the debate is evidence that the “right” to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn. Stat., Tit. 22, §§ 14, 16. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today. Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and “has remained substantially unchanged to the present time.”

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.¹¹⁵

Justice White also was troubled by what he considered the disregard of legal and constitutional history in the *Roe/Doe* majority opinion. He stated:

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right for pregnant [women] and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and

115. *Roe*, 410 U.S. at 174-77 (Rehnquist, J., dissenting).

the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.¹¹⁶

The even more fragmented Supreme Court of 1992 in *Planned Parenthood v. Casey*¹¹⁷ addressed the historical issue this way:

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. [*Author's Note: No citations. No discussion. No Fourteenth Amendment support.*] It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights, and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*.¹¹⁸

That statement, however, was not necessarily any more than the view of Justices O'Connor, Souter, and Kennedy, a mere one-third of the nine Justices.

J. THE CHAOTIC *ROE-DOE* LITIGATION "STRATEGY"

The writings are so vast; an encyclopedia could be published consisting of articles, briefs, and books about abortion, and the abortion cases of 1973.¹¹⁹ The end is nowhere in sight, and not likely ever to be.¹²⁰

116. *Doe v. Bolton*, 410 U.S. 179, 221-22 (1973) (White, J., dissenting).

117. 505 U.S. 833 (1992).

118. *Id.* at 847-48 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

119. DAVID GARROW, *LIBERTY & SEXUALITY* (University of California Press 1994) [hereinafter GARROW]. GARROW sets out historical private papers, interviews with law clerks, and private information from Justices, parties to litigation, counsel, families, friends, and foes. Any critical analysis by GARROW is only diminished slightly by his chronological approach, 20 year distance from the events, and lack of training as a strategic litigator of complex multidisciplinary medical and health cases. Three years of law school and 3,000 hours per year working at litigation can make a

While *Roe* is the landmark case of the 20th century, aspects of it are often criticized, from the inside and out.¹²¹ Detractors point to the absence of a physician-plaintiff not under indictment, the perfunctory trials of only a few hours each at most, the failure to present any expert medical testimony or evidence, the false claim of rape by Jane Roe, the altogether at-best-average oral arguments on both sides, the extensive medical-health journal evidence submitted on appeal but never cross-examined,¹²² the shifting grounds of decision,¹²³ the disputed and politically tainted decision to reargue, the absence of any constitutional privacy right in the text of the Constitution,¹²⁴ and the legislative appearance¹²⁵ of the opinions, among others.

The process also raised concerns from within the Court itself. The individual Justices typically research and decide these cases in separate, unique ways. Justices each have three or more law clerks¹²⁶ to conduct

Grand Canyon chasm of difference in one's perception and analysis of matters. Seasoned litigators tend to evaluate material differently from others, as it relates to evidence, rules of procedure, trial strategy, argumentation, and precedent. I have yet to hear of a historian, journalist, or political scientist who has studied and practiced evidence or trial technique. Justice Scalia had something right when he stated: "The first year of law school makes an enormous impact upon the mind . . . a sort of intellectual rebirth, the acquisition of a whole new mode of perceiving and thinking." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3-9 (Princeton 1997).

120. One's viewpoint on abortion sometimes may depend upon metaphysical value judgments. Those may be highly subjective, inflexible, too flexible, ill-informed, excessively informed, devout, whimsical, or even delusional. To some a fetus is a small human and a treasure. To others an unwanted pregnancy is a life-threatening curse and the fetus a parasite.

121. See generally, Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21 (1978).

122. Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit commented that the wealth of medical literature introduced in *Roe* and *Doe* was only done for the first time at the Supreme Court level. *Id.* at 37.

123. The holding, in at least one of the printed draft opinions, changed on each of the following issues: mandatory hospitalization, stage of pregnancy, residency, and vagueness. See Bernard Schwartz, *How a Legal Landmark Manque Became a Constitutional Cause Celebre*, in *UNPUBLISHED OPINIONS OF THE BURGER COURT* (Oxford 1988).

124. Justices Black and Stewart in *Griswold v. Connecticut*, 381 U.S. 479, 508-09 (1965) (Black, J., dissenting), had argued in dissent that no right of privacy should be recognized because there was none in the text of the Constitution and were unwilling to draw an inferential right to privacy from analogous case law. *Id.* at 509-10.

125. See Archibald Cox, *Storm Over the Supreme Court*, in *THE EVOLVING CONSTITUTION* 10 (Norman Dorsen ed., Harper & Row 1987). A common criticism of the *Roe/Doe* opinions is that they look just like statutory or legislative decrees, not judicial opinions, and "substitute judicially determined values and judicial rules" for those of the legislative branches. *Id.*

126. Supreme Court law clerks are usually at the top of their class at the top law schools in the country. They now come from federal appellate clerkships, with first rate published journal articles, and with the highest of recommendations from law professors and deans. Such proficiency helps to

research, write summary memos, draft opinions, and act as captive audiences in testing theories and arguments.¹²⁷ Lastly, litigation is not softball, with hits, runs, wins, and losses. It is a complex process requiring mental skills not unlike grandmaster chess. Lawyers also do not win or lose cases, in the cause-and-effect sense.¹²⁸

In the *Roe/Doe* litigation within the Court, Chief Justice Burger posed the first question in oral argument; whether *United States v. Vuitch* foreclosed the vagueness argument.¹²⁹

Ms. Weddington suggested that the term “life” was more indefinite than “health.”¹³⁰ She did not refer to numerous lower courts that had carefully explained how the expression “preserve the life” was vague and unworkable in practice from hospital-to-hospital.¹³¹ Instead she pointed out that the Texas Supreme Court had upheld the law as not vague and relied on *Vuitch* in that respect, reliance that was, in her opinion, “misplaced.”¹³²

Interestingly, Justice Stewart posited the followed comment: “I trust you are going to get to what provisions of the Constitution you rely

make up for their lack of experience. Law clerks are expected to grasp the subtleties of hundreds of important and complex appeals to the Court in a very short period of time. However, even the clerks do not always influence decisions by the Justices. See LAWRENCE BAUM, *THE SUPREME COURT*, 16-17 (Congressional Quarterly 3d ed. 1989). It is therefore hard to imagine how counsel such as Weddington, Hames, Floyd, or Beasley made any serious positive difference. Based on Justice Blackmun’s comments, this conclusion is not a difficult one to reach.

127. The entire Library of Congress is one block away from and available to the Court.

128. The work of the Justices and that of the Court could accurately be described as intervening independent causes that supercede any input from the advocates. It may be helpful at this juncture to discuss oral arguments at the Supreme Court in general. Oral argument is definitely a misnomer. Lawyers typically do not stand up and launch argument. The reality is that lawyers are there to answer questions, but they may make useful points if and when they can. The most effective oral arguments are those in which the Justices take extensive notes, ask sympathetic questions, demolish the other counsel, and draft a favorable decision using some of the advocate’s own words. The “lore” of the Supreme Court is that oral arguments may persuade a vote or two. The Justices look primarily to their own research and the written briefs.

The initial impressions a Justice has of an appeal are from a one-page law clerk memo on whether the case should be heard at all. Then the Justices see the printed briefs before they hear oral argument, if they take the time. Lastly, in a stressful atmosphere, the nine Justices cross-examine the advocates for 30 minutes each, with sometimes clever and pointed questions, to elicit information on matters of fact or law, concessions, or admissions, perhaps even agony.

A preferable procedure may be for judges and lawyers to gather around a large conference table with their clients and discuss the essence of a case back-and-forth in a more efficient unpressured setting. The formality of appellate courts today is an unnecessary anachronism, an inefficient ritual without back-and-forth discussion and negotiation. We deserve something more efficient and better organized than the current shooting gallery.

129. 402 U.S. 62, 63-66 (1971).

130. 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 812 (Phillip B. Kurland & Gerhard Casper eds., 1975).

131. *Id.* at 813-15. Indeed, the *Vuitch* case was easily distinguishable as involving a federal law that the Court could and did interpret broadly. The Court could not so interpret a state law, because that was the role of the state courts.

132. See *id.* at 815.

on. . . [we] cannot here be involved simply with matters of policy, as you know.”¹³³

Ms. Weddington responded to Justice Stewart with reliance upon the Ninth Amendment,¹³⁴ which Justice Stewart had ridiculed in his *Griswold* separate opinion.¹³⁵ Ms. Weddington also erroneously referred to the Fourteenth Amendment as an appropriate place to rest her Constitutional argument due to its “rights of persons to life, liberty, and the *pursuit of happiness*.”¹³⁶

Justices White and Stewart further questioned Weddington about the relevance of the stages of pregnancy, from conception up to birth. She observed that there was more of an “emotional” reaction to advanced pregnancies.¹³⁷ She did not back away from claiming an absolute right of abortion throughout pregnancy.¹³⁸ But again, Ms. Weddington let pass the opportunity to answer briefly and make strong positive points.¹³⁹

The argument by Mr. Floyd, representing the State of Texas was equally weak. Throughout the arguments, there was no mention of the names *Hawker, Hurwitz, Jackson, Ritter, or Burt*, not by any Justice or lawyer.¹⁴⁰

133. *Id.*

134. 75 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 130, at 788.

135. In *Griswold*, Justice Stewart had written:

But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment . . . was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of [a] . . . State . . . would have caused James Madison no little wonder.

Griswold v. Connecticut, 381 U.S. 479, 529-30 (1965).

136. *Historical Perspective: Roe v. Wade Oral Arguments*, 8 SETON HALL CONST. L. J. 315, 323 (1998). The Fourteenth Amendment includes no right to pursue happiness. That phrase is in the Declaration of Independence, not the United States Constitution or the Bill of Rights.

137. 75 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 130, at 789-90.

138. Justice White appeared to be offended from that point forward that this young Texas lawyer was so unfamiliar with his and Justice Stewart’s approach and concerns that dated back in print to *Griswold*.

139. Chief Justice Burger used the inadequate arguments as a good reason to insist upon reargument, with the two new Nixon appointees participating. Burger’s memo to all Justices stated: “Perhaps my problem arises from the mediocre to poor help from counsel. On reargument, I would propose we appoint amici for both sides.” Memorandum from Chief Justice Warren E Burger, to the Conference (May 31, 1972) (on file with author). No documents indicate that any of the Justices disagreed with his evaluation of the oral argument. The Court was on its own, but at least it had extensive briefs and medical and public health literature from the amici curiae on both sides.

140. See *Historical Perspective: Roe v. Wade Oral Arguments*, *supra* note 136, at 315.

K. INSIDE THE SUPREME COURT DECISION-MAKING PROCESS WITH *ROE*

The seven Justices convened three days after argument to discuss the disposition of *Roe* and *Doe*, at the scheduled 10:00 AM, Thursday, December 16, 1971, conference.¹⁴¹

Chief Justice Burger of course presided over the seven men and opened the discussion, followed by the other Justices in descending order of service on the Court.¹⁴² Chief Justice Burger suggested at the outset that neither the Doe couple nor Dr. Hallford had standing because of the speculative nature of the Doe's claims and because of Dr. Hallford's pending state court criminal proceeding.¹⁴³ The Texas lawyers had not organized or involved an unindicted physician,¹⁴⁴ so only Jane Roe remained.¹⁴⁵ Chief Justice Burger certainly concluded that Ms. Roe had standing, but otherwise, he just touched upon various issues in the case.¹⁴⁶ He thought the law was not necessarily unconstitutional.¹⁴⁷

Justice Douglas next expressed his opinion that the Texas law was unconstitutionally vague.¹⁴⁸ Justice Brennan was both willing to find the Texas law unconstitutionally vague, and to affirm the district court decision on privacy and Ninth Amendment grounds.¹⁴⁹

Justice Stewart thought that a state law could limit the performance of abortions to physicians, and might be able to draw lines at later stages of pregnancy.¹⁵⁰

Justice White felt that Ms. Weddington had overstated her case to insist upon abortion up to birth, for choice alone, on demand, without regard to any health needs of the woman.¹⁵¹ Justice White, however, despite his dissatisfaction with the oral argument, had still not decided what to do on the merits.¹⁵²

141. Schwartz, *supra* note 123, at 84.

142. *Id.*

143. THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT OPINIONS 806 (Del Dickson ed., 2001)

144. That strategic omission of a "respectable plaintiff" in the *Roe* case was odd. Doctors all over the U.S. were willing to challenge the State abortion laws as plaintiffs adversely affected by the law. The omission again shows the insufficient background of the Texas team in federal litigation practice and tactics.

145. Dickson, *supra* note 143, at 806.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 806-807. See also Schwartz, *supra* note 123, at 85.

150. Dickson, *supra* note 143, at 807.

151. *Id.*

152. *Id.*

Justice Marshall stated his straightforward view that abortion in early pregnancy was a protected liberty interest under the Fourteenth Amendment.¹⁵³

Lastly, Justice Blackmun discussed generally his already complicated views on a number of aspects of the case. He would invalidate the Texas law on at least Ninth Amendment grounds, but he thought the original Georgia law had been a “fine statute” until the lower court ruined it.¹⁵⁴ Chief Justice Burger then moved on to the *Doe v. Bolton* Georgia discussion.¹⁵⁵

In the conference no Justice ever mentioned *Hawker, Hurwitz, Jackson, Ritter*, or the status of abortion in the last decades of the 19th century.¹⁵⁶ This likely would have been the province of Justice Rehnquist, but he had not yet been sworn in, and ultimately, not even he ever referred to the several prior abortion decisions.

Next came the decision as to who should write the opinions of the Court. Justice Brennan might have written opinions of equal or better caliber than Justice Blackmun, but he would probably have lost the vote of Chief Justice Burger, possibly part of Justice Blackmun’s, and certainly that of Justice White.¹⁵⁷

Justice Blackmun accepted the assignment to draft initial opinions in *Roe* and *Doe*, and began in relative solitude to research and write.¹⁵⁸ He would produce preliminary draft printed opinions for both cases in May of 1972.¹⁵⁹

Following the *Roe/Doe* conference, the 1879 Texas law was doomed.¹⁶⁰ Justice Blackmun, on May 18, 1972, distributed a memorandum to his waiting colleagues.¹⁶¹ Attached was a 16-page printed draft opinion in *Roe v. Wade*.¹⁶² Justice Blackmun explained that his draft opinion would hold the Texas abortion law unconstitutionally vague, although he was still

153. *Id.*

154. *Id.*

155. *Id.* at 808.

156. *See id.* at 806-810.

157. *See generally* Schwartz, *supra* note 123, at 86-87.

158. *Id.* at 89.

159. *Id.*

160. *See id.* at 86.

161. *Id.* at 89. This draft is reprinted in Schwartz, *supra* note 123, at 103-120. The manuscript archives in the Library of Congress also have several copies of the memorandum and initial draft opinion [on file with the author] within the collections of Justices Douglas, Brennan, and Marshall, from which the majority of this section can also be substantiated.

162. *Id.*

flexible.¹⁶³ He also stated his view that the Georgia case should be reargued before all nine Justices.¹⁶⁴

Dr. Hallford and the “speculative” Does were out of the case entirely for lack of standing.¹⁶⁵ Justice Blackmun also made an extensive argument in his draft that the expression “saving the life” was unconstitutionally vague.¹⁶⁶ He was not yet ready to put forth the right of privacy or Ninth Amendment theories.

The result of Justice Blackmun’s analysis, had this opinion become final, would have been that the majority of abortion laws nationally were unconstitutionally vague. States may or may not enact new, more specific statutes. Many would. Others would not, depending on local politics and the value accorded by legislators to the potential life within each such State. The core privacy issue was to be postponed for another day; if Justice Blackmun’s original approach had won out. However, it did not.

Justice Brennan sent Justice Blackmun a letter immediately on May 18, 1972.¹⁶⁷ He urged that the Court go beyond vagueness and decide “the core constitutional question.” He suggested that his view was “shared by Bill [Douglas], Potter [Stewart], [and] Thurgood [Marshall],” and possibly by Justice Blackmun as well, “at least in this Texas case.”¹⁶⁸

Soon, the Court majority decided to hold the cases over for reargument before the entire nine Justices, including now Justice Lewis F. Powell, Jr., and Justice William H. Rehnquist.¹⁶⁹

On October 11, 1972, the Supreme Court heard oral reargument in *Roe v. Wade* and *Doe v. Bolton*, with essentially the same cast of characters,¹⁷⁰ plus two more decision-makers, Justices Powell and Rehnquist.¹⁷¹ Justice Rehnquist was considered politically conservative and therefore unlikely to cast a vote in agreement with Justice Blackmun. Conversely, Justice Powell had friends and relatives in the medical profession and was a past-president of the American Bar Association, which had endorsed elective abortion. It is unclear, however whether those relationships impacted his views on the Constitution and Bill of Rights in the abortion context.

163. *Id.* at 89.

164. *Id.* at 91.

165. *Id.* at 109-12.

166. *Id.* at 115-17.

167. *Id.* at 90, 144.

168. *Id.* at 144.

169. *Id.* at 147.

170. *Id.* at 148. A different Texan would represent the State of Texas, Attorney General Flowers.

171. *Id.*

L. REARGUMENT OF *ROE*

Ms. Weddington began her second argument in *Roe* with a familiar recitation of facts and constitutional amendments, nothing directly responsive to the known points with which the Court was struggling.¹⁷² Those struggles had to do with late pregnancy and “viability” limitations, the legislative versus judicial role, the issues related to the government’s interest in the life of the fetus earlier posed by Justices Stewart and White, and the “vagueness question” that had not yet gone away.¹⁷³

Initially, Ms. Weddington claimed, “*Griswold*, of course is the primary case,”¹⁷⁴ even though *Griswold* was decided in part based on marital privacy.¹⁷⁵ Jane Roe was not married.¹⁷⁶

Ms. Weddington also made no mention of the significant recent *Eisenstadt* case,¹⁷⁷ or the article by former Justice Tom Clark, *Religion, Morality and Abortion*.¹⁷⁸ Those were arguably authoritative supporting legal authority in favor of Ms. Weddington’s position, but she neglected to mention them in oral argument. These failures were probably obvious to some observers and the Justices.

Once again, the questions and arguments about the interests of the fetus came to Ms. Weddington through Justices White and Stewart.¹⁷⁹ One Justice inquired: “Is it critical to your case that the fetus not be a person under the due process clause?”¹⁸⁰ She did not answer as concisely as she could have by referring quickly to the “born or naturalized” language of the Fourteenth Amendment. Another question: “Would you lose your case if the fetus was a person?”¹⁸¹ Again, Ms. Weddington offered no explicit yes

172. Transcript of Reargument, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) [hereinafter *Transcript of Reargument*], reprinted in 75 LANDMARK BRIEFS & ARGUMENT OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 808 (Philip B. Kurland & Gerhard Casper eds., 1975).

173. See Schwartz, *supra* note 123, at 148.

174. *Transcript of Reargument*, *supra* note 172.

175. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

176. *Roe v. Wade*, 410 U.S. 113, 120 (1973).

177. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (stating in dicta that *Griswold* should apply with equal force to non-married persons).

178. Tom Clark, *Religion Morality and Abortion*, 2 LOY. L.A. L. REV. 1 (1969) (arguing that the right of abortion is within a zone of liberty interests which the state can only abrogate if its interests outweigh.).

179. *Transcript of Reargument*, *supra* note 172, at 812-814.

180. *Id.* at 813.

181. *Id.*

or no answer, only a suggestion that “balancing” would then be in order.¹⁸² Another Justice asked: “Do you make any distinction between the first month, and ninth month of gestation?”¹⁸³ Ms. Weddington answered indirectly that “[o]ur statute does not.”¹⁸⁴ Ms. Weddington seemed unwilling to deal with the expected questions regarding the interests of the fetus, perhaps because she wanted the right to abortion to be absolute. However, she did not seem to accept that no Justice agreed with her on that point. Finally, Ms. Weddington sat down. *Roe* was now in the hands and minds of the nine Justices, as it always had been.

Even before October 11, 1972, notes from the conference suggest that the Justices were tentatively lined up to invalidate the Texas statute and statutes like it.¹⁸⁵ Ms. Weddington never mentioned Justice White’s approach in *Griswold* or *Baird*. However, neither did Texas Attorney General Flowers argue to that effect, because those two cases did not help the Texas case in any way.¹⁸⁶

What did the lawyers *not* argue that they might have?

First, obviously, *Hawker*, *Hurwitz*, *Ritter*, and the history of the Fourteenth Amendment might have been argued. This could have brought in the votes of Chief Justice Burger and Justice Stewart, making the decision five to four, but it probably would not have had that effect because they appeared committed on stronger grounds than mere history.

Second, neither side made any reference to the particularized concerns of Justice Stewart, which he had voiced earlier, and in his dissent in *Griswold*.¹⁸⁷ Justice Stewart was often a strong voice in argument and in conference, someone to be reckoned with, not ignored.

Third, neither set of lawyers formulated a rationale to decide the case in their favor using the framework previously espoused by Justice White in *Griswold*, *Baird*, and other cases. With Justice White, the most important tactic in past cases had been whether the State interest was insufficient, arbitrary, irrational, or discriminatory.¹⁸⁸ Failure to make this argument was a grave tactical omission by both sides.

182. *Id.*

183. *Id.*

184. *Id.* A more solid appropriate answer might have been: I do make a distinction after ‘viability’ when the fetus is capable of independent survival. The State then might limit abortions and allow only those required by a woman for reasons of her health. Ninety-percent-plus of abortions, however, are done in the first trimester when the State has no legitimate interest beyond requiring that a qualified physician be involved.

185. See Schwartz, *supra* note 123, at 146-47.

186. See *Transcript of Reargument*, *supra* note 172.

187. See *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting); see also Dickson, *supra* note 143, at 807.

188. See Dickson, *supra* note 143, at 807.

Finally, no one reached out for Justice Rehnquist's vote at all. He had been on the Court only nine months, but the confirmation hearings should have illustrated that his interests lay in constitutional history and early precedent, a very traditional approach that often reached the most conservative result.¹⁸⁹

In sum, none of the lawyers appeared sufficiently knowledgeable to understand how to build a winning decision vote-by-vote.

M. PRIVACY, HEALTH, OR VAGUENESS?

Justice Blackmun circulated a Memorandum to the conference on November 21, 1972, with a printed draft of his proposed views and opinions.¹⁹⁰

As to the void for vagueness argument, Justice Blackmun reversed his previous approach to declaring the Texas law unconstitutional on that ground.¹⁹¹ While he *personally* still considered the statute vague, he had moved on to the core constitutional question of a right of privacy under the Ninth Amendment and the "liberty" protection of the Fourteenth.¹⁹²

At this stage, Justice Blackmun had "concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary," in his view.¹⁹³

Justice Douglas joined the two opinions.¹⁹⁴ Justice Stewart joined the Blackmun opinions on November 27, 1972, and indicated he might write separately in concurrence.¹⁹⁵

Justice Marshall, on December 12, 1972, penned a letter to Justice Blackmun endorsing the "viability" line, and explaining that this would better accommodate "the difficulties which many women may have in believing that they are pregnant and deciding to seek an abortion"¹⁹⁶

Justice Brennan on the following day, December 13, 1972, sent a three-page letter to "Dear Harry," expressing "basic agreement" with Justice Blackmun and adding a few suggestions.¹⁹⁷

189. See, e.g., Schwartz, *supra* note 123, at 148 (stating that Justice Rehnquist had expressed early on that he did not want to second guess legislatures).

190. *Id.*

191. *Id.* at 148.

192. *Id.*

193. *Id.* at 149.

194. See *Roe*, 410 U.S. at 115.

195. Schwartz, *supra* note 123, at 151.

196. *Id.* at 149.

197. *Id.* at 150.

Justice Brennan, too, was clarifying the conceptual difficulties of what regulations to allow when, and in support of what state interests. He was of the opinion that state interests in the life of the fetus could not be asserted until viability.¹⁹⁸ State interests in health and safety might arise earlier, after the first trimester, perhaps at sixteen to twenty-four weeks, at which time a medically informed legislature could enact licensing standards for safety reasons.¹⁹⁹

N. REVISIONS TOWARDS A FINAL OPINION

On December 21, 1972, Justice Blackmun distributed a further memorandum and revised opinions.²⁰⁰ This was to be virtually the final form of the opinions released Monday, January 22, 1973.²⁰¹

The *Roe* and *Doe* opinions at various and multiple points rejected the absolutist personal right to use one's body in any way.²⁰² There also was no reference either to *Hawker* or *Hurwitz* or the relevance of events closer to the ratification of the Fourteenth Amendment.

The extensive creative efforts of Justices Blackmun, Brennan, Powell, and Marshall appear throughout the pages of the opinions and the conclusions. The precedent cited most strongly and looming most large is the 1972 opinion by Justice Brennan in *Eisenstadt v. Baird*.²⁰³

Material from the gray brief for *Roe* is evident throughout the two opinions. All of the historical privacy cases cited were first set out in the gray brief, and actually much earlier in the author's 1968 article, all except *Hawker* and *Hurwitz* that is.²⁰⁴

O. CONCURRING OPINION OF JUSTICE STEWART

Justice Potter Stewart wrote a five page concurring opinion in *Roe* to explain his relatively new view "that the right asserted . . . is embraced

198. *Id.*

199. *See id.*

200. *Id.*

201. *Id.*

202. *See, e.g., Doe v. Bolton*, No 70-40, at 8, 9, 10, 11 (May 25, 1972) (1st draft) reprinted in Schwartz, *supra* note 123. This was no surprise. There is no indication in the developing case history or the published opinions that oral argument impacted any of the key successes in the two decisions.

203. 405 U.S. 438 (1972).

204. *See Roy Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. Rev. 730 (1968). Those basic privacy/family cases were the dissents in *Poe v. Ullman*, 367 U.S. 497 (1961), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See also* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Olmstead v. United States*, 277 U.S. 438 (1928); and *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250 (1891).

within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.”²⁰⁵ Justice Stewart found that the “inflexible criminal statute”²⁰⁶ in Texas could not “survive the ‘particularly careful scrutiny’ that the Fourteenth Amendment here requires.”²⁰⁷ The Stewart analysis was of the kind employed by Justice Harlan some years back, and by Justice White in *Griswold* and *Eisenstadt*.²⁰⁸

Ms. Weddington and Ms. Hames contributed nothing to the strengthening of the Stewart opinion, and likely contributed to the failure to reel in the vote of Justice White, and with it, Justice Rehnquist.

P. CONCURRING OPINION OF CHIEF JUSTICE BURGER

Chief Justice Burger swore in Richard Nixon for a second term as President of the United States before the *Roe* and *Doe* opinions came down on January 22, 1973.²⁰⁹ Burger surprised many knowledgeable people by voting with Blackmun to overturn the Texas and Georgia laws. Probably without realizing or intending to do so, Chief Justice Burger seemed to adopt the “right to health” argument that had drifted about on the periphery of the case. Chief Justice Burger expressed his holding in these words:

I agree that, under the Fourteenth Amendment . . . the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of the pregnant women, using the term health in its broadest medical context.²¹⁰

The Chief took a swing at the arguing counsel with his last sentence: “Plainly the Court today rejects any claim that the Constitution requires abortion on demand.”²¹¹

205. *Roe*, 410 U.S. at 170 (Powell, J., concurring).

206. *Id.*

207. *Id.* at 169.

208. See *Griswold*, 381 U.S. at 502 (White, J., concurring); *Eisenstadt*, 405 U.S. at 464 (White, J., concurring).

209. See Library of Congress, *American Memory: Historical Collections for the National Digital Library*, at <http://www.memory.loc.gov> (last visited Feb. 21, 2003).

210. *Roe*, 410 U.S. at 207.

211. *Id.* at 208.

Q. THE OVERRULING CONUNDRUM

As Justice Stevens observed, concurring in *Stenberg v. Carhart*,²¹²

[D]uring the past 27 years, the central holding of *Roe v. Wade*, has been endorsed by all but 4 of the 17 Justices who have addressed the issue. That holding [is] that the word ‘liberty’ in the Fourteenth Amendment includes a woman’s right to make this difficult and extremely personal decision²¹³

Justice Scalia, nonetheless, persistently asserts that *Roe*, *Casey*, and presumably many other cases must be overruled. As he stated in *Stenberg*: “If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed. *Casey* must be overruled.”²¹⁴

The pros and cons, and the methodology and impact of a decision overruling the thirty-year line of precedent recognizing an abortion “liberty” right are a very complex and exceedingly important problem in American Supreme Court jurisprudence, appropriate for another article by another author on another day. The outcome is very much dependent upon the persuasion of swing votes and new as-yet-unappointed Justices. The Court has the power to rule either way. The Nation will not collapse with either result.²¹⁵

R. CONCLUSION

The Abortion Cases of 1973²¹⁶ and subsequent decisions adhering to them have completely ignored the only Supreme Court cases that discussed abortion at all since the ratification of the Fourteenth Amendment, *Hawker v. New York*,²¹⁷ *Missouri ex rel Hurwitz v. North*,²¹⁸ *Ex Parte Jackson*,²¹⁹

212. 530 U.S. 914 (2000).

213. *Id.* at 946. (Stevens, J., concurring) (internal citation omitted).

214. *Id.* at 956 (Scalia, J., dissenting).

215. To be abundantly clear, despite this interesting history, I personally am of the opinion that most living Justices could write persuasive opinions reaching the same result as *Roe* and *Doe*. We must live with ourselves and make decisions based upon contemporary constitutional analysis, instead of being slaves to the opinions of long-deceased Justices from centuries past who were unaware of modern health, psychology, and the broad idea of the progress of civilization. To do otherwise is ancestor worship at its most oppressive.

216. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

217. 170 U.S. 189 (1898).

218. 271 U.S. 40 (1926).

219. 96 U.S. 727 (1877).

and *Ritter v. Mutual Life Ins. Co. of New York*.²²⁰ Those cases treated the validity of the 19th century abortion laws as a given, plain enough not to require discussion or argument. Both came much closer in time to the ratification and early implementation of the Fourteenth Amendment: *Hawker* in 1898,²²¹ and *Hurwitz* in 1926.²²² The path of the Massachusetts birth control case *Gardner* showed that the Court was inclined to leave the State legislatures alone to set policy in matters of morals and public health, such as contraception and abortion.²²³ *Gardner*, if anything reinforced the continuing validity of both the *Hawker* and *Hurwitz* outlook on the world of morals, bad character, birth control, and abortion. That was 65 years ago, more or less, and may seem archaic, but does the Fourteenth Amendment of 1868 forbid it in our scheme of constitutional government? Perhaps.

Roe was not quite a half-century after *Hurwitz*, and 35 years after *Gardner*. Those are brief time periods in the world of Supreme Court jurisprudence. Below is the relevant timetable of events:

1868- Fourteenth Amendment confirmed.²²⁴

1877- *Ex parte Jackson* refers to abortion circulars in the mail as subject to prohibition.²²⁵

1898- *Ritter* decision notes that abortion is dangerous and should be condemned (30 years passed).²²⁶

1898- *Hawker* decision enforces the New York law.²²⁷

1926- *Hurwitz* decision enforces the Missouri law (28 more years).²²⁸

1938- *Gardner* decision approves a ban on contraceptives (12 more years).²²⁹

1973 - *Roe/Doe* decriminalizes abortion (35 further years).²³⁰

As to the remedy for the *Hawker-Hurwitz-Jackson-Ritter* oversight, only a partial remedy, if any, is possible. In a sense this article is a personal remedy, a published acknowledgment that several other substantially adverse relevant cases in the *Roe* and *Doe* litigation were not even alluded to by any of the nine Justices at the relevant time.

220. 169 U.S. 139 (1898).

221. 170 U.S. 189 (1898).

222. 271 U.S. 40 (1926).

223. See *Commonwealth v. Gardner*, 15 N.E.2d 222 (Mass. Sup. Jud. Ct. 1938).

224. U.S. CONST. amend. XIV.

225. *Jackson*, 96 U.S. at 736.

226. *Ritter*, 169 U.S. at 157.

227. *Hawker*, 170 U.S. at 578.

228. *Hurwitz*, 271 U.S. at 43.

229. *Gardner*, 15 N.E.2d. at 224.

230. *Roe*, 410 U.S. at 166.

The lawyers for the States of Texas and Georgia, as well as numerous amici counsel, of course were the principal individuals who should have unearthed and developed *Hawker* and *Hurwitz*, but did not. Instead, the debate will continue, and from now on *Hawker*, *Hurwitz*, *Jackson*, *Ritter*, and *Gardner* will hopefully be on the balancing scales to allow a more honest disputation.²³¹

231. I have no pony in this race, only an interest, more of a curiosity for watching the historical record evolve.