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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 13, 1972

RE: Abortion Cases

Dear Harry:

While as you know I am in basic agreement with your opinions in these cases, I too welcome your giving second thoughts to the choice of the end of the first trimester as the point beyond which a state may appropriately regulate abortion practices. But if the "cut-off" point is to be moved forward somewhat, I am not sure that the point of "viability" is the appropriate point, at least in a technical sense. I read your proposed opinions as saying, and I agree, that a woman's right of personal privacy includes the abortion decision, subject only to limited regulation necessitated by the compelling state interests you identify. Moreover, I read the opinions to say that the state's initial interests (at least in point of time if not also in terms of importance) are in safeguarding the health of the woman and in maintaining medical standards. If this be the case, is the choice of "viability" as the point where a state may begin to regulate abortions appropriate? For if we identify the state's initial interests as the health of the woman and the maintenance of medical standards, the selection of "viability" (i.e., the point in time where the fetus is capable of living outside of the woman) as the point where a state may begin to regulate in consequence of these interests seems to me to be technically inconsistent.

"Viability," I have thought, is a concept that focuses upon the fetus rather than the woman. As the opinions point out, there may be some point in pregnancy where the state's interest in protecting potential life becomes sufficiently compelling to sustain regulation of abortions for that reason alone. At this point, however, the state is asserting its interest in the life of the child, as opposed only to

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the health of the woman and the maintenance of medical standards, and thus considerations of "viability" -- the interest in the life of the child -- arise at a point in time after the state has asserted its interests in safeguarding the health of the woman and in maintaining medical standards. It seems to me, therefore, that the selection of the term "viability" to designate the initial point where state regulation is permissible does not coincide with the state interests which your opinions recognize as occurring first in point of time.

Lest I be misunderstood, I have no objection to moving the "cut-off" point (the point where regulation first becomes permissible) from the end of the first trimester (12 weeks) as it now appears to a point more closely approximating the point of viability (20 to 28 weeks), but I think our designation of such a "cut-off" point should be articulated in such a way as to coincide with the reasons (i. e., the asserted state interests) for creating such a "cut-off" point. Thus, the opinions recognize that the danger to the health of the woman who undergoes an abortion tends to increase as the period of pregnancy advances. In fact, I am told (correct me if I am wrong) that at an early stage of pregnancy, prior to 18 or 20 weeks for example, relatively simple and safe abortion procedures such as the suction method or the D and C are available to the physician; but thereafter the abortion methods are medically more complex (i. e., induced labor or Caesarean section) and the danger to the health of the woman increases accordingly as does the required medical facilities and expertise. I read the opinions as saying, and I agree, that these medical considerations are the factors which initially give rise to permissible state regulation of abortions. As such, can we not simply articulate the "cut-off" point in terms which correspond with the factors which give rise to the "cut-off" point in the first place? For example, rather than using a somewhat arbitrary point such as the end of the first trimester or a somewhat imprecise and technically inconsistent point such as "viability," could we not simply say that at that point in time where abortions become medically more complex, state regulation -- reasonably calculated to protect the asserted state interests of safeguarding the health of the woman and of maintaining medical standards -- becomes permissible. By way of discussion, we might then explain that this point usually occurs somewhere between 16 and 24 weeks (or whatever the case may be), but the exact "cut-off" point and the specifics of the

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narrow regulation itself are determinations that must be made by a medically informed state legislature. Then we might go on to say that at some later stage of pregnancy (i. e., after the fetus becomes "viable") the state may well have an interest in protecting the potential life of the child and therefore a different and possibly broader scheme of state regulation would become permissible.

I do not mean to add confusion to such an admittedly complex problem, but I offer these suggestions with the thought that logically -- from both a medical and a legal standpoint -- they might complement the excellent medical and legal discussion which you have put together in the opinions. It seems to me that our reasons for the choice of a "cut-off" point (which I think we all agree must be found) should be consistent with the state interests which allow the states to select a "cut-off" point, and I repeat that I question whether the term "viability" identifies a point in time which is definitionally related to the state interests which can properly be asserted first in time.

I venture two other very minor and unrelated suggestions. First, does not your opinion in the Georgia case cut the heart out of the Georgia statute? If so, should we leave other portions of the statute in tact, as I think you do? Is this a desirable result, particularly during the interval between our decision and the enactment of a new, constitutionally permissible statute by the Georgia Legislature? There may be nothing of substance here, so I leave this to your own discretion.

The second suggestion relates to our discussion of Shapiro v. Thompson on page 19 of the Georgia opinion. Since Shapiro v. Thompson is not relied upon to invalidate the Georgia statute's residency requirement, does not the statement "We see in the statute no undue restrictions on the travel right as such" and the sentence which follows inferentially decide issues which the Court need not decide in this case?

Sincerely,

Bill

Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 18, 1972

RE: No. 70-18 - Roe v. Wade

Dear Harry:

My recollection of the voting on this and the Georgia case was that a majority of us felt that the Constitution required the invalidation of abortion statutes save to the extent they required that an abortion be performed by a licensed physician within some limited time after conception. I think essentially this was the view shared by Bill, Potter, Thurgood and me. My notes also indicate that you might support this view at least in this Texas case. In the circumstances, I would prefer a disposition of the core constitutional question. Your circulation, however, invalidates the Texas statute only on the vagueness ground. I see no reason for a reargument in the Georgia case. I think we should dispose of both cases on the ground supported by the majority.

This does not mean, however, that I disagree with your conclusion as to the vagueness of the Texas statute. I only feel that there is no point in delaying longer our confrontation with the core issue on which there appears to be a majority and which would make reaching the vagueness issue unnecessary.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

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