

Spring 3-1-2014

## Justice Lewis F. Powell's Baffling Vote in *Roe v. Wade*

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### Recommended Citation

Samuel W. Calhoun, *Justice Lewis F. Powell's Baffling Vote in Roe v. Wade*, 71 Wash. & Lee L. Rev. 925 (2014), <https://scholarlycommons.law.wlu.edu/wlulr/vol71/iss2/10>

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# /Justice Lewis F. Powell’s Baffling Vote in *Roe v. Wade*

Samuel W. Calhoun\*

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### *I. Introduction: Judge Henry J. Friendly’s Abortion Opinion*

Even though my subject is Justice Lewis F. Powell’s vote with the majority in *Roe v. Wade*,<sup>1</sup> I begin with a few words about the late United States Circuit Judge Henry J. Friendly. Judge Friendly is widely regarded as one of our most distinguished jurists.<sup>2</sup> What many may not know is that he authored a draft

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\* Associate Dean for Academic Affairs and Professor of Law, Washington and Lee University School of Law. I appreciate those who helped me prepare the remarks on this subject that I delivered at the *Roe at 40 Symposium*: Lyman Johnson, Lynne Kohm, Brian Murchison, and several members of my family. Mark Grunewald is due special thanks for his invaluable help in commenting on both my remarks and on multiple drafts of this Article. Thanks also to Nora Demleitner, Clarke Forsythe, Stephen Gilles, John Jeffries, Jeffrey D. Kahn, and Ron Krotoszynski. I am also grateful to John Jacob for helping me access the Powell Archives. Finally, thanks to the Frances Lewis Law Center for its financial support.

1. 410 U.S. 113 (1973).

2. See A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly’s Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL’Y 1035, 1035 & n.1 (2006) (asserting that Judge Friendly is one of “the greatest judges in our nation’s history” and

opinion “in the first abortion-rights case ever filed in a federal court.”<sup>3</sup> The opinion was never issued because the case in question, *Hall v. Lefkowitz*,<sup>4</sup> a challenge to New York’s abortion statute, was dismissed as moot when New York’s approach to abortion was significantly liberalized in 1970.<sup>5</sup>

Judge Friendly’s law clerk at the time,<sup>6</sup> now Senior United States Circuit Judge Raymond Randolph, has published an article that contains Friendly’s draft opinion.<sup>7</sup> The short opinion is well worth reading.<sup>8</sup> Friendly believed there was a large gulf between *Griswold v. Connecticut*,<sup>9</sup> which accorded privacy protection to contraceptive use within marriage,<sup>10</sup> and the argument that privacy doctrine also affords a right to destroy a fetus.<sup>11</sup> To him, *Griswold* did “not seem to afford even a slender foundation” for the challenge to New York’s abortion statute.<sup>12</sup> “A holding that the privacy of sexual intercourse is protected against governmental intrusion scarcely carries as a corollary that when this has resulted in conception, government may not forbid destruction of the fetus.”<sup>13</sup> Almost ten years later, Judge Friendly reaffirmed his view that *Griswold* provided “no real precedential support” for the decision in *Roe*.<sup>14</sup> The Court gave “no real answer

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collecting sources to support such a claim).

3. *Id.* at 1035.

4. 305 F. Supp. 1030 (S.D.N.Y. 1969).

5. See Randolph, *supra* note 2, at 1037 & n.15 (citing to Act of Apr. 11, 1970, ch. 127, 1970 N.Y. Laws 852 (codified as amended at N.Y. PENAL LAWS § 125.05(3) (McKinney 2004)) as allowing “abortion on demand”).

6. See *id.* at 1036 (“I was his law clerk on the case.”).

7. See *generally id.* (containing both evaluation and circumstances of particular portions of the draft, as well as the draft in its entirety as an Appendix).

8. See *id.* at 1057–61 (providing a copy of Judge Friendly’s draft opinion).

9. 381 U.S. 479 (1965).

10. See *id.* at 486 (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”).

11. Randolph, *supra* note 2, at 1057.

12. *Id.* (quoting Judge Friendly’s draft opinion) (internal quotation marks omitted).

13. *Id.* (quoting Judge Friendly’s draft opinion) (internal quotation marks omitted).

14. Henry J. Friendly, *The Courts and Social Policy: Substance and*

to the argument that the state's interest in preserving the fetus was alone a sufficient justification for drastic limitation of abortions. The invocation of a 'right of privacy' was not convincing."<sup>15</sup>

To Judge Friendly, abortion was a public policy dispute that "must be fought out through the democratic process."<sup>16</sup> He suggested that had he been a legislator, he would have favored more liberal abortion laws.<sup>17</sup> But, as a judge, he saw no basis for holding that the States, in ratifying the Fourteenth Amendment, "placed at risk of judicial condemnation [abortion-restricting] statutes then so generally in effect and still not without a rational basis, however one may regard them from a policy standpoint."<sup>18</sup> He "simply [could not] find . . . anything" in the Amendment's "vague contours" to prohibit New York's restrictive statute.<sup>19</sup>

Judge Randolph writes that he has often wondered whether Friendly's views, if published, would have influenced other lower federal courts with pending abortion cases and perhaps even the Supreme Court itself.<sup>20</sup> I am puzzled in a different way: Why did Justice Lewis Powell not write something akin to Friendly's opinion as a dissent in *Roe v. Wade*? Part II, after showing that Powell's *Roe* vote was surprising, will demonstrate that no satisfactory explanation has yet been offered. Part III argues that Powell's vote negatively impacts his legacy.

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*Procedure*, 33 U. MIAMI L. REV. 21, 34 (1978).

15. *Id.*

16. Randolph, *supra* note 2, at 1061 (quoting Judge Friendly's draft opinion) (internal quotation marks omitted).

17. *See id.* at 1059 (showing Judge Friendly believed that more liberal abortion laws were supported by strong arguments). Judge Friendly's policy preference for liberalized abortion laws is confirmed by his biographer. *See* DAVID M. DORSEN, HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA 190–92 (2012) ("[Judge Friendly] stated that he personally favored some [abortion] right, especially in the early months of pregnancy.").

18. Randolph, *supra* note 2, at 1060 (quoting Judge Friendly's draft opinion) (internal quotation marks omitted).

19. *Id.* at 1061 (quoting Judge Friendly's draft opinion) (internal quotation marks omitted).

20. *Id.* at 1043.

## II. Justice Powell's Baffling Vote

### A. Contrary to Expectations

President Richard Nixon, in announcing his decision to appoint Lewis Powell to the Supreme Court, stated that he nominated only those who shared his “judicial philosophy,”<sup>21</sup> which was that “the duty of a judge [is] to interpret the Constitution and not to place himself above the Constitution or outside the Constitution. He should not twist or bend the Constitution in order to perpetuate his personal political and social views.”<sup>22</sup> Justice Powell, in his nomination hearings, stressed “the importance of judicial restraint, especially at the Supreme Court level.”<sup>23</sup> He also emphasized that a Justice should “make a conscious and determined effort to put aside his own political and economic views and his own predilections and to the extent possible to put aside whatever subtle influences may exist from his own background and experience.”<sup>24</sup> General public

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21. Richard Nixon, President of the United States, Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr., and William H. Rehnquist To Be Associate Justices of the Supreme Court of the United States (Oct. 21, 1971), available at <http://www.presidency.ucsb.edu/ws/?pid=3196>.

22. *Id.* Professor John Hart Ely points out that, although this language appears to embody a conservative judicial philosophy, President Nixon then gave an example—his belief that the Court had done too much to weaken law enforcement—that revealed that Nixon would have been happy were his own personal views reflected in subsequent Supreme Court decisions. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 945–46 (1973).

23. *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearing Before the S. Comm. on the Judiciary*, 92d Cong. 219 (1971) [hereinafter *Nominations*] (statement of Lewis F. Powell, Jr.).

24. *Id.*; see also *id.* at 236 (“I would certainly not consider it appropriate to inject my own personal views with respect to a constitutional question of an act of Congress.”). Powell expressed this same view of a judge’s role after his retirement from the Court: “The respect given the Court by the public, and by the other branches of government, rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law. Rather, the Court is a body vested with the duty to exercise the judicial power prescribed by the Constitution.” Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 44 REC. ASS’N B. N.Y.C. 813, 819 (1989). “[T]he judicial branch has a constitutional obligation to avoid making . . . fundamentally legislative choices.” *Id.* at 824 n.43. Whenever courts intervene in what are properly political disputes, they “unwisely, and in my view unconstitutionally, denigrate the political process and the distinct nature of our tripartite system of

opinion was that Powell would strictly construe the Constitution,<sup>25</sup> a view shared by Wilma Heide, President of the National Organization for Women, who testified against him because of his strict constructionist credentials.<sup>26</sup> Heide expressed her hope that the Fourteenth Amendment would be applied “in the interest[s] of women”<sup>27</sup> but did not think Powell would support this development.<sup>28</sup> Instead, his record of omission in

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government.” *Id.*

25. *See id.* at 92–109 (reprinting numerous newspaper articles commenting on Powell’s nomination, submitted by Senator Byrd of Virginia, that presented his anticipated conservative judicial approach as a positive trait). Some people believed differently. Professor Gerald Gunther writes of “the glib certitude of the early 1970’s that insisted that [Powell], like all Nixon appointees, would be a predictable, fungible member of the right wing.” Gerald Gunther, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 409, 410 (1987).

26. *See Nominations, supra* note 23, at 425–26, 428 (testimony of Wilma Scott Heide, President, National Organization for Women, Inc.) (construing strict constructionism to uphold “sexist” Supreme Court precedent as cited and interpreted by Ms. Heide). Powell admitted to being a strict constructionist in a particular sense. After Arkansas Senator John McClellan expressed his own opinion on the meaning of that term—that “it is the Congress’ prerogative to set national policy in those areas within the framework of the Constitution and that that policy should stand and not be overruled by a court because the court’s philosophy is that it was bad policy”—Powell said, “I certainly subscribe to those views, Senator.” *Id.* at 237 (statement of Lewis F. Powell, Jr.).

27. *Id.* at 437 (testimony of Wilma Scott Heide). Several witnesses at Powell’s hearing had a different concern about the Constitution—that it would be used to overturn laws protective of fetal life. *See id.* at 473 (testimony of Lucille Buffalino, Celebrate Life Committee of Long Island, N.Y.) (“If any inquiry discloses that any of the present nominees are disposed to reach for the label ‘unconstitutional’ to strike down laws protecting the unborn . . . , we ask that such nominations be rejected.”); *id.* at 478 (testimony of Annette Garkowski, L.I.F.E. Committee of New York) (“If it is ascertained that [the nominees Rehnquist’s and Powell’s] disposition is to regard laws protecting unborn life as less worthy of judicial respect than laws in the criminal area, we urge rejection of Mr. Powell and Mr. Rehnquist.”); *id.* at 479 (testimony of Florence Quigley, Brooklyn Right to Life Committee) (“If . . . Mr. Powell believe[s] . . . that the Supreme Court should declare unconstitutional . . . the State statutes which have traditionally regarded the unborn child as a human being . . . , then we ask . . . that the Senate . . . reject [him] . . .”). These pro-life witnesses “were politely ignored.” JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 354 (1994).

28. *Nominations, supra* note 23, at 437 (stating that Ms. Heide was “[un]persuad[ed]” that Justice Powell would represent women’s “voice[s]” through “effective action”).

regard to women's issues portended injustice for women were he confirmed.<sup>29</sup>

Is Justice Powell's vote with the *Roe* majority consistent with any concept of judicial restraint? Obviously not. Powell biographer Professor John Jeffries writes that

[a]s constitutional law, the . . . decision was an astonishing act of judicial innovation. . . . Nothing in the conventional sources of constitutional interpretation pointed to that result. There was nothing in the document's text . . . or its history, or the preexisting legal traditions that the Constitution might be thought to have incorporated. There was nothing in the usual sources of legal reasoning to suggest that abortion was a constitutional right.<sup>30</sup>

Thus, "[a]s an act of conventional [constitutional] interpretation, *Roe v. Wade* is next to impossible. . . . Abortion was not *found* in the Constitution; it was *put* there by the Supreme Court."<sup>31</sup>

29. See *Nominations*, *supra* note 23, at 428, 433–35 (testimony of Wilma Scott Hedie) (referring to Powell's alleged failures to act on women's behalf in leading his law firm and during his presidency of the American Bar Association); see also JEFFRIES, *supra* note 27, at 233 (noting that feminist opposition was predicated on an absence of a record as opposed to any particular instance of injustice). Powell's future vote in *Roe* brands Heide's opposition as richly ironic. There are other examples. A pro-choice litigator commented that there was "nothing in [Powell's] background[] that would give any supporter of abortion law repeal or reform any comfort or hope for a favorable judicial solution." DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 512 (1994) (quoting pro-choice litigator Joe Nellis). It is also ironic that some opposed holding *Roe* over for reargument from fear that Powell would vote to uphold the challenged abortion statute. See *id.* at 521, 548 (discussing various parties that wanted to defeat any motion for reargument); JEFFRIES, *supra* note 27, at 333, 337 (same).

30. JEFFRIES, *supra* note 27, at 348. For similar assessments of *Roe*'s weaknesses, see J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 28 (2012) [hereinafter WILKINSON, *COSMIC CONSTITUTIONAL THEORY*]; Ely, *supra* note 22, at 935–36, 949. "*Roe*'s flaw was not just that it was anti-originalist, but that it was also inimical to the values of textualism, self-restraint, separation of powers, and federalism as well." J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256 (2009) [hereinafter Wilkinson, *Of Guns*]. One scholar writes that due in part to the "almost complete exclusion of the sources of constitutional law, Blackmun's opinion for the Court is probably the weakest of any major decision in American history." L.A. Powe, Jr., *The Court Between Hegemonies*, 49 WASH. & LEE L. REV. 31, 39 (1992).

31. JEFFRIES, *supra* note 27, at 361.

Therefore, a question is posed, Jeffries writes, “that cries out for answer”:<sup>32</sup> How could Powell, “supposedly a fan of judicial restraint, . . . find a right to abortion in the Constitution,”<sup>33</sup> thereby taking a “plunge into judicial activism”?<sup>34</sup>

One response would be to point out that there is “a competing approach” to constitutional law,

the tradition of *fundamental rights*. This view holds that the Constitution authorizes the Supreme Court to safeguard rights not specified in the document. This approach is not interpretive. It does not rely on the text but on moral reasoning, extrinsic to the document itself, that identifies certain interests as fundamental to the human personality. . . . Whatever the source, fundamental rights are protected because they are simply too important to leave to legislative control.<sup>35</sup>

Whatever the merits of a fundamental rights analysis,<sup>36</sup> it explains Powell’s *Roe* vote only if he accepted this approach at the time of the decision, January 22, 1973,<sup>37</sup> just over one year after

32. *Id.* at 347.

33. *Id.*

34. *Id.* at 350. Powell’s vote no doubt astounded those holding pro-choice views who had worried about his appointment. *See supra* note 29 and accompanying text (referring to several pro-choice advocates concerned over Justice Powell’s appointment). It also astonished his law clerk, Larry Hammond, who had anticipated the opposite result. *See GARROW, supra* note 29, at 575 (quoting Hammond as saying it “hit [him] like a ton of bricks”). Although the surprised pro-choice parties were no doubt thrilled, Powell’s vote contrary to expectations is no less perplexing, especially because, according to Jeffries, he “found the decision easy. . . . There was no equivocation, no debate, no exchange of memoranda, no tentative drafts. . . . Despite the bitter passions aroused by the issue of abortion, Powell’s initial consideration of it was straightforward, free from doubt, almost routine.” JEFFRIES, *supra* note 27, at 346.

35. JEFFRIES, *supra* note 27, at 361–62; *see also* EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 361 (1998) (stating that fundamental rights jurisprudence looks to external sources such as “moral philosophy and political theory”). Professor Jeffries argues that the fundamental rights approach is now dominant in constitutional law, an outcome due largely to *Roe*. *See* JEFFRIES, *supra* note 27, at 362–64 (“*Roe* was not the first . . . decision to create a new constitutional right, but it was at once the most extreme and the most important [for future cases].”).

36. For my criticism of this approach as it relates to *Roe*, *see infra* Section II.B.

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



he was sworn in as a Justice on January 7, 1972.<sup>38</sup> Professor Jeffries asserts that although “Powell later moved toward” a more expansive concept of the Constitution,<sup>39</sup> “he was at the outset of his career a disciple of judicial restraint.”<sup>40</sup> “He thought the Constitution might be construed like a statute—controlled by a close reading of the text, informed by the historical intentions of those who drafted it, with judges resolving only borderline ambiguities.”<sup>41</sup> Jeffries’s conclusion? Powell’s vote in *Roe* “forever challenge[s]” his self-concept “as a disciple of restraint.”<sup>42</sup>

### *B. Not Satisfactorily Explained by Griswold*

Professor Jeffries writes that one way to reconcile Powell’s vote with his conservative judicial philosophy is to argue, as Powell “always claimed,”<sup>43</sup> that *Griswold*, contrary to Judge Friendly’s view,<sup>44</sup> actually provides precedential support for *Roe*.<sup>45</sup> Given what Jeffries states about Powell’s initial views,<sup>46</sup> it is curious that he does not comment on the strangeness of the Justice’s reliance upon *Griswold*. That decision plainly embodies a fundamental rights approach,<sup>47</sup> whereas Jeffries states that

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38. JEFFRIES, *supra* note 27, at 243.

39. *Id.* at 410. For the argument that *Roe* was inconsistent with Powell’s subsequently expressed concept of fundamental rights jurisprudence, see *infra* notes 94–103 and accompanying text.

40. JEFFRIES, *supra* note 27, at 410. Contrary to what this quotation suggests, Powell still espoused support for judicial restraint after his retirement for the Court. See generally Powell, *supra* note 24.

41. *Id.* at 409.

42. *Id.* at 349.

43. *Id.* at 348.

44. *Supra* notes 9–14 and accompanying text.

45. See JEFFRIES, *supra* note 27, at 348 (“Powell always claimed, . . . that his vote in *Roe* was supported by precedent . . .”); GARROW, *supra* note 29, at 576 (noting that Powell believed *Griswold* and *Roe* “presented the same basic question”). This approach, of course, assumes *Griswold*’s own constitutional legitimacy, a suspect presupposition for some. See Randolph, *supra* note 2, at 1043–44 (“[T]here are many objections to *Griswold*’s reasoning . . .”).

46. See *supra* notes 38–42 and accompanying text (showing that, at first, Justice Powell was a stalwart of judicial restraint and textualism).

47. The right of privacy was famously premised in the emanations and penumbras from specific constitutional guarantees. See LAZARUS, *supra* note 35, at 252–54 (providing historical context for the judicial evolution of the right of

Powell, early in his career, “was not ready for the soaring phrases of the Bill of Rights that suggest so much yet specify so little.”<sup>48</sup>

Beyond the general oddity of Powell’s dependence upon *Griswold*, other aspects of that decision make it an unpersuasive explanation for his *Roe* vote. *Griswold* involved contraception and *Roe* involved abortion, a major distinction to Judge Friendly.<sup>49</sup> Powell, however, believed that the distance between the two wasn’t “that great” because “both involved sexuality and reproduction.”<sup>50</sup> But this is like saying there’s no difference between a firecracker and a nuclear device because both involve explosives.<sup>51</sup> There is a fundamental distinction between preventing a human life from forming and destroying that life after its creation.<sup>52</sup> Thus, the jump from contraception in

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privacy).

48. JEFFRIES, *supra* note 27, at 409–10. Jeffries ultimately acknowledges *Griswold*’s inadequacy as support for *Roe*. See *infra* note 104 and accompanying text (noting that, in light of *Griswold* and other precedent, *Roe*’s holding was “venturesome”).

49. See *supra* notes 9–14 and accompanying text (discussing Judge Friendly’s interpretation).

50. JEFFRIES, *supra* note 27, at 348.

51. For an explanation on why Justice Byron White would have disagreed with this analogy, see *infra* note 70.

52. The biological distinction is undeniable. Sperm and egg cells prior to fertilization retain their own distinct genetic identities; they also die soon absent fertilization. See ALEXANDER TSIARAS, FROM CONCEPTION TO BIRTH: A LIFE UNFOLDS 42 (2002) (discussing the science of fertilization); TABER’S CYCLOPEDIA MEDICAL DICTIONARY 1555 (20th ed. 2005) (defining “ovulation”). Fertilization produces a genetically distinct, living human organism. See TSIARAS, *supra*, at 6, 16, 50–51 (outlining the details of fertilization at a cellular level). To label this very early life not “actually present,” as Justice Douglas does, *Doe v. Bolton*, 410 U.S. 179, 218 (1973) (Douglas, J., concurring) (quoting Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1, 10 (1969) (internal quotation marks omitted)), is scientifically indefensible. With time and nutrition, a child is subsequently born. TSIARAS, *supra*, at 28. Some argue that the fragility of early human life demonstrates that fertilization lacks profound significance: studies show that as many as two-thirds of zygotes fail to survive until live birth. Gregg Easterbrook, *Abortion and Brain Waves*, THE NEW REPUBLIC, Jan. 2000, at 21, 22. Some fail to implant in the uterine wall and others “are lost to natural miscarriage.” *Id.* Surely this means that early human life has no particular importance. See *id.* (arguing that brain activity, and not genetic uniqueness, is most “important”). This argument is unpersuasive. One-hundred per cent of the humans alive today will die. Does this mean that we’re all ultimately valueless? Furthermore, couldn’t the extreme fragility of preborn human life logically lead to the opposite conclusion—that unborn life is infinitely precious and should be protected to the extent possible? People may

*Griswold* to the abortion right in *Roe* constituted a “tectonic shift.”<sup>53</sup> Some contest this characterization. For example, Professor David Garrow, in a passage revealing his own view plus that of another influential scholar, writes that “in 1981 [Professor Laurence] Tribe accurately told a congressional committee that ‘*Roe v. Wade* was but a logical extension of *Griswold*.’”<sup>54</sup>

Ironically, the most powerful refutation of any notion that *Roe* was only the “slightest step past *Griswold*”<sup>55</sup> comes from language in *Roe* itself: “The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. . . . The situation is therefore *inherently different*

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certainly disagree on such complex subjects, a common occurrence in a democracy. A key question posed by this Article is whether one side of this dispute should be enshrined in constitutional law, in effect silencing all competing views. *Infra* notes 109–13 and accompanying text.

53. WILKINSON, *COSMIC CONSTITUTIONAL THEORY*, *supra* note 30, at 29. “Unlike . . . contraception, abortion ‘involves the purposeful termination of a potential life.’ The abortion decision must therefore ‘be recognized as *sui generis*, different in kind from the others that the Court has protected’ . . . One cannot ignore the fact that . . . the decision to abort necessarily involves the destruction of a fetus.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 952 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citations omitted).

54. GARROW, *supra* note 29, at 615. The intervening decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), is often relied upon to help bridge the gap, *see* LAZARUS, *supra* note 35, at 364, in particular a statement by Justice Brennan: “If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Eisenstadt*, 405 U.S. at 453. *Eisenstadt*, however, was an equal protection case, *see id.* at 447 & n.7 (“[W]e do not have to address the statute’s validity . . . because the law fails to satisfy . . . [the] equal protection standard.”); consequently, “Brennan’s comments about the right to privacy were gratuitous dicta.” LAZARUS, *supra* note 35, at 364. Moreover, the profound distinction between contraception and abortion, *see supra* note 52 and accompanying text (discussing the science behind the distinction), cannot be negated by the mere declaration that begetting and bearing a child are synonymous. This is especially true because Brennan’s wording was trumped up: he “added the crucial ‘bear or beget’ language . . . precisely because, while he was working on his *Eisenstadt* draft, the Court was already considering *Roe*. . . . *Eisenstadt* provided the ideal opportunity to build a rhetorical bridge between the right to use contraception and the abortion issue pending in *Roe*.” LAZARUS, *supra* note 35, at 365; *see also* BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 211 (1979) (noting that Brennan referred “to the decision to ‘bear’ a child with the abortion case in mind”).

55. LAZARUS, *supra* note 35, at 366.

from marital intimacy . . . with which . . . *Griswold* . . . [was] ultimately concerned.”<sup>56</sup> Admittedly, this passage is somewhat vague. By referring to “marital intimacy,” perhaps the Court was not referring to contraception as the key fact distinguishing *Griswold* from the abortion issue, but rather to the privacy of sexual relations within the marital home.<sup>57</sup> Still, if the Court had not intended to include contraception as grounds for distinguishing *Griswold*, why would it have referred to embryos and fetuses? No such “developing young” can exist if contraception prevents fertilization, and abortion necessarily terminates their existence.<sup>58</sup>

One would have expected that the Court’s allusion to the inherent difference between contraception and abortion would have naturally led it to reject *Griswold*’s precedential value for those seeking an abortion right.<sup>59</sup> This did not happen. Instead,

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56. *Roe v. Wade*, 410 U.S. 113, 159 (1973) (emphasis added).

57. Professor Ely would support this interpretation. To him, unlike Justice Byron White, see *infra* note 70 (noting Justice White’s distinction between contraception and abortion), “[c]ontraception and at least early abortion obviously have much in common.” Ely, *supra* note 22, at 929 n.67. For Ely, *Griswold* was principally concerned with “likely invasions of the privacy of the bedroom.” *Id.* at 929 n.69; see also *infra* note 59 (discussing the term “marital intimacy” and its contextual interpretation in *Roe* and *Griswold*).

58. See *supra* note 53 (supporting the argument that abortion terminates a life). Additional support for the significance of contraception in distinguishing *Griswold* comes from the history of the *Roe* opinion. The “inherently different” paragraph referenced in the text, *Roe*, 410 U.S. at 159, initially appeared in the first draft of the opinion in *Roe*’s companion case, *Doe v. Bolton*, 410 U.S. 179 (1973). This draft was circulated to the Justices’ conference on May 25, 1972, and reviewed by Powell on October 2, 1972. First Draft of *Doe v. Bolton* Opinion, at 1 (circulated May 25, 1972) (unpublished draft opinion), available at [http://law.wlu.edu/deptimages/powell%20archives/70-40\\_Doe\\_Bolton.pdf](http://law.wlu.edu/deptimages/powell%20archives/70-40_Doe_Bolton.pdf) (on file with the Powell Archives, Washington and Lee University School of Law). Subsequent to the subject paragraph comes this language, which did not make it into the *Roe* opinion: “The heart of the matter is that somewhere, either forthwith at conception, or at ‘quickening,’ or at birth, or at some point in between, another being becomes involved and the privacy the woman possessed has become dual rather than sole.” *Id.* at 10. Powell’s handwritten margin notes state, “[S]ituation different from other privacy cases” and “[A]nother being’ becomes involved.” *Id.*

59. In addition to the differentiating impact of the developing child, the *Roe* Court’s reference to “marital intimacy” reveals another reason for discounting *Griswold*’s authoritativeness for the *Roe* result: “*Griswold*, after all, was grounded in the traditional privacy of acts within marriage. *Roe* reached far beyond that context.” JEFFRIES, *supra* note 27, at 348; see also LAZARUS, *supra*

the “inherently different” passage relates to a different issue,<sup>60</sup> addressed by the Court after the constitutional right to abortion had already been declared.<sup>61</sup> Earlier, in “the opinion’s most crucial sentence,”<sup>62</sup> Justice Blackmun, after proclaiming a right of privacy based upon decisions such as *Griswold*, simply asserts that the privacy right “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>63</sup> There is no reference whatsoever to the profound distinction between contraception and abortion.<sup>64</sup> Apparently Justice Powell did not

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note 35, at 363 (noting that the abortion right does “not implicate the privacy of the home,” nor is “it necessarily linked to marriage”); Ely, *supra* note 22, at 930 (suggesting enforcement of the Connecticut law “would have been virtually impossible without the most outrageous sort of governmental prying into the privacy of the home”). It is true that *Eisenstadt* struck down a statute prohibiting contraceptive use by unmarried persons, but its weak precedential value for *Roe* has already been noted. *Supra* note 54.

There is another key distinction between *Griswold* and *Roe*. “The prohibition on the use of contraception that *Griswold* struck down . . . was a pure anachronism, unique in the nation, almost never invoked, and ineffectual except to preclude birth control clinics from distributing contraceptives to the poor.” LAZARUS, *supra* note 35 at 363–64; *see also* JEFFRIES, *supra* note 27, at 351 (“In *Griswold*, the Court had not so much overridden the legislative action as updated it.”). “The right to abortion presented a very different case. At the time of *Roe*, almost every state regulated abortion in some fashion, some quite strictly, and had done so for a century or more. In many places these laws were the subject of debate, but by and large they were still enforced.” LAZARUS, *supra* note 35, at 364.

60. *See infra* note 69 and accompanying text (discussing the issue further).

61. It is even more astounding that the *Roe* Court considered the fetus’s possible status as a Fourteenth Amendment person only after declaring the abortion right. *Roe*, 410 U.S. at 156–59 (analyzing the Fourteenth Amendment’s applicability only after referring to abortion as a “right of personal privacy”). This is true even though the Court acknowledged that were fetal constitutional personhood established, the challenge to the Texas abortion statute would “collapse[.]” *Id.* at 156–57.

62. LAZARUS, *supra* note 35, at 356.

63. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

64. The Court was no doubt influenced by other courts’ abortion decisions. For example, the California Supreme Court, also with no mention of how abortion differs from contraception, simply declared that a woman’s fundamental right “to choose whether to bear children” flows from decisions such as *Griswold* that acknowledged a privacy right “in matters related to marriage, family, and sex.” *People v. Belous*, 458 P.2d 194, 199 (Cal. 1969). Other prior decisions, referenced by the *Roe* Court, but not discussed, *Roe*, 410 U.S. at 155, emphasized the contraception/abortion dichotomy. *See, e.g.*, *Corkey v. Edwards*, 322 F. Supp. 1248, 1251–52 (W.D.N.C. 1971) (reasoning that abortion is not logically synonymous with contraception); *Steinberg v. Brown*,

consider this difference either.<sup>65</sup> “Presented with the challenge of extending the right to privacy from contraception to abortion, the Court largely skipped the process of interpretation and moved on to announcing its conclusions.”<sup>66</sup> By including the word “largely,” this statement, by Justice Harry Blackmun’s former clerk,

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321 F. Supp. 741, 745–46 (N.D. Ohio 1970) (same). As the *Steinberg* court put it, to extend *Griswold* to the abortion context would “equat[e] contraception and abortion [which would] pay no attention to the facts of biology.” *Steinberg*, 321 F. Supp. at 746.

65. Justice Powell’s law clerk, Larry Hammond, ignored the contraception/abortion dichotomy in the Bench Memo submitted to Powell on October 9, 1972. See generally Bench Memorandum from Larry Hammond, Law Clerk, Supreme Court of the U.S., to Justice Lewis F. Powell, Jr., Supreme Court of the U.S. (Oct. 9, 1972) [hereinafter Bench Memorandum], [http://law.wlu.edu/deptimages/powell%20archives/70-18\\_RoeWade.pdf](http://law.wlu.edu/deptimages/powell%20archives/70-18_RoeWade.pdf) (on file with the Powell Archives, Washington and Lee University School of Law). After a paragraph describing *Griswold* as the “seminal precedent” for the fundamental rights doctrine, the Memo states that “[i]t would not be difficult for this Ct [sic] to find a fundamental right of a woman to control the decision whether to go through the experience of pregnancy and assume the responsibilities that occur thereafter.” *Id.* at 11. Hammond makes no comment on the fact that *Griswold* dealt with contraception, not abortion. The Memo commends another decision, *Abele v. Markle*, 351 F. Supp. 224 (D. Conn. 1972) [hereinafter *Abele II*], to Powell’s attention. Bench Memorandum, *supra* at 10. The *Abele* court does not ignore the contraception/abortion dichotomy. Far from it. But the court, rather than relying upon the distinction to deny the abortion right, the approach followed in *Corkey v. Edwards* and *Steinberg v. Brown*, *supra* note 64, instead does just the opposite by arguing that “[t]he right to an abortion is of even greater concern to the woman than the right to use a contraceptive protected in *Griswold* . . . for contraception is not the only means of preventing pregnancy, whereas abortion is the only means of terminating an unwanted pregnancy.” *Abele II*, 351 F. Supp. at 227 (emphasis added). A copy of the *Abele* slip decision is in the Powell Archives. See generally Slip Opinion of *Abele v. Markle* (filed Sept. 20, 1972) (reviewed and marked up by Justice Lewis F. Powell, Jr., Oct. 10, 1972) (slip opinion duplicate) (on file with the Powell Archives, Washington and Lee University School of Law), [http://law.wlu.edu/deptimages/powell%20archives/70-18\\_RoeWadeOpinionDistrict.pdf](http://law.wlu.edu/deptimages/powell%20archives/70-18_RoeWadeOpinionDistrict.pdf). The majority opinion shows many of Powell’s handwritten notations, including emphasis markings in the left margin opposite the preceding quotation. *Id.* at 7–18. It is telling that the dissenting opinion in *Abele* does not show a single notation. *Id.* at 23–33. Thus, Powell perhaps never even read the passage arguing that *Griswold* was inapplicable in evaluating an abortion statute because that decision focused “upon the choice as to the begetting of new life and not upon the destruction of life already begotten.” *Abele II*, 351 F. Supp. at 234 (Clarie, J., dissenting); see also *Abele v. Markle*, 342 F. Supp. 800, 814–15 (D. Conn. 1972) [hereinafter *Abele I*] (Clarie, J., dissenting) (“[*Griswold*] is not applicable to the facts of the present case.”).

66. LAZARUS, *supra* note 35, at 366.

Edward Lazarus,<sup>67</sup> is too forgiving. The Court (and Powell), in regard to the contraception/abortion dichotomy, completely skipped interpretation in favor of bald assertion.<sup>68</sup>

Later, after announcing the abortion right, the Court did focus on the developing child as part of its inquiry into whether Texas could demonstrate a compelling state interest to justify regulation of the fundamental right of abortion.<sup>69</sup> Judge Friendly presumably seriously disagreed with this ordering. To him, the fetus demanded consideration as part of analyzing whether there was a fundamental abortion right in the first instance.<sup>70</sup> It was unnecessary

67. *See id.* at xi (discussing the benefits of Lazarus's clerkship for Justice Blackmun). Lazarus clerked for Blackmun over ten years after the *Roe* decision. *See id.* at 20–21 (describing Lazarus's clerkship interview with Justice Blackmun in 1988).

68. The Court did present an after-the-fact justification of the abortion right based upon the impact of abortion restrictions upon women. *See infra* notes 81–82 and accompanying text (discussing the reasoning of the Court in deciding that abortion was a fundamental right).

69. *See Roe v. Wade*, 410 U.S. 113, 155, 159–62 (1973) (“Texas urges that . . . life begins at conception, . . . and that, therefore, the State has a compelling interest . . .”). Professor Jeffries notes that the Court begins its discussion with an “incoherent” passage. JEFFRIES, *supra* note 27, at 340. Justice Blackmun states that the Court “need not resolve the difficult question of when life begins,” *Roe*, 410 U.S. at 159, but then in effect answers that “very question” by holding that Texas “could not protect fetal life from conception.” JEFFRIES, *supra* note 27, at 341.

70. *See supra* notes 9–14 and accompanying text (discussing Judge Friendly's thoughts on the subject). Justice Byron White agreed:

That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself. . . .

My point can be illustrated by drawing on a related area in which fundamental liberty interests have been found: childrearing. The Court's decisions . . . can be read for the proposition that parents have a fundamental liberty interest to make decisions with respect to the upbringing of their children. But no one would suggest that this fundamental liberty extends to assaults committed upon children by their parents. It is not the case that parents have a fundamental liberty to engage in such activities and that the State may intrude to prevent them only because it has a compelling interest in the well-being of children; rather, such activities, by their very nature, should be viewed as outside the scope of the fundamental liberty interest.

*Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792 n.2

to determine just when a fetus becomes a 'human being.' It is enough that the legislature was not required to accept [the law's challengers'] demeaning characterizations of it. Modern biology instructs that the genetic code that will dictate the entire future of the fetus is formed as early as the \_\_\_ day after conception; the fetus is thus something more than inert matter. The rules of property and of tort have come increasingly to recognize its rights. . . . [I]t would be incongruous in their face for us to hold that a legislature went beyond constitutional bounds in protecting the fetus . . . .<sup>71</sup>

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(1986) (White, J., dissenting) (citations omitted); *see also* Michael H. v. Gerald D., 491 U.S. 110, 124 n.4 (1989) (Scalia, J.) (plurality opinion) (arguing that to consider an "act which is assertedly the subject of a liberty interest in isolation from its effect upon other people—[is] rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body"). Thus, White would characterize my firecracker/nuclear bomb analogy, *supra* note 51 and accompanying text, as being too weak. Comparing these two explosives reveals only a difference in degree, whereas the egg/sperm versus zygote comparison is a difference in kind. *See supra* notes 52–53 and accompanying text (discussing the science of zygotes). For criticism of White's constitutional analysis, see LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 96–98 (1990) ("The approach suggested by . . . [Justice] White . . . would do violence to all our rights.").

71. Randolph, *supra* note 2, at 1059 (underscore in original). Judge Friendly's unissued opinion was written in 1970. *Id.* at 1035. In 1972, an important decision, although largely overlooked, declared the same view of legislative power. *Byrn v. N.Y.C. Health & Hosps. Corp.*, 286 N.E.2d 887 (N.Y. 1972), has an interesting connection to the specific issue addressed by Judge Friendly. His opinion evaluated New York's older, restrictive abortion statute. *Supra* notes 4–5 and accompanying text. *Byrn* assessed the validity of the liberalized New York abortion statute that rendered the older law moot. *Byrn*, 286 N.E.2d at 888. The new law was attacked as constitutionally invalid for denying the right to life to all those fetuses it deprived of legal protection. *See id.* ("The issue, a novel one in the courts of law, is whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life."). The court rejected the challenge, holding that the "Constitution does not confer or require legal personality for the unborn." *Id.* at 890. But the court went on to say that "the Legislature may" accord legal personality to the unborn should it decide to do so. *Id.* As a concurring judge expressed the holding, "the formidable task of resolving this issue is not for the courts. Rather, the extent to which fetal life should be protected 'is a value judgment not committed to the discretion of judges but reposing instead in the representative branch of government.'" *Id.* at 891 (Jasen, J., concurring) (quoting *Corkey v. Edwards*, 322 F. Supp. 1248, 1254 (W.D.N.C. 1971)). Interestingly, the *Roe* Court obscured this significant aspect of *Byrn*, a decision rendered, after all, by the Court of Appeals of New York, one of the nation's most prestigious courts, by citing the case only for its holding that the unborn were not constitutional persons. *Roe*, 410 U.S. at 158.



Judge Friendly correctly asserts that a legislature should be able to generally prohibit abortion without first finding that a fetus is a human being.<sup>72</sup> The *Roe* Court disagreed,<sup>73</sup> and so did Justice Powell, whose support of the abortion right was based in part on his belief “that a fertilized embryo was [not] a fully recognized human life.”<sup>74</sup> But, as pointed out by Professor John

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72. It is important to note, however, that Judge Friendly himself relied upon increasing legal recognition given to fetal rights in the non-abortion context. *Supra* text accompanying note 71. The *Roe* Court’s discussion of this trend, *Roe*, 410 U.S. at 161–62, is so incomplete as to be irresponsible. See *Hamilton v. Scott*, 97 So. 3d 728, 743–44 (Ala. 2012) (Parker, J., concurring) (“[S]cholars have repeatedly pointed to inaccuracies in *Roe* . . . .”); James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181, 254–55 (1989) (urging that *Roe*’s discussion of wrongful death actions for unborn children is inaccurate and incomplete); Ely, *supra* note 22, at 925 (asserting that the “bodies of doctrine” relied upon by the *Roe* Court were erroneously applied and “tend to undercut rather than support its conclusion”); David Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639, 652–56 (1980) (critiquing the *Roe* Court’s analysis); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 47–54 (1993) (same). This trend has sped up exponentially since *Roe*. See *Hamilton*, 97 So. 3d at 737–40 (Parker, J., concurring) (quoting statistics of a marked increase in fetal homicide laws); Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 ST. THOMAS J.L. & PUB. POL’Y 141, 143–44 (2011) (same).

73. See *Roe*, 410 U.S. at 162 (finding that the law had never recognized “the unborn . . . as persons in the whole sense”). Consequently, Texas, “by adopting one theory of life, . . . [could not] override the rights of the pregnant woman that are at stake.” *Id.*

74. JEFFRIES, *supra* note 27, at 350. Powell’s view of the human embryo hardly makes *Griswold* convincing precedential support for *Roe*, which constitutionalized abortion of developing human lives far beyond the embryo stage. *Roe*, 410 U.S. at 164–65. In fact, it was Powell himself who was instrumental in extending an unimpaired abortion right all the way to fetal viability. JEFFRIES, *supra* note 27, at 341–42, 346; *infra* notes 156–64 and accompanying text. Thus, it is shocking to discover that Powell in 1979 described *Roe* as “sustaining the right of a woman, with the approval of her doctor, to have an abortion during the first trimester.” *Constitutional Interpretation: An Interview with Justice Lewis Powell*, KENYON C. ALUMNI BULL., Summer 1979, at 16 [hereinafter *Constitutional Interpretation*]. In view of Powell’s own influence in extending *Roe*’s reach, could he really not have grasped the decision’s full impact? Yet Professor Jeffries’s biography reports this same anomaly. The book notes that the Justice “thought it intolerable that the law should interfere with a woman’s right to control her own body during early pregnancy,” yet, *in the very next paragraph*, Jeffries states that it was Powell who made “sure that the woman’s right reached beyond the end of the first trimester, as Blackmun originally proposed, to the point of fetal viability.” JEFFRIES, *supra* note 27, at 346. One would think that Powell’s apparent self-

Hart Ely in his famous critique of *Roe*,<sup>75</sup> “[d]ogs are not ‘persons in the whole sense[,]’ . . . but that does not mean the state cannot prohibit killing them.”<sup>76</sup> *Roe* suggests that widespread disagreement on fetal status prevents a state from acting in accord with its own legislative judgment.<sup>77</sup> Powell’s papers suggest that this point was important to him too.<sup>78</sup> But Judge

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contradiction would have drawn a comment from Jeffries. In any event, the result in *Roe* is even further divorced from Powell’s stated rationale. If his support of the abortion right was confined to early pregnancy, why didn’t he at least protest the expansive post-viability health exception, which allows no meaningful protection for fetuses “even on the verge of a full-term delivery.” Samuel W. Calhoun, *Stopping Philadelphia Abortion Provider Kermit Gosnell and Preventing Others Like Him: An Outcome That Both Pro-Choicers and Pro-Lifers Should Support*, 57 VILL. L. REV. 1, 37–40 (2012); see also *infra* note 123 (arguing that *Roe* provides no meaningful fetal protection post-viability).

75. Professor David Garrow emphasizes the importance of Professor Ely’s attack on *Roe*. See GARROW, *supra* note 29, at 609 (“Far and away the most important critique of *Roe v. Wade* was written by . . . John Hart Ely.”). This criticism is made more potent by Ely’s pro-choice public policy stance on abortion. See Ely, *supra* note 22, at 923, 926, 947 (articulating why Ely believes the *Roe* decision to be unfounded in constitutional law, despite his agreeing with the underlying policy of pro-choice abortion liberalization).

76. Ely, *supra* note 22, at 926 (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

77. See *Roe v. Wade*, 410 U.S. 113, 159–62 (1973) (“In view of all [these contrasting viewpoints], we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”).

78. Powell’s clerk, Larry Hammond, in summarizing a recent decision invalidating Connecticut’s abortion statute, *Abele II*, 351 F. Supp. 224 (D. Conn. 1972), wrote that the

crux of [District] Judge Newman’s analysis is that the state may not bar abortifacient freedom altogether on the basis of a proposition that is subject to such great public debate and affects individuals so personally. . . . If there is a great dispute between people of good faith about the significance of the state’s interest in the life of the unborn, we will not allow it to take the right to decide away from the individual.

Bench Memorandum, *supra* note 65, at 12. Justice Powell underlined the first fifteen words of the quoted passage. *Id*; see also Memorandum from Larry Hammond, Law Clerk, Supreme Court of the U.S., to Justice Lewis F. Powell, Jr., Supreme Court of the U.S., Regarding Abortion Cases (No. 70-18 & 70-40) 4 (Nov. 27, 1972), [http://law.wlu.edu/deptimages/powell%20archives/70-18\\_RoeWade.pdf](http://law.wlu.edu/deptimages/powell%20archives/70-18_RoeWade.pdf) (showing that Powell wrote “Yes” in the margin next to similar language) (on file with the Powell Archives, Washington and Lee University School of Law). Admittedly, at this point in his Bench Memo, Hammond is assuming a woman’s fundamental right to abortion choice. See Bench Memorandum *supra* note 65, at 12 (“It would not be difficult for this Ct [sic] to find a fundamental right of a woman to control the decision whether to go

Friendly wondered “why does a state lack power to decide this question when it can decide so many others where thinking is equally divergent.”<sup>79</sup>

Although the *Roe* Court ignored the contraception/abortion dichotomy at the critical point in its analysis<sup>80</sup>—when it considered whether *Griswold* constitutionalized abortion—the Court did state a rationale for declaring abortion a fundamental right. According to Professor Ely, the Court “[a]pparently . . . thought [this conclusion] . . . derived[d] from the passage that immediately follow[ed] it,”<sup>81</sup> i.e., an account of the burdens that

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through the experience of pregnancy . . .”). Still, he expresses a curious, if not shocking, concept of how a democracy operates. Can a legislature only enact valid laws in the absence of dispute? Does not our entire history as a country refute this view?

79. Friendly, *supra* note 14, at 33 n.64. The *Roe* Court and Powell attributed significance to disagreement about fetal status in regard to Texas’s ability to demonstrate a State interest sufficient to generally override the fundamental abortion right. *See Roe*, 410 U.S. at 159–62 (“In view of all [these contrasting viewpoints], we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”); *supra* note 78 and accompanying text (describing Powell’s indications of such a significance through memoranda with his law clerk, Larry Hammond); *see also Abele II*, 351 F. Supp. at 231 (“[T]he Supreme Court ruled that such a viewpoint could not constitutionally be imposed by the power of the state upon individuals who did not share this view.”). Judge Friendly rebutted the significance of that disagreement in the context of arguing against initial recognition of a fundamental right to abortion. Friendly, *supra* note 14, at 33–34 (“[*Roe*] provided no real answer to the argument that the state’s interest in preserving the fetus was alone a justification for drastic limitation of abortions.”). Justice Byron White believed that the importance of disagreements about fetal status could be overstated:

However one answers the metaphysical or theological question whether the fetus is a ‘human being’ . . . one must at least recognize . . . that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others . . . .

*Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting). To Justice White, these incontrovertible facts distinguished contraception from abortion and meant there was no fundamental right to the latter. *See supra* note 70 (delineating more fully Justice White’s views).

80. *See supra* notes 71–72 and accompanying text (dissecting the *Roe* Court’s conspicuous avoidance of the scientific and logical gap between contraception and abortion).

81. Ely, *supra* note 22, at 932.

denial of the abortion choice would impose upon women.<sup>82</sup> Professor Ely believed that the enumerated “life-shaping costs of having a child”<sup>83</sup> were “[a]ll . . . true and ought to be taken very seriously.”<sup>84</sup> But Ely also thought these consequences had “nothing to do with privacy in the Bill of Rights sense”<sup>85</sup> or with any other “value inferable from the Constitution.”<sup>86</sup> Everyone’s lifestyle is “constantly limited, often seriously, by governmental regulation; and while many of us would prefer less direction, granting that desire the status of a preferred constitutional right would yield a system of ‘government’ virtually unrecognizable to us and only slightly more recognizable to our forefathers.”<sup>87</sup>

Judge Friendly’s draft abortion opinion pointed out another serious flaw in the *Roe* Court’s argumentation. Friendly well understood “the hardship to a woman who is carrying and ultimately bearing an unwanted child under the best of circumstances.”<sup>88</sup> Less than ideal circumstances of various kinds could “transform a hardship into austere tragedy.”<sup>89</sup> These “humanitarian considerations” supported “repeal . . . [or] substantial modification” of New York’s strict abortion law.<sup>90</sup> Yet, because “the legislature could permissibly consider the fetus itself to deserve protection,”<sup>91</sup> such decisions were policy choices “for the elected representatives of the people, not for . . . appointed judges.”<sup>92</sup> Legislatures could choose among a variety of

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82. See *Roe*, 410 U.S. at 153 (listing potential physical harm during early pregnancy and then six potential “detriment[s]” of child-rearing).

83. Ely, *supra* note 22, at 933.

84. *Id.* at 932. Ely also noted “that most of the factors enumerated also apply to the inconvenience of having an unwanted two-year-old, or a senile parent, around.” *Id.* at 932 n.81. Ely failed to mention, though, that several of the listed detriments of unwanted pregnancy could be eliminated by giving the baby up for adoption.

85. *Id.* at 932.

86. *Id.* at 933.

87. *Id.*

88. Randolph, *supra* note 2, at 1058 (quoting Judge Friendly’s draft opinion).

89. *Id.* (quoting Judge Friendly’s draft opinion).

90. *Id.* at 1059 (quoting Judge Friendly’s draft opinion) (internal quotations omitted).

91. *Id.* (quoting Judge Friendly’s draft opinion) (internal quotations omitted).

92. *Id.* at 1060 (quoting Judge Friendly’s draft opinion) (internal quotations

approaches, “observe the results, and act again as observation may dictate. Experience in one state may benefit others; this is conspicuously an area for application of Mr. Justice Brandeis’ view that the Fourteenth Amendment should not be so utilized as to prevent experimentation in the laboratories of the several states.”<sup>93</sup>

The contraception/abortion dichotomy and the weaknesses in the burdens-of-unwanted-pregnancy argument in themselves demonstrate that *Griswold* offers little, if any, precedential support for *Roe*. An additional argument strengthens this conclusion. In *Moore v. City of East Cleveland*,<sup>94</sup> decided just over four years after *Roe*, Justice Powell stated his understanding of the scope of a fundamental rights approach to the Constitution.<sup>95</sup> Judges are not “free to roam where unguided speculation might take them.”<sup>96</sup> Instead, limits are supplied by “careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society.’”<sup>97</sup> These principles led Powell to declare invalid a housing ordinance that defined family in a way

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omitted).

93. *Id.* at 1060 (quoting Judge Friendly’s draft opinion) (internal quotations omitted). Justice Brandeis’s view of the Fourteenth Amendment is perhaps most appropriately summed up in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932): “There must be power in the States . . . to remould, through experimentation, . . . to meet changing social . . . needs. . . . It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments . . . .” *Id.* (Brandeis, J., dissenting).

94. 431 U.S. 494 (1977).

95. *See id.* at 500–01 (explaining that the rationale for other fundamental rights involving family autonomy must extend to the right to live with one’s extended family).

96. *Id.* at 501 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

97. *Id.* at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)). Powell also emphasized the importance of a historical restraint in equal protection cases. *Id.* at 503 nn.10–11. The first *Moore* footnote just cited refers to Powell’s opinion in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which upheld Texas’s system for financing public schools against an equal protection challenge. The Court concluded “that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.” *Id.* at 40. One scholar wrote that “Powell’s efforts to make fundamental rights a closed class had a hollow ring to it coming just two months after *Roe*.” Powe, *supra* note 30, at 38.

that excluded grandchildren.<sup>98</sup> “[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. . . . [And] [o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.”<sup>99</sup>

It would be difficult to overstate how dramatically abortion differs from “the institution of family” in regard to its rootedness “in this Nation’s history and tradition.”<sup>100</sup> As noted by Justice Rehnquist,

[t]he fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortion for at least a century is a strong indication . . . 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.”<sup>101</sup>

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98. See *Moore*, 431 U.S. at 495–97 (striking down an East Cleveland ordinance that limits occupancy of houses to a family but defines family to include “only a few categories of individuals” that excluded a grandmother living with two grandchildren who were themselves cousins).

99. *Id.* at 503–04. Given that Powell in this 1977 opinion grounds fundamental rights in society’s “basic values” and the nation’s “history and tradition,” it is surprising that he, in a 1979 interview, forsook an easy opportunity to reiterate his position. The interviewer asked Powell to identify the sources of principles the Justices use in interpreting broad mandates such as the due process clause. *Constitutional Interpretation*, *supra* note 74, at 16. Did they resort to “public opinion, American tradition, political theory, moral philosophy of some sort, religion[?]” *Id.* One would have expected Justice Powell to refer to his approach in *Moore*, but instead he basically dodged the question, stating that it was too complex for a brief answer. *Id.* Elsewhere in the interview, Powell referred to the Constitution in an unexpected way given his approach in *Moore*: “The Constitution has been described, properly I think, as a sort of living political organism. The Court has helped, by its decisions, to keep the Constitution abreast of the vast changes that occur in the life of our nation.” *Id.* at 15.

100. *Id.* at 503. Another telling comparison involves child-rearing, which, according to Powell, has been recognized as a fundamental right “because it reflects a ‘strong tradition’ founded on ‘the history and culture of Western civilization,’ and because the parental role ‘is now established beyond debate as an enduring American tradition.’” *Id.* at 503 n.12 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)). It would be ludicrous to suggest that abortion freedom could be accurately described in this way. See *infra* text accompanying notes 101–102 (identifying a lack of tradition regarding the right to abortion).

101. *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (quoting *Snyder v. Mass.*, 291 U.S. 97, 105 (1934)). Professor Ron Krotoszynski argues that “[a]n approach that gives dispositive effect to the prior existence of

Justice White believed this conclusion was corroborated by the “continuing and deep division of the people . . . over the question of abortion.”<sup>102</sup> Thus, under Powell’s own articulation of the requirements for finding fundamental rights, *Roe* was wrong. Rather than recognizing “values animating the Constitution,” the Court, in declaring abortion a fundamental right, instead “engage[d] . . . in the unrestrained imposition of its own, extraconstitutional value preferences.”<sup>103</sup>

The foregoing section has shown that *Griswold* is insufficient precedential support for *Roe*. Thus, “*Griswold* as precedent” is an

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laws proscribing a particular course of conduct, and no effect whatsoever to the rampant repeal or invalidation of such laws, fails to honor the notion that ‘tradition is a living thing’ or engage ‘tradition’ in a meaningful fashion.” Ronald J. Krotoszynski, Jr., *Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 1015 (2006) (citation omitted). He advocates “state counting . . . [as] a useful way of identifying and protecting the traditions from which we have broken, which are no less deserving of constitutional protection than those traditions from which we have come.” *Id.* at 1022–23. Here, Krotoszynski alludes to Justice Harlan’s famous statement about substantive due process rights in *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Krotoszynski, *supra* at 1014–15. A state-counting approach, however, even should one accept it as constitutionally appropriate, would do nothing to justify *Roe*, for the decision, as will soon be shown, far outstripped state law abortion permissiveness in 1973. *Infra* notes 120–31 and accompanying text.

102. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 793 (1986) (White, J., dissenting).

103. *Id.* at 793–94. Justice Powell, of course, disagreed with this assessment. He believed that abortion liberty “was based firmly on . . . [a] long-recognized and essential element of personal liberty,” i.e., “freedom of personal choice in matters of marriage and family life,” flowing from decisions like *Griswold*. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427 (1983) (quoting *Roe*, 410 U.S. at 169 (Stewart, J., concurring)). See *Constitutional Interpretation*, *supra* note 74, at 17 (quoting Powell as stating that “the concept of liberty was the underlying principle of the abortion case—the liberty to make certain highly personal decisions that are terribly important to people”). That Powell did not distinguish between abortion and contraception is perhaps most clearly shown by a phrase in *Moore*, in which he summarizes earlier Supreme Court decisions that recognized fundamental rights: “[These decisions] were immediately concerned with freedom of choice with respect to childbearing, e.g., . . . *Roe v. Wade*, *Griswold* . . .” *Moore v. City of East Cleveland*, 431 U.S. 494, 500 (1977). Equating abortion with contraception is indefensible in regard to both biology and constitutional analysis. *Supra* notes 52, 70 and accompanying text.

unsatisfying explanation of Powell's vote with the majority in *Roe*. Are other rationales more compelling?

*C. Not Satisfactorily Explained by Appealing to the Future*

If *Griswold* lacks persuasive power,<sup>104</sup> are there better explanations of Powell's vote? Professor Jeffries explores one option: "Underlying Powell's abortion vote was an appeal to the future."<sup>105</sup> State abortion laws were "slowly and haphazardly" becoming "more permissive."<sup>106</sup> "Constitutionalizing abortion would merely speed that process."<sup>107</sup> Thus, according to Jeffries, "Powell meant to anticipate popular sentiment, not to supplant it. By leaping over the current legislative muddle, the Court would achieve—quickly, cleanly, and without wrenching divisions—the solution toward which the country as a whole was clearly aimed."<sup>108</sup>

This "speed-up-the-future" rationale conflicts with any notion of judicial restraint in applying/interpreting the Constitution.<sup>109</sup> It is not the Court's job to shortcut the legislative role.<sup>110</sup> As

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104. "Even conceding all the prior precedents, one still must rank the abortion decision as among the most venturesome acts of judicial innovation in the history of the Supreme Court." JEFFRIES, *supra* note 27, at 349.

105. *Id.* at 350.

106. *Id.* at 351.

107. *Id.* Professor Krotoszynski believes that *Roe* preempted the process by which a new fundamental right to abortion choice *might* one day have been legitimately identified. E-mail from Ronald J. Krotoszynski, John S. Stone Chairholder of Law & Dir. of Faculty Research, Univ. of Ala. Sch. of Law, to author (Mar. 7, 2014, 12:14 AM) (on file with author).

108. JEFFRIES, *supra* note 27, at 352. Needless to say, this prediction was spectacularly wrong as to the impact of *Roe*, as Professor Jeffries recognizes. See *id.* at 354–55 (describing how *Roe* "energized the right-to-life movement").

109. It is surprising that Jeffries does not mention this flaw in Powell's thinking. Instead, he comments on "the profound irony . . . [in] Powell's haste toward the future he thought inevitable." JEFFRIES, *supra* note 27, at 352. "[P]olls confirm that support for freedom of choice is strong and widespread, but also that the opposition to it is committed and unreconciled. . . . Though the right is secure, the issue remains corrosively divisive." *Id.* Thus, Powell's advance-the-future motivation "may have made that future more costly to attain." *Id.*

110. See Randolph, *supra* note 2, at 1061 (explaining the dangers of judicial legislation).



Judge Friendly stated in his unissued abortion opinion, political contests “must be fought out through the democratic process, not by utilizing the courts as a way of overcoming the opposition of what [pro-choicers] assume[,] but [judges] cannot know[,] to be a minority[,] and thus[, by] clearing the decks, . . . enable legislators to evade their proper responsibilities.”<sup>111</sup> Judge J. Harvie Wilkinson III, Powell’s former clerk and a longtime family friend,<sup>112</sup> colorfully expresses the same idea: “[T]he club of unconstitutionality is a weapon of last resort, precisely because it so often knocks every other player out of the ring.”<sup>113</sup>

Even if one concedes some relevance to judicial forecasts of the future, how astute were Powell’s predictive powers? Professor Jeffries argues that the high abortion rate after *Roe* “tend[s] to confirm the practical assessment on which Powell’s vote had been based.”<sup>114</sup> This contention ignores two critical facts. First, it was *Roe* itself that removed virtually all legal barriers to abortion.<sup>115</sup> Second, as Professor Jeffries writes,

*Roe* boosted the ideology of choice. The Supreme Court’s decision did not merely expand the practical opportunity for abortion; it declared abortion available *as a matter of right*. It said that there was something fundamentally wrong with compelling a pregnant woman to carry an unwanted child to term. It . . . placed the enormous authority of the Supreme Court behind a woman’s freedom of choice.<sup>116</sup>

The fact is that Powell’s prediction was startlingly incorrect.<sup>117</sup> The abortion controversy started prior to

111. *Id.* “It is the people at the ballot box who should decide, not the people wearing black robes—the many, not the few.” WILKINSON, *COSMIC CONSTITUTIONAL THEORY*, *supra* note 30, at 114.

112. *See* JEFFRIES, *supra* note 27, at 54–56, 562 (describing the relationship between Powell and Wilkinson).

113. WILKINSON, *COSMIC CONSTITUTIONAL THEORY*, *supra* note 30, at 106.

114. JEFFRIES, *supra* note 27, at 353.

115. *See infra* note 123 and accompanying text (explaining how the Supreme Court, not the Constitution, required abortion on demand).

116. JEFFRIES, *supra* note 27, at 353–54.

117. Professor Ely shared Powell’s mistake. *See* Ely, *supra* note 22, at 947 (asserting that *Roe* likely aligned with public sentiment). Admittedly, Powell’s and Ely’s prognosis was not unreasonable based on state legislative developments through 1970. *See id.* at 947 n.136 (describing the trend toward “less stringent” abortion statutes and repealing criminal penalties for some abortions); *infra* note 119 and accompanying text (noting the states which

*Roe*.<sup>118</sup> Although pro-choice advocates made significant gains in the late 1960s and early 1970s,<sup>119</sup> by 1971 “a large, vigorous pro-life movement . . . was beginning to win the public debate on abortion.”<sup>120</sup> As stated by historian Daniel K. Williams, “[i]n the spring of 1971, pro-lifers defeated abortion legalization bills in all twenty-five of the state legislatures that considered them. . . . Pro-lifers were equally successful at the ballot box. When Michigan and North Dakota introduced voter initiatives to legalize abortion in 1972, . . . both measures [were defeated] by wide margins.”<sup>121</sup>

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allowed for abortion before *Roe*). But they both missed the fact and/or the significance of pro-life political victories beginning in 1971. *See infra* notes 120–21 and accompanying text (explaining the pro-life movement’s success immediately before *Roe*).

118. *See infra* notes 119–21 (describing the abortion debate in the years prior to *Roe*).

119. “By the end of 1970, fourteen states . . . allowed for abortion in limited circumstances—usually rape and incest, dangers to a woman’s physical and mental health, or suspected fetal deformity.” Daniel K. Williams, *No Happy Medium: The Role of Americans’ Ambivalent View of Fetal Rights in Political Conflict over Abortion Legalization*, 25 J. POL’Y HIST. 42, 50 (2013). Most of these laws followed the pattern of the “model abortion law” promulgated by the American Law Institute in 1959. *Id.* at 46, 50. In addition, in 1970, “four states removed nearly all restrictions on first- and second-trimester abortions, essentially legalizing abortion-on-demand.” *Id.* at 42.

120. Daniel K. Williams, *The Real Reason to Criticize Roe*, PUBLIC DISCOURSE (Jan. 24, 2013), <http://www.thepublicdiscourse.com/2013/01/7679> (last visited Dec. 30, 2013) (on file with the Washington and Lee Law Review).

121. *Id.* And what was the record as a whole in the two years immediately prior to *Roe*? “From December 1970 until January 1973, no other states legalized abortion-on-demand and only one state liberalized its abortion law—and it did so only because of a court order.” Williams, *supra* note 119, at 42. For criticism of several others’ “fundamental historical ignorance” in regard to stalled pro-choice legislative efforts, see David J. Garrow, *Roe v. Wade Revisited*, 9 GREEN BAG 71, 73, 75–76 (2005). What explains this “sudden reversal in fortune for the abortion rights movement in 1970”? Williams, *supra* note 119, at 43. Williams attributes the change to the belief of most Americans “that a fetus has intrinsic value, but not an absolute right to life.” *Id.* The latter view in the 1960s “allowed proponents of abortion law liberalization to gain widespread support in their campaign to loosen restrictions on abortion.” *Id.* But the former view “posed problems for the abortion rights movement in the early 1970s, when abortion law became more liberal than prevailing public sentiment and abortion rights supporters began arguing that fetuses had no rights at all.” *Id.*

*Roe* brought this tumultuous popular contest to a screeching halt.<sup>122</sup> According to Williams,

*Roe* stopped a victorious pro-life movement in its tracks and deprived it of its gains [earned] through the democratic process. It forced dozens of states to legalize the [abortion] procedure against the will of their citizens. When *Roe* was issued, only nineteen states had adopted liberalized abortion laws, and only four . . . allowed abortion on demand. *Roe* required every state to allow abortion on demand.<sup>123</sup>

Thus, *Roe* did not simply provide a nudge to a future already unfolding according to a widely shared view of how best to handle the abortion issue. Instead, the Court imposed its own vision of the common good<sup>124</sup> upon a largely unwilling populace.<sup>125</sup> *Roe* thus “represents an act of judicial aggrandizement: a transfer of power to judges from the political branches of government—and thus, ultimately from the people themselves.”<sup>126</sup>

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122. Prior to *Roe*, abortion choice was recognized as a constitutional right under some state constitutions. See, e.g., *People v. Belous*, 458 P.2d 194, 199–200 (Cal. 1969) (recognizing a fundamental right to choose abortion in California and reasoning “[t]hat such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right”). But such rulings still left realistic room for a political response through attempts to amend the state constitution or to obtain federal legislative action.

123. Williams, *supra* note 120. The *Roe* Court in essence denied that it had imposed abortion on demand. See *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (stressing that the right to abortion is not absolute). Chief Justice Burger stated this conclusion explicitly: “Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.” *Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring). Justice Burger later changed his mind. *Infra* note 205. Nonetheless, *Roe* prescribes abortion on demand because throughout the pregnancy no meaningful restrictions are allowed in regard to the reasons for seeking an abortion. For the first two trimesters, the Court makes this point explicitly. *Roe*, 410 U.S. at 164. For the third trimester, i.e., post viability, *id.* at 160, the Court purports to allow states to prohibit abortion (but they are not required to do so). *Id.* at 164–65. The required health exception, *id.* at 165, however, deprives the unborn of any meaningful protection. See Calhoun, *supra* note 74, at 37–39 (describing the very broad scope of the health exception, which accounts for both emotional and physical harm).

124. See *supra* text accompanying note 116 (describing *Roe* as signaling that it is morally wrong to deny women abortion choice).

125. See *supra* text accompanying note 123 (explaining how *Roe* imposed a right of abortion against the will of most American citizens).

126. Wilkinson, *Of Guns*, *supra* note 30, at 254.

Additional evidence of *Roe*'s anti-democratic intervention is supplied by its companion case of *Doe v. Bolton*.<sup>127</sup> That litigation invalidated Georgia's enactment of the American Law Institute's Model Abortion Act.<sup>128</sup> Of the eighteen States that liberalized their abortion laws prior to *Roe*, fourteen had followed this pattern.<sup>129</sup> These statutes allowed abortion only in designated exigent situations such as fetal deformity, rape or incest, or serious risk to the woman's health or life.<sup>130</sup> In striking these laws down and instead imposing abortion on demand, *Roe* and *Doe* compelled a level of abortion permissiveness far surpassing that prevalent in most abortion-liberal states in 1973.<sup>131</sup> This in itself is enough to refute the "speed-up-the-future" rationale for Powell's vote.

#### *D. Not Satisfactorily Explained by Empathy*

President Barack Obama has generated much discussion by identifying empathy as an important trait for a Supreme Court Justice.<sup>132</sup> Lewis Powell would have pleased the President in this regard, for Powell's empathy was exalted in an important moment at his confirmation hearing. An attack had been launched against Powell based on his record on race, and a key part of his defense was to present endorsements.<sup>133</sup> According to Professor Jeffries, "[t]he high point of this strategy was an extraordinary letter from Jean Camper Cahn," who extolled Powell for several reasons, including his "instigat[ing] an

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127. 410 U.S. 179 (1973).

128. *Doe v. Bolton*, 319 F. Supp. 1048, 1055–56 (N.D. Ga. 1970).

129. *Supra* note 119.

130. *Supra* note 119 and accompanying text.

131. *Supra* notes 127–30 and accompanying text.

132. See Dahlia Lithwick, *Once More, Without Feeling: The GOP's Misguided and Confused Campaign Against Judicial Empathy*, SLATE (May 11, 2009, 7:15 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/05/once\\_more\\_without\\_feeling.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/05/once_more_without_feeling.html) (last visited Dec. 31, 2013) (identifying President Obama's "repeated claim" about empathy's importance and explaining how this sparked a "war on empathy" between Democrats and Republicans) (on file with the Washington and Lee Law Review).

133. See JEFFRIES, *supra* note 27, at 233–36 (describing this attack, the charges against Powell, and the people that endorsed him).

invitation that made her the first black lawyer, male or female, to address a plenary session of the American Bar Association annual meeting.”<sup>134</sup> The letter ended with “a moving tribute”:<sup>135</sup>

I am drawn inescapably to the sense that Lewis Powell is, above all, humane; that he has a capacity to empathize, to respond to the plight of a single human being to a degree that transcends ideologies or fixed positions. . . . In that court of last resort to which I and my people so frequently must turn as the sole forum in which to petition our government for a redress of grievances, it is that quality of humanity on which we must ultimately pin our hopes in the belief that it is never too much to trust that humanity can be the informing spirit of the law.<sup>136</sup>

Senator Birch Bayh said in Powell’s presence that this language was “particularly important to some of us who must make this decision.”<sup>137</sup> In the subsequent Judiciary Committee Report recommending confirmation, Senator Bayh joined Senator Edward Kennedy and two other Senators in giving their individual reasons for supporting Powell.<sup>138</sup> Their statement closed with the foregoing quotation.<sup>139</sup>

The evidence suggests that Powell’s empathy for women desperate to end unwanted pregnancies contributed significantly to his vote in *Roe*.<sup>140</sup> First, empathy led him to support

134. *Id.* at 236.

135. *Id.*

136. *Nominations, supra* note 23, at 285.

137. *Id.* at 280 (statement of Sen. Birch Bayh). Powell responded that the praise was “far more than any man deserves.” *Id.* at 281 (statement of Lewis F. Powell).

138. EXEC. REP. NO. 92-17, at 5 (1971).

139. *Id.* at 8.

140. Another Powell vote has been attributed to his empathy. *Plyler v. Doe*, 457 U.S. 202 (1982), presented “the question [of] whether a state could deny to the children of illegal aliens the free public education that it provides to other children.” Richard H. Fallon, Jr., *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 399, 403 (1987). Powell, fewer than ten years earlier, “had written the Court’s opinion holding that the Constitution creates no ‘fundamental right’ to education.” *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973)). Fallon, his law clerk, “therefore assumed that the Justice would vote to find states free to withhold public education from the children of illegal aliens.” *Id.* Instead, Powell, after lying awake “much of the night,” voted the other way. *Id.* Even though “the path to upholding the children’s claim . . . was a legally difficult one,” Powell’s compassion prevailed. *Id.* He believed “it would be

invalidating the challenged abortion statutes in the first instance.<sup>141</sup> Second, empathy in part led him to advocate for a broader abortion freedom than Justice Blackmun had first contemplated.<sup>142</sup>

A personal experience “convinced Powell that women would seek abortions whether they were legal or not and that driving the practice underground led to danger and death.”<sup>143</sup> This conclusion was bolstered by “all the horrifying stories of unsanitary butchers and coat-hanger abortions” that Powell had heard from several obstetricians in his extended family.<sup>144</sup> “From this perspective, *Roe* was simply the right and decent thing to do.

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in no one’s long-term interest to create a perpetual underclass of uneducated permanent residents.” *Id.* Powell also opposed the law for penalizing and stigmatizing children “due to a violation of law by their parents.” *Plyler*, 457 U.S. at 238–39 (Powell, J., concurring); see also Ronald J. Krotoszynski, Jr., *The Wages of Crying Wolf Revisited: The Essential Consanguinity of Lochner, Roe, and Eastern Enterprise*, 1 GEO. J.L. & PUB. POL’Y 133, 145 (2002) (explaining that Powell’s *Plyler* vote arguably is an instance when his “commitment to justice overcame his commitment to formal process and legal doctrine”).

141. See *infra* notes 143–45 and accompanying text (explaining that Powell believed that invalidating the statutes would end the unsafe and inhumane abortion practices).

142. See *infra* text accompanying notes 153–60 (explaining that “Powell pushed Blackmun” for a broader freedom).

143. JEFFRIES, *supra* note 27, at 347. Powell had helped an office boy in his law firm deal with the aftermath of an illegal abortion in which the young man’s girlfriend had bled to death. *Id.* “Powell, shaken by this grisly event, persuaded prosecutors not to file charges against the young man [who had helped perform the abortion], and once on the Supreme Court he championed women’s right to choose so that they would not die in circumstances like that.” Steven Conn, *Rob Portman, Nancy Reagan and the Empathy Deficit*, HUFFINGTON POST (Apr. 5, 2013, 4:55 PM), [http://www.huffingtonpost.com/steven-conn/rob-portman-nancy-reagan\\_b\\_3022352.html](http://www.huffingtonpost.com/steven-conn/rob-portman-nancy-reagan_b_3022352.html) (last visited Dec. 31, 2013) (on file with the Washington and Lee Law Review). Bob Woodward and Scott Armstrong argue that this incident determined Powell’s *Roe* vote despite his “conclusion that the Constitution did not provide meaningful guidance” on abortion. WOODWARD & ARMSTRONG, *supra* note 54, at 230. “If there was no way to find an answer in the Constitution, Powell felt he would just have to vote his ‘gut.’” *Id.* Professor Jeffries questions the word choice but says that “the sentiment rings true.” JEFFRIES, *supra* note 27, at 346. Basing constitutional decisions on one’s gut is hardly consistent with what one expects of a “disciple of restraint.” *Id.* at 349. Doing so also demonstrates that in this instance Powell was unsuccessful in fulfilling the commitment he made in his Confirmation Hearing—to resist any influences resulting from his personal experiences. *Supra* text accompanying note 24.

144. WOODWARD & ARMSTRONG, *supra* note 54, at 230.

It would end the horror and humiliation of self-induced or underground abortions and return the abortion decision to safe and responsible hands.”<sup>145</sup>

Judge Friendly, at the time he wrote his unissued abortion opinion, believed that the societal impact of illegal abortion “militate[d] against” state abortion restrictions.<sup>146</sup> Prohibiting abortion had “created illegal abortion mills.”<sup>147</sup> Whereas a wealthy woman had safe abortion options, a poor woman “was relegated to . . . undergoing, or undertaking, procedures threatening her health or even her life.”<sup>148</sup> Nonetheless, he wrote a draft opinion arguing that addressing abortion involved “[p]olicy choices” best committed to the representative branches of government, not the courts.<sup>149</sup>

Justice Powell’s response to illegal abortion is one empathetic policy choice, but certainly not the only one. One can think of several relevant considerations.<sup>150</sup> How widespread were illegal abortions in the pre-*Roe* era? How many women were harmed? How safe is legal abortion? Does killing an embryo or fetus take a human life? If so, does the illegal abortion argument collapse? If mothers could kill their newborns only in ways that risked their own lives, would we legalize killing babies to make it safer for mothers who want to kill them? People might respond in various ways to these questions. Why should Lewis Powell’s individual response, as an “extraconstitutional value preference[],”<sup>151</sup> be accorded special deference?<sup>152</sup>

145. LAZARUS, *supra* note 35, at 368.

146. See Friendly, *supra* note 14, at 32–33 (describing the harms of unsafe abortion procedures before *Roe* and *Doe* and explaining how these harms particularly affected poor women).

147. *Id.* at 33; see also *Roe v. Wade*, 410 U.S. 113, 150 (1973) (referring to “high mortality rates at illegal ‘abortion mills’” in a discussion of the State interest in protecting women’s health).

148. Friendly, *supra* note 14, at 33.

149. See Randolph, *supra* note 2, at 1060–61 (arguing that such choices “must be fought out through the democratic process, not by utilizing the courts,” which would “enable legislators to evade their proper responsibilities”).

150. For a fuller discussion of this issue, see Samuel W. Calhoun & Andrea E. Sexton, *Is It Possible to Take Both Fetal Life and Women Seriously? Professor Laurence Tribe and His Reviewers*, 49 WASH. & LEE L. REV. 437, 477 n.202 (1992).

151. See *supra* text accompanying note 103.

152. “A judge’s view of the law may be esteemed; a judge’s view on policy is

Justice Powell's empathy also in part led him to advocate *expanding* the period during which a State could not prohibit abortion.<sup>153</sup> To consider this dimension of Powell's role in *Roe*, we must assume a fundamental right to abortion. Even after declaring this right, the *Roe* Court still had to decide when a state's interest in protecting fetal life became compelling, thereby allowing a state to override the woman's freedom to choose abortion.<sup>154</sup>

Justice Blackmun originally proposed the end of the first trimester as the time a State could intervene to prohibit abortion.<sup>155</sup> Until then, a woman would have virtually unfettered freedom to abort.<sup>156</sup> Powell pushed Blackmun to expand the abortion right to the point of fetal viability,<sup>157</sup> which in 1973 was roughly at the beginning of the third trimester.<sup>158</sup> In a November 29, 1972, letter to Blackmun, Powell quoted Judge Jon O.

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worth no more than any other." Wilkinson, *Of Guns*, *supra* note 30, at 322 ; *see also* WILKINSON, *COSMIC CONSTITUTIONAL THEORY*, *supra* note 30, at 106 ("When judges lay aside the law for policy, shall we listen to them then?"). It is significant to recall that Professor John Hart Ely also had much empathy for women facing unwanted pregnancies. *See supra* notes 83–84 and accompanying text (acknowledging the serious costs imposed by having a child). Nonetheless, he opposed recognizing abortion choice as a fundamental right. *Supra* text accompanying notes 85–87.

153. *See infra* text accompanying notes 157–164 (noting that Powell pushed for a longer period for protecting abortion and explaining his reasoning for doing so).

154. *See Roe v. Wade*, 410 U.S. 113, 155–56 (1973) (explaining that the Court has held that most laws regulating fundamental rights are subject to strict scrutiny).

155. JEFFRIES, *supra* note 27, at 341.

156. *Id.* Blackmun admitted that this point was "arbitrary," but stated that "perhaps any other selected point, such as quickening or viability, . . . [would be] equally arbitrary." *Id.*

157. *Id.* at 341–42. Clarke Forsythe points out how "careless" it was for the Court even to consider shifting to viability: "[V]iability, and its implications, were never argued in the lower courts, never briefed in the Supreme Court, and never mentioned, even once, during the four hours of oral arguments in December 1971 and October 1972." CLARKE D. FORSYTHE, *ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE* 141 (2013). Judge Friendly also had concerns about the weak record in *Roe*. *See Friendly*, *supra* note 14, at 36–39 (discussing the safety of legal first-trimester abortions).

158. *See Roe*, 410 U.S. at 160 ("Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.").



Newman's defense of the viability line in *Abele II*:<sup>159</sup> “[T]he state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than the interest in preventing the abortion of a fetus that is not viable.”<sup>160</sup> This letter was undoubtedly prompted by a memo submitted to Powell two days earlier by his clerk, Larry Hammond. This document, after referring to Judge Newman's viability line, stated that the controversy about when life begins “[a]t some point . . . does not appear to be so great. Most people would probably agree that the state has a much greater interest in protecting a viable entity than it does at some earlier time.”<sup>161</sup> In the left-hand margin, Justice Powell marked this passage with a vertical line and signified his agreement by the word “[y]es.”<sup>162</sup>

Powell was also influenced by a December 11, 1972 memo from Hammond that described “the most important practical consideration[s]” favoring viability:

For many poor, or frightened, or uneducated, or unsophisticated girls the decision to seek help may not occur during the first 12 weeks. The girl might be simply hoping against hope that she is not pregnant but is just missing periods. Or she might know perfectly well that she is pregnant but be unwilling to make the decision—unwilling to tell her parents or her boyfriend.<sup>163</sup>

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159. 351 F. Supp. 224 (D. Conn. 1972).

160. Letter from Lewis Powell to Harry Blackmun (Nov. 29, 1972), at 1 (on file with the Powell Archives, Washington and Lee University School of Law) (quoting *Abele II*, 351 F. Supp. 224, 232 (D. Conn. 1972)). In the left-hand margin, Justice Powell marked this passage with a vertical line and signified his agreement with the word “[y]es.” *Id.*

161. Memorandum from Larry Hammond, Law Clerk, Supreme Court of the U.S., to Justice Lewis F. Powell, Jr., Supreme Court of the U.S. (Nov. 27, 1972), at 4 (on file with the Powell Archives, Washington and Lee University School of Law).

162. *Id.*

163. Memorandum from Larry Hammond, Law Clerk, Supreme Court of the United States, to Justice Lewis F. Powell, Jr., Supreme Court of the United States (Dec. 11, 1972), at 1 (on file with the Powell Archives, Washington and Lee University School of Law).

In the memo's left-hand margin, Powell marked this passage with a curly bracket and signified his agreement by the word, "[y]es."<sup>164</sup>

In regard to the alleged lack of agreement for protectable fetal status prior to viability, one wonders how Powell explained the fact that at the time of *Roe*, almost all the states still afforded legal protection to pre-viable fetuses.<sup>165</sup> And this situation cannot be dismissed as attributable to old, out-of-date statutes, because substantial contemporaneous political activity confirmed a present commitment to continue this protection.<sup>166</sup> Some people, perhaps many, disagreed with this stance, but, as Judge Friendly argued, how does personal disagreement deprive a state of the power to act?<sup>167</sup>

And what was *Roe*'s argument for the substantive validity of the viability line? Here is the key passage: "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus [at viability] . . . presumably has the capability of meaningful life outside the mother's womb."<sup>168</sup> Professor Ely forty years ago attacked the Court for "mistak[ing] a definition for a syllogism."<sup>169</sup> The phrase "begging the question" also comes to mind. *Roe* in effect says that viability is the compelling point because that's when the fetus becomes viable.<sup>170</sup> Professor Randy Beck criticizes the Court for failing "to offer any constitutional principle connecting state regulatory power and the value of developing fetal life that—when combined with the Court's definition of viability—would entail the conclusion that the state

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164. *Id.* For a helpful summary of Powell's importance in expanding the abortion right to viability, see David J. Garrow, *Revelations on the Road to Roe*, AM. LAW., May 2000, at 80.

165. *See supra* text accompanying note 123 (explaining that, prior to *Roe*, "only four [states] . . . allowed abortion on demand").

166. *See supra* note 121 and accompanying text (describing pro-life political victories immediately prior to *Roe*).

167. *See supra* note 79 and accompanying text (asking why state legislatures lack power to decide abortion questions while they have power in other contexts in which views are split); *see also supra* note 78 (same).

168. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

169. Ely, *supra* note 22, at 924.

170. *See supra* text accompanying note 168 (displaying *Roe*'s circular reasoning regarding viability).

can only prohibit abortion of a viable fetus.”<sup>171</sup> Professor Beck also attacks viability for its moral randomness in depending upon four morally irrelevant variables: (1) the fetus’s year of conception; (2) where the abortion is performed; (3) doctors’ differing perspectives in assessing fetal survival prospects; and (4) the disparate impact of race and gender on survivability.<sup>172</sup>

Justice Powell’s special solicitude for certain women seeking abortion also enters into a moral evaluation of the viability line. He urged extending the time for abortion because a first-trimester cut-off would disadvantage “poor,” “frightened,” “uneducated,” and “unsophisticated” girls.<sup>173</sup> Powell’s concern appears empathetic. But an overall evaluation is more complicated. Is abortion necessarily best for all these girls? Might not even legal abortion have physical and psychological risks? If the poor are largely black,<sup>174</sup> is abortion’s disparate impact upon a particular racial minority problematic? And what of the fathers involved in the terminated pregnancies? Does empathy include a place for the feelings of men affected by the loss of their developing children? And what about the destroyed fetal lives themselves? Is there no empathy for them?

### III. Conclusion: Impact on Powell’s Legacy

Justice Powell’s vote with the majority in *Roe* is indeed baffling. It is not satisfactorily explained by *Griswold* as

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171. Randy Beck, Gonzales, Casey, and the Viability Rule, 103 Nw. U. L. REV. 249, 270 (2009).

172. *Id.* at 257–61. It is noteworthy that prominent pro-choice advocates have also criticized the viability concept. Carl Sagan, for example, maintained that “[v]iability arguments cannot . . . coherently determine when abortions are permissible.” Carl Sagan & Ann Druyan, *Is It Possible to Be Pro-Life and Pro-Choice?*, PARADE MAG., Apr. 22, 1990, at 8.

173. *Supra* notes 163–64 and accompanying text. Powell’s clerk, Larry Hammond, wrote to him that a first-trimester rule would fall “most heavily” on “the poor and the black.” Memorandum from Larry Hammond, Law Clerk, Supreme Court of the United States, to Justice Lewis F. Powell, Jr., Supreme Court of the United States (Dec. 12, 1972) (on file with the Powell Archives, Washington and Lee University School of Law).

174. *See supra* note 173 (including these two demographics in the same generalization).

precedent,<sup>175</sup> by appealing to the future,<sup>176</sup> or by empathy.<sup>177</sup> The question yet to be explored is how this confounding vote should impact Powell's legacy.

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175. *Supra* Part II.B. I am aware that since *Roe* there have been multiple efforts to bolster its outcome with constitutional theories not used in *Roe* itself. *E.g.*, WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005). "Today the gender-equality argument is plainly dominant in the justification of *Roe*." JEFFRIES, *supra* note 27, at 364 n.\*. Because "[t]he argument from equality was not yet developed in 1973," LAZARUS, *supra* note 35, at 371, evaluating this theory is beyond the scope of this Article, which seeks to assess Justice Powell's vote as of the time he cast it. For my views on equality-based defenses of *Roe*, see Calhoun & Sexton, *supra* note 150, at 474–83.

176. *Supra* Part II.C.

177. *Supra* Part II.D. Professor Jeffries suggests that the "[m]ost important" reason for Powell's vote may have been the existing firm majority for striking the abortion statutes at the time he arrived on the Court. JEFFRIES, *supra* note 27, at 349–50. Powell thus "had no reason to think that his vote would matter one way or the other." *Id.* at 350. Jeffries acknowledges that the fact "the issue seemed settled was in itself no reason to support the constitutionalization of abortion," but nonetheless concludes that this situation "eased Powell's way into a preexisting majority." *Id.* Jeffries may well be right, but this still is an unsatisfactory explanation of Powell's vote. As we have seen, Powell played an active part in the deliberations and was instrumental in expanding the unfettered abortion right to fetal viability. *See supra* notes 153–64 and accompanying text (explaining that Powell advocated for the viability standard and why he believed in that standard). Not only were Powell's reasons for this expansion unconvincing, *supra* notes 165–74 and accompanying text, but also his active participation had implications for how the Justices would view their decision in *Roe*. "Any fears . . . [they] may have had that they were embarking on a radical course would have been allayed by Powell's presence and performance." LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 228 (2012).

Some might proffer another possible explanation for Powell's vote—he was very new on the Court, with just over one year's service. *Supra* text accompanying notes 37–38. Perhaps the natural diffidence of a relatively new Justice made him reluctant to confront his more experienced colleagues. This theory, although plausible in the abstract, is contradicted by Powell's actions, noted in the previous paragraph, in urging Justice Blackmun to expand the unfettered abortion right to fetal viability. The "diffident Powell" theory is also undercut by his actions in another controversial decision even earlier in his tenure, *Furman v. Georgia*, 408 U.S. 238 (1972). *Furman*, decided roughly six months after Powell's installation, involved a constitutional challenge to three death sentences, two from Georgia and one from Texas. *Id.* at 239. The Court invalidated the death sentences as violative of the Eighth and Fourteenth Amendments, *id.* at 239–40, and Powell filed a fifty-six page dissenting opinion, *id.* at 414–65, which plainly demonstrates his willingness to speak out despite being a newcomer.

I begin with the unremarkable observation that no one of us can be perfectly consistent in following our principles. Thus, it is not particularly surprising that Powell may have experienced lapses in his effort to exercise judicial restraint. This is in essence the conclusion of Judge J. Harvie Wilkinson III.<sup>178</sup> Powell “took

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Admittedly, there are important differences between *Furman* and *Roe*. The Fifth Amendment refers to capital crimes once directly and twice indirectly. U.S. CONST. amend. V. This fact was very important to Powell’s conclusion that “there cannot be the slightest doubt that [the Framers] intended no absolute bar on the Government’s authority to impose the death penalty.” *Furman*, 408 U.S. at 419–20 (Powell, J., dissenting). There is no comparable constitutional language endorsing a governmental right to proscribe abortion. Thus, the *Furman* majority may well present a stronger case of judicial activism than does *Roe*’s. Nonetheless, as Professor Jeffries acknowledges, *Roe* is an extreme example of activism. *Supra* text accompanying notes 30–34. It is therefore appropriate to contrast Powell’s dissent in *Furman* with his joining the *Roe* majority.

Powell’s *Furman* dissent presents several interesting ironies. One is that the case involved Texas and Georgia, as did *Roe* and *Doe*. More significant is the substance of Powell’s argument, which contains numerous points that this Article argues should have appeared in a Powell dissent in *Roe/Doe*. Powell’s *Furman* dissent is too long to be exhaustively described, but one passage is sufficient to demonstrate its relevance to *Roe*:

[The ruling] invalidates a staggering number of state and federal laws. . . . The Court’s judgment not only wipes out laws presently in existence, but denies to Congress and to the legislatures of the 50 States the power to adopt new policies contrary to the policy selected by the Court. . . .

In terms of the constitutional role of this Court, the impact of the majority’s ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the legislative branch. . . . It is the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped. Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who sit on this bench of the duty of self-restraint, especially when called upon to apply the expansive due process . . . rubric[.]. I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent.

*Furman*, 408 U.S. at 417–18 (Powell, J., dissenting); see also *id.* at 461–65 (describing how the Court’s ruling deprives states of legislative power). This quote’s final sentence presents the most striking irony. In a few short months, Powell would himself significantly contribute to a stunning subordination of democratic governance in *Roe*.

178. Judge Wilkinson was Justice Powell’s former clerk and a personal friend. *Supra* text accompanying note 112.

the habit of deference seriously.”<sup>179</sup> Yet even though his “career was governed by canons of caution, [Powell] nonetheless voted with the majority in *Roe v. Wade*,”<sup>180</sup> a decision that Wilkinson vigorously condemns as the antithesis of restraint.<sup>181</sup>

I could conclude here by simply agreeing with Wilkinson that Justice Powell, “for all . . . [his] talent, [was] unable to make of restraint a prevalent and enduring creed.”<sup>182</sup> But I am compelled to proceed, in part because of the subtle warning in Professor Thomas Reed Powell’s famous statement, “If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you

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179. WILKINSON, COSMIC CONSTITUTIONAL THEORY, *supra* note 30, at 110. Powell “practiced a principled restraint.” J. Harvie Wilkinson III, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 417, 419 (1987) [hereinafter Wilkinson, *Tribute*].

180. WILKINSON, COSMIC CONSTITUTIONAL THEORY, *supra* note 30, at 109. Judge Wilkinson believes that Powell’s *Roe* vote is also inconsistent with his vote in *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (holding that Georgia’s sodomy statute did not violate the fundamental rights of homosexuals) (Powell, J., concurring). See Wilkinson, *Tribute*, *supra* note 179, at 420 & n.17 (offering a comparison between *Roe* and *Bowers* as evidence that “[s]ome of [Powell’s] votes are not easy to reconcile”). As further evidence that Powell was not always consistent, after his retirement he recanted his vote in *Bowers*. Powe, *supra* note 30, at 44. *Plyler v. Doe*, 457 U.S. 202 (1982), may be another decision in which Powell’s vote was inconsistent with his basic judicial philosophy. See *supra* note 140 (discussing *Plyler* and the basis for Powell’s vote in that case).

181. See *supra* note 30 and text accompanying note 126 (describing Judge Wilkinson’s qualms with *Roe*). In view of Judge Wilkinson’s strong denunciation of *Roe*, his measured criticism of Powell’s vote in itself demonstrates judicial restraint, no doubt in part due to Wilkinson’s long and close association with the Justice. Professor Ronald Krotoszynski, in an article discussing “the Supreme Court’s creation and enforcement of unenumerated constitutional rights,” does not comment on Powell’s *Roe* vote. Krotoszynski, *supra* note 140, at 133. Had he done so, Krotoszynski, given how he describes Powell, presumably would have agreed with me that the vote was baffling—Powell was a “[p]rincipled conservative” who

argued forcefully that the Supreme Court labors under an obligation to exercise a modicum of self-discipline before interjecting itself into the most contentious issues of the day. . . . [He] respected and observed the prudential doctrines that seek to limit the role of the Supreme Court in a system ostensibly dedicated to *democratic* self-government.

*Id.* at 144–45. As this Article has shown, Powell’s *Roe* vote hardly fits this description.

182. WILKINSON, COSMIC CONSTITUTIONAL THEORY, *supra* note 30, at 110.

have a legal mind.”<sup>183</sup> This Article has until now principally engaged in a detached evaluation of Justice Powell’s *Roe* vote in light of his own judicial philosophy. One cannot ignore, however, the context of this discussion. Abortion necessarily involves the purposeful destruction of a developing human life. Consequently, any assessment of constitutional principles, and of Powell’s legacy, must ultimately take this into account.

Any ill-grounded constitutional adjudication thwarts democratic self-government. As stated by Justice Byron White, “decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people’s authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.”<sup>184</sup> *Roe*, having no convincing constitutional basis, is subject to this criticism. But because *Roe* dealt with abortion, a deeply controversial moral dispute, the Court’s usurpation of popular government is especially problematic.<sup>185</sup>

Consider the moral values that clash in the abortion debate. “To pro-choicers, the freedom to choose abortion is integral to a woman’s equality, dignity, and liberty—a critical dimension of a woman’s right to control her own body.”<sup>186</sup> But “to pro-lifers, a woman who chooses abortion does not simply exercise sovereignty over her own body, but also takes the life of another human

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183. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2433 n.2 (2013) (Ginsburg, J., dissenting) (quoting THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 101 (1935) (internal quotation marks omitted)). I use this quote not to make a point about the physical connection between fetuses and the women carrying them, but instead to refer to elements of an argument that are inseparable despite one’s efforts to think of them in isolation.

184. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 787 (1986) (White, J., dissenting). Conversely, “[b]ecause the Constitution itself is ordained and established by the people of the United States, [properly grounded] constitutional adjudication . . . does not . . . frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own making.” *Id.*

185. This Article has previously rebutted the suggestion that the existence of a popular dispute *justifies* the Court’s intervention. *Supra* notes 77–79 and accompanying text.

186. Samuel W. Calhoun, *Why Strive for Balance in a Roe Symposium?*, 71 WASH. & LEE L. REV. 817, 818 (2014).

being.”<sup>187</sup> It is difficult to imagine a disagreement more fundamental and seemingly intractable.<sup>188</sup>

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187. *Id.*

188. The example of second-trimester fetuses makes this clear. The principal abortion method at this stage of pregnancy is dismemberment by dilatation and evacuation (D&E). WARREN M. HERN, *ABORTION PRACTICE* 122–56 (1990). Pro-lifers often combat such practices by displaying graphic images of the results. Professor Jeffries criticizes such tactics as “savagery.” JEFFRIES, *supra* note 27, at 367. Jeffries does not explain his evaluation, but it is easy to see that pro-lifers and pro-choicers would assess the strategy very differently. A pro-choicer might be inclined to agree with Jeffries, but a pro-lifer would ask, “What is true savagery—to show pictures of dismembered fetuses or the dismembering itself?”

Pro-choicers and pro-lifers would also obviously differ in assessing Blackmun’s decision to expand the unfettered abortion right to viability, *but see supra* note 123, thereby subjecting second-trimester fetuses to destruction at their mothers’ will. Pro-lifers are no doubt appalled, whereas it is clear that some pro-choicers view this change as a positive achievement. Justice Powell complimented his clerk, Larry Hammond, for educating him “on the viability issue.” Memorandum from Justice Lewis F. Powell, Jr., Supreme Court of the United States, to Larry Hammond, Law Clerk, Supreme Court of the United States (Jan. 3, 1973) (on file with the Powell Archives, Washington and Lee University School of Law). But, in the very next sentence, Powell states that he himself “was perhaps the first to press for viability change.” *Id.*; *supra* notes 153–60 and accompanying text. Arizona Supreme Court Justice Andrew Hurwitz, former law clerk to Judge Jon Newman, whose views on viability so influenced Powell, *supra* notes 159–60 and accompanying text, wrote an entire law review article to claim the credit for his judge. Andrew D. Hurwitz, *Jon O. Newman and the Abortion Decisions: A Remarkable First Year*, 46 N.Y.L. SCH. L. REV. 231 (2002–03).

One’s stance on each of the foregoing situations ultimately depends on how one views the moral status of second-trimester fetuses. Pro-lifers would accord them independent moral status and thus argue that there should be no general freedom to kill them by abortion. Some pro-choicers would disagree, arguing that only in the third trimester does the fetus become a being with independent moral status. For some, this time limitation on an unrestrained right to abort, *but see supra* note 123, is not based on fetal viability—in other words, survivability—but rather on fetal brain development. *See* RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 168–70 (1993) (explaining the relationship between brain activity and viability); Easterbrook, *supra* note 52, at 21, 25 (discussing a fetus’s brain activity in the third trimester and arguing that a trimester approach is thus better than the current viability framework); Sagan & Druyan, *supra* note 172, at 7–8 (discussing when brain waves appear in fetuses and how this should factor into the abortion timeline). As citizens in a democracy, advocates for both sides should have been left free to do battle in the political realm on this hotly contested issue. Instead, *Roe* (and Powell) unjustifiably accorded constitutional status to one side of the debate.



The disputants had already joined in a spirited contest in the normal venues a democracy affords when the *Roe* Court, with no persuasive constitutional warrant, suddenly intervened.<sup>189</sup> The impact on the abortion debate was cataclysmic. In one critical sense, the debate was ended, for the Court effectively locked the pro-life side out of the political arena.<sup>190</sup> Moral arguments could still be asserted, but it was no longer possible for pro-lifers to operate as citizens in a democracy routinely do—attempt to persuade their fellow citizens that certain moral principles should be reinforced by law.<sup>191</sup>

Not only did *Roe* radically disrupt an ongoing moral debate, but the Court itself became a participant by putting our legal system's "highest moral imprimatur" on abortion.<sup>192</sup> Some might contest this claim, either as to the formal role of the Court in our government or the informal perception of its decisions by our

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189. *Roe* is of special concern not from the mere fact that abortion is a moral issue, but because the Court, *lacking constitutional authority*, intervened in a moral dispute. As stated by Professor Ely,

the Court often resolves difficult moral questions, and difficult questions yield controversial answers. I doubt, for example, that most people would agree that letting a drug peddler go unapprehended is morally preferable to letting the police kick down his door without probable cause. The difference, of course, is that the Constitution, which legitimates and theoretically controls judicial intervention, has some rather pointed thing to say about this choice. There will of course be difficult questions about the applicability of its language to specific facts, but at least the document's special concern with one of the values in conflict is manifest. [The Constitution] simply says nothing, clear or fuzzy, about abortion.

Ely, *supra* note 22, at 927.

190. *Supra* notes 122–31 and accompanying text. Following the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), pro-lifers were given "considerable leeway to discourage . . . [abortion] through legislation." LAZARUS, *supra* note 35, at 485. This Article, however, focuses on *Roe*.

191. Amending the United States Constitution was still theoretically possible, but, given its difficulties, not practically feasible. See U.S. CONST. art. V (detailing the process by which the Constitution may be amended, providing that any Amendment must be "ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . .").

192. Steven G. Calabrisi, *How to Reverse Government Imposition of Immorality: A Strategy for Eroding Roe v. Wade*, 31 HARV. J.L. & PUB. POL'Y 85, 85 (2008).

society. Justice Blackmun presumably also would have objected to the assertion that *Roe* provided a positive moral endorsement to abortion. Blackmun, after all, began the *Roe* majority opinion by noting the intense moral debate on abortion, but then quickly stated that the Court's "task . . . [was] to resolve the issue by constitutional measurement."<sup>193</sup> Blackmun went even further, professing the earnestness of his commitment to rely exclusively on the Constitution.<sup>194</sup>

Blackmun's assertion that constitutional *law*, not moral principles, would determine *Roe*'s outcome, does not diminish the moral message of the decision. Fundamental rights jurisprudence requires recourse to moral values, at least as understood by Justice Powell. As previously noted,<sup>195</sup> he recognized that judges, in evaluating fundamental rights claims, should be constrained by "careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'"<sup>196</sup> If the Court concludes that the right to abortion is an aspect of the right to privacy so grounded in our society's "basic values" as to be protected from legislative interference,<sup>197</sup> how can it be denied that the Court placed its moral imprimatur on abortion?

But might not one say that *Roe* morally endorsed *only* giving women a choice,<sup>198</sup> not the outcome they might choose, whether

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193. *Roe v. Wade*, 410 U.S. 113, 116 (1973). Many members of the Court have similarly described their role as interpreters of the Constitution. This is true both of majority and dissenting opinions, and both with regard to abortion rights, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849–50 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter), and more generally, e.g., *Lawrence v. Texas*, 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting).

194. *See Roe*, 410 U.S. at 116–17 (stating that the Court should undertake this "constitutional measurement, free of emotion and of predilection").

195. *Supra* notes 94–99 and accompanying text.

196. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1932) (citation omitted). To Justice Cardozo, the issue was whether the putative fundamental right was "of the very essence of a scheme of ordered liberty" or "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

197. This Article has argued that this conclusion is historically indefensible. *Supra* notes 100–03 and accompanying text.

198. *Roe*'s language has been criticized for emphasizing the doctor's medical judgment over a woman's choice. *See, e.g.,* JEFFRIES, *supra* note 27, at 340 ("Worst of all, the opinion read as if it were not really the woman's choice that mattered but rather the medical judgment of her doctor."). Nonetheless, *Roe* on

abortion or maintaining the pregnancy?<sup>199</sup> Although initially this formulation, with which Justice Powell agreed,<sup>200</sup> sounds plausible, it ultimately is unpersuasive. The abortion controversy presents a stark example of competing moral claims—the woman’s right to choose versus the fetus’s right to live. *Roe* accorded absolute deference to a woman’s choice. A non-abortion example demonstrates how assuring choice can constitute a moral judgment. Princeton Professor Peter Singer has suggested that “[p]erhaps, like the ancient Greeks, we should have a ceremony a month after birth, at which the infant is admitted to the community. Before that time, infants would not be recognized as having the same right to life as older people.”<sup>201</sup> The reason he proffers is to allow identification of infants with “severe and irreparable disability,” so that their lives could then be intentionally terminated.<sup>202</sup> Consider the implications were a legislature to pass such a law and a court to uphold it. Most babies are protected, presumably because society considers it morally wrong to kill them. The new law, however, would single out one subclass of babies as killable. Wouldn’t the lack of legal protection necessarily signal that ending these severely handicapped lives is morally appropriate?

Similarly, *Roe* excludes developing human beings from the law’s protection. Allowing women freely to abort their unborn children plainly signals that the Court does not consider the unborn as lives worth protecting.<sup>203</sup> Justice Powell played a

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its face gave women unfettered discretion to choose abortion for the first two trimesters, and, in my opinion, conferred that same freedom for the third trimester as well. *Supra* note 123.

199. Professor Jeffries would seem to agree. *Supra* text accompanying note 116.

200. “[T]he public often thinks we approve of action that the Constitution—in our judgment—permits. For example, we still receive mail criticizing the Court’s 1973 decision sustaining the right of a woman . . . to have an abortion . . . . Contrary to public opinion, the Court expressed no view as to the wisdom or morality of abortions. We simply made a constitutional judgment.” *Constitutional Interpretations*, *supra* note 74, at 16.

201. Peter Singer, *Killing Babies Isn’t Always Wrong*, THE SPECTATOR, Sept. 16, 1995, at 22, available at <http://archive.spectator.co.uk/page/16th-september-1995/22>.

202. *Id.*

203. It is therefore inexplicable that the Court professed not to decide when life begins. *Supra* note 69.

significant role in expanding the period of choice to include the second trimester of pregnancy. *Roe* and Powell thereby denied to first- and second-trimester fetuses the legal protection accorded to babies after birth. This disparate treatment necessarily signals that terminating these fetuses is morally appropriate.<sup>204</sup>

Justice Powell, with his *Roe* vote, deviated from his principles of restraint in the worst possible circumstances. Not only did *Roe* unjustifiably disarm pro-lifers politically in a vitally important and hotly contested public policy dispute, it did so by taking sides in the underlying substantive moral debate. Justice Powell's baffling *Roe* vote therefore regrettably, but unavoidably, tarnishes his legacy as a devotee of restraint.<sup>205</sup>

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204. It is important to remember my contention that the practical effect of *Roe* was to confer an unfettered abortion right all the way to birth. *Supra* note 123. *Roe* thus also signals the moral permissibility of killing even third-trimester, viable fetuses.

205. I thus state my conclusion more strongly than Professor Jeffries's similar assessment. *Supra* text accompanying note 42. I do so principally for the reasons given in the Conclusion, but another point is worth noting. Justice Powell never deviated from his endorsement of *Roe*, even though its majority support eroded over time. Chief Justice Burger, for example, who initially denied that the decision had instituted abortion on demand, *supra* note 123, later changed his mind on this point, leading him to support reexamining *Roe*. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 782–85 (1986) (Burger, J., dissenting). Justice Powell, though, remained a steadfast *Roe* adherent. *See City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 (1983) (reaffirming *Roe*); Powell, *supra* note 24, at 816 (commenting that, had he been on the Court for *Webster v. Reproductive Health Services*, because he “joined *Roe* and wrote the Court opinion in *Akron v. Akron Center for Reproductive Health, Inc.*, there is no secret as to how [he] would have voted in *Webster*”). Because Professor Jeffries emphasizes Powell's unwavering support of *Roe*, JEFFRIES, *supra* note 27, at 353, 369–70, a reader might justifiably find puzzling Jeffries's statement that Powell “said privately that the abortion opinions were ‘the worst opinions I ever joined.’” *Id.* at 341. It is clear, however, that Powell here was not referring to *Roe*'s outcome. Instead, as Jeffries suggests, Powell was likely referring to *Roe*'s stated rationale. It troubled Powell that *Roe* read as defending doctors' medical judgment, not women's right to choose abortion. *See id.* at 340. “It was left to Powell, writing ten years later, to recharacterize *Roe* as holding ‘that the right of privacy . . . encompasses a woman's right to decide whether to terminate her pregnancy.’” JEFFRIES, *supra* note 27, at 340 (quoting *Akron*, 462 U.S. at 419).