7-1-2011

Self-Conscious Dicta: The Origins of Roe v. Wade’s Trimester Framework

Randy Beck
University of Georgia School of Law, rbeck@uga.edu

Repository Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Georgia Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Georgia Law. Please share how you have benefited from this access For more information, please contact tstriepe@uga.edu.
The "trimester framework" of Roe v. Wade permitted states to enact different categories of abortion regulations at different stages of pregnancy.1 “For the stage prior to approximately the end of the first trimester,” Justice Blackmun wrote for the Court, “the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.”2 In the second trimester, the state could adopt abortion restrictions "reasonably related to maternal health."3 After fetal "viability"—the point when the fetus could survive outside the womb, then associated with the third trimester—a state’s interest in “the potentiality of human life” would support prohibition of abortion, so long as the law allowed exceptions for the life or health of the mother.4 This trimester framework derived from the Court’s assessment of when in pregnancy each of the two recognized state interests—preserving maternal health and protecting fetal life—became “compelling.”5

* Justice Thomas O. Marshall Professor of Constitutional Law, University of Georgia School of Law. I would like to thank John Little, Isaac McAdams and Jason Sheppard for excellent research assistance. I am also grateful to David Garrow and Clarke Forsythe for helpful comments on a draft of the article. The errors that remain are my responsibility.

3 Id.
4 Id. at 160 (defining “viable” to mean “potentially able to live outside the mother’s womb, albeit with artificial aid”); Beck, supra note 1, at 250 (viability associated with third trimester at time of Roe).
5 Roe, 410 U.S. at 164-65.
6 Id. at 163 (“With respect to the State’s important and legitimate interest in the health of the mother, the ‘compelling’ point, in the light of present medical knowledge, is at approximately the end of the first trimester”); id. (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability.”).
The Court’s subsequent decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* diminished the doctrinal significance of *Roe*’s trimester analysis.7 The controlling plurality opinion of Justices O’Connor, Kennedy and Souter “abandoned” the trimester framework as a rigid prohibition on all pre-viability regulation aimed at the protection of fetal life.8 The plurality did retain one element of the trimester framework—the rule that a state could not forbid abortion prior to fetal viability9—but pre-viability regulations were now reviewed under a less rigorous standard, subject to invalidation only if they created an “undue burden” on the right to terminate a pregnancy.10 *Casey* thus discarded the trimester framework, apart from the viability rule, and diminished the level of scrutiny applied to pre-viability regulations.

One of the many controversies generated by *Roe* has concerned which portions of Justice Blackmun’s opinion should be treated as expressing the holding of the case. The *Roe* opinion itself used the term “holding” in a passage referring to the entire trimester framework: “This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day.”11 It is not clear whether the Court meant the term “holding” here to be understood in the technical sense of “[a] court’s determination of a matter of law pivotal to its decision,”12 or was employing the word more informally.13 If the opinion did mean to

---

8 Id.
9 Id. at 879 (“a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability”).
10 Id. at 876-77.
12 See Black’s Law Dictionary (8th ed. 2004); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) (“The term dicta typically refers to statements in a judicial opinion that are not necessary to support the decision reached by the court. A dictum is usually contrasted with a holding, a term used to refer to a rule or principle that decides the case.”).
13 The Court may have used the word “holding” in a looser sense as a synonym for “decision.” The next two sentences of the opinion, which seem to follow a parallel structure, use the word “decision” in place of the word “holding” in this sentence. Id. at 165-66 (“This holding, we feel, is consistent with the relative
use the term "holding" in its technical sense, then we shall see that the usage was plainly incorrect and inconsistent with what Justice Blackmun was telling other Justices in the Court's internal correspondence about the case.

In two later opinions, Justices critical of the trimester framework offered narrower interpretations of Roe's holding that would exclude part or all of the Court's trimester analysis. In Webster v. Reproductive Health Services, Chief Justice Rehnquist authored a plurality opinion criticizing the trimester framework.\(^4\) Joined by Justices White and Kennedy, Rehnquist rejected the trimester-based analysis, but found no reason to revisit "the holding of Roe, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause."\(^5\) In narrowly describing Roe's holding, the plurality implicitly treated the entire trimester framework—including the viability rule—as \textit{dicta}, unnecessary to the original decision. Three terms later, the Casey plurality took a somewhat broader view of Roe's "essential holding," reading it to encompass the viability rule, and not simply the invalidity of the Texas statute under a due process right to abortion.\(^6\)

Identification of Roe's holding is significant, not just because of the different versions identified in various Supreme Court opinions,
but also as one facet of the larger debate about whether the Roe Court should have drafted a less ambitious opinion. Prior to joining the Court, Justice Ruth Bader Ginsburg gave a famous address arguing that “[a] less encompassing Roe, one that merely struck down the extreme Texas law and went no further on that day, I believe . . . might have served to reduce rather than to fuel controversy.”

Justice Ginsburg’s argument assumes that the Court could have written a narrower opinion that reached the same outcome, i.e., that portions of the Roe opinion were unnecessary to resolution of the issues before the Court.

Access to the papers of several Justices on the Roe Court has opened a window on the internal deliberations in the case. Those papers speak to the issue of Roe’s holding and offer support for Chief Justice Rehnquist’s analysis in Webster. At least four Justices in the Roe majority, including the author of the opinion, stated that the Court did not need to resolve the line-drawing questions addressed in the trimester analysis or used the label “dicta” when referring to draft opinions discussing the duration of abortion rights. Since some of the relevant memoranda were circulated to the entire Court, the Webster plurality’s distinction between Roe’s holding and dicta may have reflected the recollections of Chief Justice Rehnquist and Justice White, who both participated in the original deliberations in the case.

Professor David J. Garrow has previously examined internal documents from Roe and its companion case, Doe v. Bolton, telling a fascinating story about the evolution of the ultimate opinions and revealing some of the “roads not taken” that could have propelled our constitutional history in significantly different directions.

---

17 See Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. REV. 1185, 1199 (1992); see also id. at 1208 (“Roe . . . halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue.”).


19 Roe, 410 U.S. at 171 (Rehnquist, J., dissenting); 410 U.S. at 221 (White, J., joined by Rehnquist, J., dissenting).


21 See supra note 18.
review of the Roe deliberations will take us through some of the same documents discussed by Professor Garrow, but with a narrower, more precise focus. Our goal will be to highlight aspects of the internal Roe deliberations relevant to the holding versus dicta controversy and the genesis of the trimester framework that continues to leave curious traces in our law.\textsuperscript{22} The review will show that Justices who joined Justice Blackmun’s opinion in Roe were self-consciously creating dicta, in part because they wanted to assist legislators who would revise state abortion laws in the wake of the decision.

**ISSUES LITIGATED IN ROE V. WADE**

The Roe v. Wade litigation began in a three-judge district court in Texas.\textsuperscript{23} The plaintiffs included “Jane Roe,” an unmarried pregnant woman, who presented the only claim eventually addressed on the merits by the Supreme Court.\textsuperscript{24} The suit challenged several provisions of the Texas Penal Code, including a general prohibition on abortions:

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the peni-

\textsuperscript{22} See, e.g., Beck, supra note 1, at 257-67 (noting strange consequences of the viability rule and comparing it to the law of other countries).


\textsuperscript{24} Roe sued “on behalf of herself and all others similarly situated.” Id. at 1219 n.1 & 1220. The Supreme Court concluded that “wholly apart from the class aspects” Roe had standing to challenge the Texas statute and that, notwithstanding the conclusion of her pregnancy, this was an appropriate instance for applying an exception to the mootness doctrine for cases “capable of repetition, yet evading review.” Roe v. Wade, 410 U.S. 113, 124-25 (1973) (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). A doctor who intervened after suit was filed was found to have standing in the district court. 314 F. Supp. at 1219 n.1 & 1220. The Supreme Court ultimately ruled that the doctor’s claims should have been dismissed because he was subject to pending criminal prosecutions in state court. Roe, at 126-27 & n.7. There was also a married couple (the “Does”) who sued on behalf of a class in the district court, but the wife did not claim to be pregnant. 314 F. Supp. at 1219 n.1 & 1220. The Supreme Court concluded that the Does’ injuries were too speculative or otherwise insufficient to demonstrate a case or controversy. Roe, 410 U.S. at 127-29.
tentiary not less than two nor more than five years; if it be done without
her consent, the punishment shall be doubled. By “abortion” is meant that
the life of the fetus or embryo shall be destroyed in the woman’s womb or
that a premature birth thereof be caused.\textsuperscript{25}

A separate provision exempted medical abortions to preserve the
mother’s life: “Nothing in this chapter applies to an abortion proc-
cured or attempted by medical advice for the purpose of saving the
life of the mother.”\textsuperscript{26}

Relying on \textit{Griswold v. Connecticut}, the district court agreed with
the plaintiffs that the Texas statute “deprive[d] single women and
married couples of their right, secured by the Ninth Amendment,
to choose whether to have children.”\textsuperscript{27} The court acknowledged the
existence of state interests that might justify abortion regulations,
but found the statute overbroad:

To be sure, the defendant has presented the Court with several compelling
justifications for state presence in the area of abortions. These include the
legitimate interests of the state in seeing to it that abortions are performed
by competent persons and in adequate surroundings. Concern over abortion
of the “quickened” fetus may well rank as another such interest. The difficulty with the Texas Abortion Laws is that, even if they promote these inter-
est, they far outstrip these justifications in their impact by prohibiting
all abortions except those performed “for the purpose of saving the life of
the mother.”\textsuperscript{28}

As suggested by the court’s reference to a possible state interest
in protecting a “quickened” fetus,\textsuperscript{29} nothing in the opinion pur-
ported to definitively resolve the question of how late in pregnancy
the right to abortion lasts. Since the statute applied regardless of
the stage of pregnancy, almost any right to abortion early in preg-
nancy, outside the confines of the “life of the mother” exception,
would make the statute substantially overbroad.\textsuperscript{30}

\textsuperscript{25} 314 F. Supp. at 1219 n.2 (quoting Texas Penal Code art. 1191).
\textsuperscript{26} \textit{Id.} (quoting Texas Penal Code art. 1196).
\textsuperscript{27} \textit{Id.} at 1221 (relying on \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965)).
\textsuperscript{28} \textit{Id.} at 1223.
\textsuperscript{29} See \textit{Roe}, 410 U.S. at 132 (“It is undisputed that at common law, abortion performed before ‘quickening’—the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense.”).
\textsuperscript{30} In addition to the Ninth Amendment ground, the court found the statute unconstitutionally vague because of questions concerning the application of the
The Supreme Court agreed to hear appeals from the district court decision, bypassing the United States Court of Appeals for the Fifth Circuit. Since two positions on the Supreme Court were unfulfilled at the time, the case was initially argued to a seven-Justice bench, along with the companion case of Doe v. Bolton from Georgia. Following confirmation of Justices Powell and Rehnquist, both cases were scheduled for reargument before a nine-member Court.

The parties' briefs in Roe v. Wade made no effort to argue the question of when in pregnancy the right to abortion should end. According to the appellants, Texas could not demonstrate that its statute promoted a compelling interest in protecting prenatal life, but they did not discuss whether such a compelling interest might arise at some stage. The appellee defended “the state's interest in preventing the arbitrary and unjustified destruction of an unborn child—a living human being in the very earliest stages of its development.” Thus, whereas the appellants had argued for a right to abortion and against a state interest in protecting fetal life, the appellee argued that the state interest in protecting fetal life existed at conception and negated any right to abortion. Neither brief addressed the question of, assuming a right to abortion at the outset of pregnancy, when in the process of gestation the state interest in fetal life might supersede the woman's rights. Likewise, though

---

exception to save the mother's life. 314 F. Supp. at 1223. On the question of the appropriate remedy, the district court declared the statute unconstitutional, but refused the plaintiffs' request for an injunction. Id. at 1224.


32 See Garrow, Liberty and Sexuality, supra note 18, at 507 (resignation of Justices Black and Harlan); id. at 522 (cases initially argued before seating of Justices Powell and Rehnquist).


34 Roe v. Wade, 408 U.S. 919 (June 26, 1972). Justice Douglas dissented from the decision to schedule the cases for reargument. Id.

35 Brief for Appellants in Roe v. Wade, 1971 WL 128054, at 118-24. See also Supplemental Brief of the Appellants in Roe v. Wade, 1972 WL 126044, at 9-14 (expanding on argument that statute was not narrowly drawn to achieve compelling interest).

36 Brief for Appellee in Roe v. Wade, 1971 WL 134281, at 55. For the most part, appellee focused on conception, but a few sentences were also devoted to “differentiation” or “implantation” as potentially significant events. See id. at 30.
Justices asked questions in both the initial oral argument and the reargument relating to whether a state might regulate to protect fetal life after some point in pregnancy, the advocates declined to offer any assistance in such a line-drawing exercise.\footnote{See Garrow, Liberty and Sexuality, supra note 18, at 524-27 (describing first oral argument); id. at 525 (Justices Stewart and White questioning Sarah Weddington); id. at 526 (questioning of Jay Floyd); id. at 568-72 (describing second oral argument); id. at 569 (Chief Justice Burger questioning Sarah Weddington); id. at 570-71 (Justice White questioning Sarah Weddington); id. at 571 (Justice White questioning Margie Hames).}

In light of the posture of the litigation and the framing of the issues by the parties, the Court needed to address two principal points of law to resolve the substantive dispute concerning the constitutionality of the Texas statute under the Due Process Clause. First, the Court needed to determine whether the Constitution, as interpreted in the light of privacy precedents, protects a fundamental right to terminate a pregnancy. If the answer was "no," the state would presumably prevail. If the Court found a fundamental right to terminate a pregnancy, it would then need to decide whether Texas had a compelling governmental interest in protecting unborn life from the outset of pregnancy onward.\footnote{Roe, 410 U.S. at 155 ("Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (citations omitted)).} If Texas did have a compelling interest in protecting newly-conceived human life, the statute would presumably be upheld.\footnote{It is possible the Court could have found a compelling interest in protecting fetal life from the point of conception, but nevertheless decided that the statute needed to contain additional exceptions beyond the exception for the mother’s life.} If the Court decided that Texas did not have a compelling interest in protecting unborn life from the point of conception, the statute would be unconstitutionally overbroad.

The Court’s opinion in \textit{Roe v. Wade} resolved both questions against the state of Texas. With respect to the first issue, the Court said:

\begin{quote}
This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reserv-
\end{quote}
tion of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.\(^4\)

With respect to the second issue—Texas' contention that "life begins at conception and is present throughout pregnancy,"—the Court responded "[w]e need not resolve the difficult question of when life begins."\(^4\)\(^1\) Noting "the wide divergence of thinking on this most sensitive and difficult question," the Court said "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."\(^4\)\(^2\)

**HYPOTHETICAL LINE-DRAWING IN THE ROE OPINION**

Had Justice Ginsburg drafted the *Roe* opinion, she might have stopped after concluding that the state lacked a compelling interest in protecting newly-conceived human life.\(^4\)\(^3\) The Supreme Court in *Roe*, however, went forward from that point. The *Roe* Court opined at length about scenarios in which states would or would not have compelling interests in the context of hypothetical statutes regulating abortion in ways Texas had not.

The *Roe* Court first addressed "the State's important and legitimate interest in the health of the mother"—even though Texas had not argued maternal health as a justification for its statute\(^4\)\(^4\)—concluding that "the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester."\(^4\)\(^5\) The Court explained:

This is so because of the now-established medical fact, referred to above, that until the end of the first trimester mortality in abortion may be less

\(^4\)\(^1\) *Id.* at 159.
\(^4\)\(^2\) *Id.* at 160, 162.
\(^4\)\(^3\) Perhaps she would have mentioned the possibility of a compelling state interest in protecting fetal life at some point after conception, the approach taken by the three-judge district court. *See Roe*, 314 F. Supp. at 1223 ("Concern over abortion of the 'quickened' fetus may well rank as another [compelling state] interest.").
\(^4\)\(^4\) The only state interest advanced to support the statute in the Brief for Appellee was the interest in preserving human life. *See Brief for Appellee in Roe v. Wade*, 1971 WL 134281, at 55 ("Whatever personal right of privacy a pregnant woman may have with respect to the disposition and use of her body must be balanced against the personal right of the unborn child to life.").
\(^4\)\(^5\) *Roe*, 410 U.S. at 163.
than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.\textsuperscript{46}

Applying this principle, the Court then purported to address the permissibility of several sorts of health regulations that were not part of the Texas statute under review:

Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.\textsuperscript{47}

This discussion of hypothetical abortion statutes was not necessary to determine the validity of the challenged Texas statute, which included an exemption for abortions conducted “by medical advice” to save the mother’s life,\textsuperscript{48} but did not address matters of qualifications, licensing or facilities.

It could be argued that \textit{Roe’s} discussion of health-related regulations was necessary to resolve the companion \textit{Doe} case, since the Georgia statute included provisions arguably designed to protect maternal health. Justice Blackmun’s opinion in \textit{Roe} indicated that the \textit{Roe} and \textit{Doe} opinions “are to be read together.”\textsuperscript{49} In \textit{Doe}, the Court struck down provisions of the Georgia law requiring abortions to be performed in an accredited hospital,\textsuperscript{50} providing for review of abortion decisions by a hospital abortion committee,\textsuperscript{51} and requiring the concurrence of two doctors in addition to the attending physician.\textsuperscript{52} But this answer takes us only so far as an explanation for \textit{Roe’s} maternal health discussion. These provisions of the Geor-

\textsuperscript{46} \textit{Id.} (reference omitted).
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} See supra text accompanying note 25.
\textsuperscript{49} \textit{Roe}, 410 U.S. at 165; see also \textit{Doe}, 410 U.S. at 189 (“\textit{Roe v. Wade, supra, sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand. What is said there is applicable here and need not be repeated.””).
\textsuperscript{50} \textit{Doe}, 410 U.S. at 193-95.
\textsuperscript{51} \textit{Id.} at 195-98.
\textsuperscript{52} \textit{Id.} at 198-200. The \textit{Doe} Court also invalidated a provision requiring that the patient be a Georgia resident. \textit{Id.} at 200.
The Georgia statute applied to all abortions, including those in the earliest stages of pregnancy. They could have been struck down as overbroad on the ground that maternal health was not a compelling state interest that early in the process of gestation. To rule on these provisions of the Georgia statute, the Court did not need to address hypothetical questions about when in pregnancy health-related regulations might be upheld or what form those regulations could take.

After dealing with maternal health, the Roe Court next addressed “the State’s important and legitimate interest in potential life,” opining that “the ‘compelling’ point is at viability. . . . If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”53 As with the discussion of maternal health regulations, this portion of the Roe opinion would not seem necessary to resolve the case. While the Court did purport to “measure” the Texas statute “against these standards,” its conclusion that the statute was unconstitutional flowed from the fact that it “ma[de] no distinction between abortions performed early in pregnancy and those performed later.”54 The declaration that a state interest in protecting fetal life becomes compelling at viability played no role in the analysis. The Texas statute would have been unconstitutional no matter what line the Court identified: eight weeks, first trimester, quickening, viability, live birth. Any line drawn by the Court after conception would have produced precisely the same result. It would seem, then, that Roe’s viability rule went “beyond the case,” to apply the language from Chief Justice John Marshall’s classic description of dicta.55

**THE ROE COURT’S AWARENESS THAT IT WAS CREATING DICTA**

The Webster plurality’s reading of the holding in Roe presumably rested on reasoning like that above, indicating that Roe’s trimester framework played no genuine role in the invalidation of the Texas

---

53 *Roe*, 410 U.S. at 163-64.
54 *Id.* at 164.
statute. Not everyone has agreed with Chief Justice Rehnquist, however, that Roe's holding extended no farther than the declaration that Texas violated a due process right to abortion. The Casey plurality suggested that at least the viability rule should be treated as part of Roe's holding, and some academic commentary has critiqued the understanding of the holding/dicta distinction supposedly reflected in Chief Justice Rehnquist's Webster opinion.56

Do the Roe Court's internal deliberations tell us anything relevant to this controversy surrounding the holding of the case? Significantly, the available papers of Justices who joined the Roe opinion suggest that they viewed the holding versus dicta question in much the same way as Rehnquist. Those papers clearly reveal the recognition of Justices in the Roe majority that they did not need to resolve the question of the duration of abortion rights, and that portions of the opinion addressing that question represented dicta.

The first oral argument in Roe v. Wade and Doe v. Bolton took place in December 1971.57 Following the initial conference discussion and Chief Justice Burger's assignment of the opinions to Justice Blackmun, Justice Douglas sent Justice Brennan a draft of an opinion in Doe with a cover letter indicating that society has a "rightful concern" with "the life of the fetus after quickening."58 Justice Brennan responded with a memorandum recording his thoughts about the abortion cases, sent only to Justice Douglas, as they waited to see what Justice Blackmun would write. Justice Brennan indicated that he would rather defer the question of the duration of abortion rights until a later case:

[A]lthough I would, of course, find a compelling State interest in requiring abortions to be performed by doctors, I would deny any such interest in the life of the fetus in the early stages of pregnancy. On the other hand, I would leave open the question when life "is actually present"—whether there is

56 See Casey, 505 U.S. at 846; Dorf, supra note 12, at 2032-33. I am not persuaded by Professor Dorf's suggestion that Chief Justice Rehnquist ignored the rationale of Roe. Such a criticism would be valid if he had re-conceptualized Roe's outcome based on some other constitutional theory, for instance, by recasting it as a case about vagueness. However, the Webster plurality acknowledged that Roe invalidated the Texas statute based on a substantive due process right to abortion. 492 U.S. at 521 (Roe held "that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause").

57 See Garrow, Liberty and Sexuality, supra note 18, at 523.

58 Id. at 534.
some point in the term before birth at which the interest in the life of the
fetus does become subordinating.\textsuperscript{59}

Justice Brennan did not use the word "dictum," but he clearly rec-
ognized that the pending cases did not require the Court to express
an opinion as to when in pregnancy a compelling state interest in
protecting fetal life might arise.

Justice Blackmun circulated a May 1972 draft opinion in \textit{Roe v. Wade},
which would have struck down the Texas statute on vague-
ness grounds.\textsuperscript{60} That draft was followed a week later by a draft
opinion in \textit{Doe v. Bolton}, which would have invalidated various pro-
visions of the Georgia abortion statute as violating constitutional
privacy rights.\textsuperscript{61} The \textit{Doe} draft acknowledged that the presence of
the fetus could qualify the woman's right to an abortion at some
point in pregnancy, but did not purport to resolve how far into preg-
nancy the right extended:

The heart of the matter is that somewhere, either forthwith at concep-
tion, or at "quickening," or at birth, or at some other point in between,
another being becomes involved and the privacy the woman possessed has
become dual rather than sole. The woman's right of privacy must be mea-
sured accordingly. It is not for us of the judiciary, especially at this point in
the development of man's knowledge, to speculate or to specify when life
begins. On this question there is no consensus even among those trained
in the respective disciplines of medicine, or philosophy, or theology.

In related contexts we have rejected the claim that an individual has an
unlimited right to do as he pleases with his body. See, for example, \textit{Jacobson
v. Massachusetts}, 197 U.S. 11 (1905) (compulsory vaccination), and \textit{Buck v.
Bell}, 274 U.S. 200 (1927) (compulsory sterilization). Except to note that the
State's interest\textsuperscript{62} grows stronger as the woman approaches term, we need
delineate that interest with greater detail in order to recognize it is a

\textsuperscript{59} Justice William J. Brennan, \textit{Memorandum re: Abortion Cases}, at 9 (Dec. 30,
1971) (emphasis added), \textit{in} William J. Brennan Papers, Library of Congress,
Manuscript Division, Box I:285, Folder 9; \textit{Garrow, Liberty and Sexuality, supra} note 18, at
537.

\textsuperscript{60} \textit{See Roe v. Wade, 1st Draft} (May 18, 1972), \textit{in} Harry A. Blackmun Papers,
Library of Congress, Manuscript Division, Box 151, Folder 4 [hereinafter Blackmun
Papers].

\textsuperscript{61} \textit{See Doe v. Bolton, 1st Draft} (May 25, 1972), in Blackmun Papers, \textit{supra} note
60, Box 152, Folder 7.

\textsuperscript{62} One version of this draft opinion includes here the handwritten emendation
"perhaps." \textit{Id.} at 10-11. I have no information as to whether all copies of this draft
included that change.
"compelling" state interest. As such, it may constitutionally be asserted when the State does so with appropriate regard for fundamental individual rights. *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940). The woman's personal right, therefore, is not unlimited. It must be balanced against the State's interest.63

The draft opinion evaluated the challenged provisions of the Georgia law and found them unduly restrictive of abortion rights in light of the state interests asserted.64 Justices Douglas, Brennan and Marshall joined the opinion the day it circulated, while recommending some improvements, and Justice Stewart joined a few days later, after Blackmun agreed to changes.65 At that stage, five out of the seven Justices who participated in oral argument supported Blackmun's first draft of the *Doe* opinion, which recognized a right to abortion, but did not address the duration of that right.66

Even though he had a clear majority, Justice Blackmun soon suggested that both *Roe* and *Doe* be reargued the following term to a nine-Justice Court.67 His memorandum raised a number of questions that the Court might still want to address, including:

Should we spell out—*although it would then necessarily be largely dictum*—just what aspects are controllable by the State and to what extent? For example, it has been suggested that upholding Georgia's provision as to a licensed hospital should be held unconstitutional, and the Court should approve performance of an abortion in a "licensed medical facility."68

Justice Blackmun did not deal explicitly with the duration of abortion rights in this passage, but he recognized that an opinion addressing "what aspects are controllable by the State and to what extent" would consist "largely" of *dictum*. Justice Douglas vigorously, but unsuccessfully resisted the idea of reargument, telling Justice Blackmun "you have a firm 5 and the firm 5 will be behind you in these two opinions until they come down."69

63 See id. at 10-11.
64 See id. at 13-19.
65 See Garrow, Liberty and Sexuality, supra note 18, at 551-52.
66 Id. at 552.
67 Justice Harry A. Blackmun, Memorandum to the Conference Re: No. 70-18—Roe v. Wade, No. 70-40—Doe v. Bolton (May 31, 1972), in Blackmun Papers, supra note 60, Box 151, Folder 3.
68 Id. at 2 (emphasis added); Garrow, Liberty and Sexuality, supra note 18, at 552-53.
69 Garrow, Liberty and Sexuality, supra note 18, at 553.
Over the summer, Justice Blackmun researched medical aspects of abortion at the Mayo Clinic while a law clerk worked on possible revisions to the draft opinions in *Roe* and *Doe.*\(^\text{70}\) At the end of the summer, the clerk wrote Justice Blackmun a memorandum explaining his proposed changes to the opinions.\(^\text{71}\) He recommended continuing with the plan to resolve *Roe* on vagueness grounds and *Doe* based on substantive due process:

Especially if you draw a line to the force of the privacy right in mid-pregnancy, as I have done in my revised draft [in *Doe*], the vagueness ground in the Texas case is an important complementary holding to that of the Georgia case, and will be necessary for a complete exposition of what the Court thinks would and would not be constitutional in this whole area.\(^\text{72}\)

As part of the effort to generate a “complete exposition” of the constitutionality of statutes “in this whole area,” the clerk indicated that he had revised the *Doe* draft to provide that abortion rights would continue until fetal viability:

I have written in, essentially, a limitation of the right depending on the time during pregnancy when the abortion is proposed to be performed. I have chosen the point of viability for this “turning point” (when state interests become compelling) for several reasons:

(a) it seems to be the line of most significance to the medical profession, for various purposes;

(b) it has considerable analytic basis in terms of the state interest as I have articulated it. The alternative, quickening, no longer seems to have much analytic or medical significance;]

(c) a number of state laws which have a “time cut-off” after which abortion must be more strongly justified by life or health interests use 24 weeks, which is about the “earliest” time of viability.\(^\text{73}\)

Justice Blackmun did not immediately embrace the clerk’s suggestion of making viability the controlling line but, as we shall see, he soon selected a different stage of pregnancy as the terminal point for abortion rights.

---

\(^\text{70}\) Garrow, *The Brains Behind Blackmun*, supra note 18, at 29.

\(^\text{71}\) Memorandum from George [Freeman] to Mr. Justice [Blackmun] (August 11, 1972), in Blackmun Papers, *supra* note 60, Box 152, Folder 5.

\(^\text{72}\) *Id.* at 1.

\(^\text{73}\) *Id.* at 1-2.
All nine Justices met for a conference following reargument of *Roe* and *Doe* in October 1972. Justice Blackmun indicated that he remained “where [he] was last spring,” and planned to continue with the initial approach of resolving *Roe* on vagueness and *Doe* on substantive due process grounds. Justice Powell, however, suggested making *Roe* the lead case and deciding it based on a constitutional right to abortion. Perhaps eager to win the vote of one of the Court’s two new members, Justice Blackmun embraced the recommendation to abandon the vagueness rationale in *Roe* and decide both cases on a substantive due process theory.

Justice Blackmun circulated his second draft of *Roe* in late November. Consistent with Justice Powell’s recommendation at conference, the discussion of a constitutional right to abortion that appeared in the first draft of *Doe* had now shifted to the opinion in *Roe*. For the first time in a circulated draft, the opinion also addressed the issue of the duration of abortion rights:

We repeat that the State does have an important and legitimate interest in the potentiality of human life and that this interest grows in strength as the woman approaches term. At some point this interest becomes “compelling.” We fix that point at, or at any time after, the end of the first trimester, as the State may determine.

A cover memorandum accompanying the opinion explained this change:

Herewith is a memorandum (1972 fall edition) on the Texas abortion case.

This has proved for me to be both difficult and elusive. In its present form it contains dictum, but I suspect that in this area some dictum is indicated and not to be avoided.

You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.

---

74 Garrow, Liberty and Sexuality, supra note 18, at 574-75.
75 Id. at 575.
76 Id. at 576.
77 See Roe v. Wade, 2nd Draft (Nov. 22, 1972), in Blackmun Papers, supra note 60, Box 151, Folder 6.
78 See id. at 48.
79 Id. at 47.
80 Justice Harry A. Blackmun, Memorandum to the Conference Re: No. 70-18—Roe v. Wade (Nov. 21, 1972) (emphasis added), in Blackmun Papers, supra note 60, Box 151, Folder 6; Garrow, Liberty and Sexuality, supra note 18, at 580.
Justice Blackmun's confession that the opinion contained "dictum," followed by his discussion of the "arbitrary" cutoff date, strongly implied that the dicta included the portion of the draft opinion indicating that the state has a compelling interest in potential human life after the first trimester. This understanding of the line between holding and dictum is consistent with Chief Justice Rehnquist's reading of Roe's holding in Webster. Interestingly, the sentence from the final Roe opinion describing the trimester framework as a "holding" already appears in this draft, applied to the first-trimester line drawn by Justice Blackmun.\(^8\)

That the draft opinion applies the word "holding" to what Justice Blackmun's internal cover memorandum labels "dictum" supports the idea that Roe here used "holding" in an informal, non-technical sense.\(^8\)

Professor Garrow describes a memorandum to Justice Powell from one of his law clerks commenting on Blackmun's second draft of Roe. On the issue of the duration of abortion rights, the clerk wrote:

> Since the statutory prohibition [in Texas] was total, it is unnecessary to the result that we draw the line. If a line ultimately must be drawn, it seems that "viability" provides a better point. This is where Judge Newman would have drawn the line.\(^8\)

Like the private memorandum from Justice Brennan to Justice Douglas and the circulated cover memorandum accompanying Blackmun's draft, Justice Powell's clerk acknowledged that the Court could resolve the Texas case without "draw[ing] a line," i.e., that any such line drawing would constitute dicta. The clerk's reference to Judge Newman relates to an opinion in a Connecticut abortion case, Abele v. Markle, which Justice Powell had previously called to the clerk's attention.\(^8\)

Following receipt of his law clerk's analysis, Justice Powell wrote privately to Justice Blackmun to inquire "whether you view your

---

82 See supra notes 12-13 and accompanying text.
83 Garrow, Revelations on the Road to Roe, supra note 18, at 82.
84 Id. (referring to Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972), vacated, 410 U.S. 951 (1973)).
choice of ‘the first trimester’ as essential to your decision.” Powell expressed a preference for viability as a possible line:

I have wondered whether drawing the line at “viability”—if we conclude to designate a particular point of time—would not be more defensible in logic and biologically than perhaps any other single time. I have reread Judge Newman’s opinion in Abele v. Markel [sic] (concurred in by Ed Lumbard). In addressing this issue, he says:

“. . . the 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. The issue might well turn on whether the time period selected could be shown to permit survival of the fetus in a generally accepted sense, rather than for the brief span of hours and under the abnormal conditions illustrated by some of the state’s evidence. As to the latter situation, the nature of the state’s interest might well not be generally accepted. Finally, and most important, such a statute would not be a direct abridgement of the woman’s constitutional right, but at most a limitation on the time when her right could be exercised.”

I rather agree with the view that the interest of the state is clearly identifiable, in a manner which would be generally understood, when the fetus becomes viable. At any point in time prior thereto, it is more difficult to justify a cutoff date.

Of course, it is not essential that we express an opinion as to such a date. Judge Newman did not do this explicitly. In holding the Connecticut statute unconstitutional, he pointed the way generally toward “viability” without making this an explicit ruling.

Justice Powell’s memorandum to Justice Blackmun thus indicated that any cutoff line identified for abortion rights would not affect his vote and, as his law clerk had argued, that the Court did not need to “express an opinion as to such a date.” He clearly viewed any cutoff period as dicta, in other words, and not particularly critical dicta at that.

85 Justice Lewis F. Powell, Jr., Memorandum re: Abortion Cases (Nov. 29, 1972), in Blackmun Papers, supra note 60, Box 151, Folder 8; Garrow, Revelations on the Road to Roe, supra note 18, at 83.

86 Justice Lewis F. Powell, Jr., Memorandum re: Abortion Cases, supra note 85, at 1-2 (emphasis added).

87 Id. at 2.

88 He also recognized that Judge Newman’s opinion, from which he drew his inspiration, had addressed this issue only in dicta. Id.
Justice Blackmun’s private response to Justice Powell indicated that he had “no particular commitment to the point marking the end of the first trimester as contrasted with some other point, such as quickening or viability.” He “could go along with viability if it could command a court,” noting that “[b]y that time the state’s interest has grown large indeed.” A week later, Justice Blackmun circulated a memorandum soliciting the views of the full Court as to whether viability would be a better choice than the first trimester:

I selected the earlier point because I felt that it would be more easily accepted (by us as well as others) and because most medical statistics and statistical studies appear to me to be centered there. Viability, however, has its own strong points. It has logical and biological justifications. There is a practical aspect, too, for I am sure that there are many pregnant women, particularly younger girls, who may refuse to face the fact of pregnancy and who, for one reason or another, do not get around to medical consultation until the end of the first trimester is upon them or, indeed, has passed.

I suspect that few could argue, or would argue, that a state’s interest by the time of viability, when independent life is presumably possible, is not sufficiently developed to justify appropriate regulation. What we are talking about, therefore, is the interval from approximately 12 weeks to about 28 weeks.

One argument for the earlier date is that the state may well be concerned about facilities and such things as the need of hospitalization from and after the first trimester. If the point of viability is selected, a decision of this kind is necessarily left to the attending physician.

* * *

I might add that some of the district courts that have been confronted with the abortion issue have spoken in general, but not specific, terms of viability. See, for example, Judge Newman’s observation in the last Abele v. Markle decision. Justice Blackmun’s memorandum to the Conference echoed themes from Justice Powell’s private communication, including the

89 Justice Harry A. Blackmun, Memorandum re: Abortion Cases, at 1 (Dec. 4, 1972), in Blackmun Papers, supra note 60, Box 151, Folder 4; Garrow, Revelations on the Road to Roe, supra note 18, at 83.

90 Justice Harry A. Blackmun, Memorandum re: Abortion Cases, supra note 89, at 1.

91 Justice Harry A. Blackmun, Memorandum to the Conference Re: Abortion Cases, at 1-2 (Dec. 11, 1972), in Blackmun Papers, supra note 60, Box 151, Folder 4; Garrow, Liberty and Sexuality, supra note 18, at 582-83.
unelaborated reference to “logical” and “biological” justifications for the viability rule, language that eventually worked its way into the *Roe* opinion.92

Reactions to Justice Blackmun’s inquiry varied. Justice Powell sent a handwritten note: “Harry—I will join your present opinion and so I leave entirely to you whether to address the ‘viability’ issue. It does seem to me that viability is a more logical & supportable time, but this is not a critical issue with me.”93 Justice Douglas, by contrast, wrote, “I favor the first trimester, rather than viability.”94 Justice Marshall foreshadowed the approach eventually taken under *Roe*’s trimester framework. He thought the state interest in “ensuring that abortions be done under safe conditions” could be accommodated if, “between the end of the first trimester and viability,” the opinion permitted regulations “directed at health and safety alone.”95 But he would be “disturbed” if some point before viability was set as the time when “the State’s interest in preserving the potential life of the unborn child overrides any individual interests of the woman.”96 One of Justice Blackmun’s clerks had already made basically the same suggestion, recommending that states be able to regulate abortion for health reasons after the first trimester and to protect fetal life after viability.97 Justice Brennan likewise advocated different cutoff points based on the distinct state interests involved:

> 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

---

92 *Roe*, 410 U.S. at 163 (“State regulation protective of fetal life after viability thus has both logical and biological justifications.”).

93 Note from L.F.P. (Dec. 12, 1972), in Blackmun Papers, *supra* note 60, Box 151, Folder 8.


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 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.98

As with Justice Marshall, we see Justice Brennan identifying distinct state interests—maternal health and medical standards on the one hand, and “potential life” on the other—and advocating different cutoff dates depending on the interest involved.

Of particular relevance for distinguishing holding and dicta in the Roe opinion is Justice Stewart’s response to Justice Blackmun’s inquiry:

One of my concerns with your opinion as presently written is the specificity of its dictum—particularly in its fixing of the end of the first trimester as the critical point for valid state action. I appreciate the inevitability and indeed wisdom of dicta in the Court’s opinion, but I wonder about the desirability of the dicta being quite so inflexibly “legislative.”99

Justice Stewart clearly described the opinion’s discussion of when states could regulate abortion as “dicta,” and criticized that dicta as “legislative” in character due to its rule-like specificity. He instead wanted “to allow the States more latitude to make policy judgments between the two alternatives mentioned in your memorandum, and perhaps others.”100

Justice Blackmun’s third draft of the Roe opinion was the first to include the trimester framework.101 States could regulate abortion procedures to promote the health of the mother after the first trimester.102 After viability, the state could proscribe abortion to

98 Justice William J. Brennan, Jr., Memorandum re: Abortion Cases, at 2-3 (Dec. 13, 1972), in Blackmun Papers, supra note 60, Box 151, Folder 8; see Garrow, Liberty and Sexuality, supra note 18, at 584-85.

99 Justice Potter Stewart, Memorandum re: Abortion Cases (Dec. 14, 1972), in Blackmun Papers, supra note 60, Box 151, Folder 8; see Garrow, Liberty and Sexuality, supra note 18, at 585.

100 Justice Potter Stewart, Memorandum re: Abortion Cases, supra note 98.


102 Id. at 49.
promote its interest in “the potentiality of human life,” except where necessary for the mother’s life or health. In the cover memorandum accompanying the third draft, Justice Blackmun acknowledged his debt to Justices Brennan and Marshall: “I have tried to follow the lines suggested by Bill Brennan and Thurgood.”

**WHY INCLUDE DICTA ON THE DURATION OF ABORTION RIGHTS?**

Our review of the Roe Court’s internal correspondence shows that the Justices knew they were creating *dicta* when they purported to draw lines governing the duration of abortion rights. Justices Brennan and Powell both indicated that the Court did not need to draw a line specifying when a state’s interest in fetal life would supersede a woman’s right to abortion. Justices Blackmun and Stewart both applied the label “*dictum*” or “*dicta*” to the initial attempt at such line-drawing in Roe’s second draft. Moreover, a five-Justice majority of the Court signed onto the initial circulation in Doe, which would have established a right to abortion without opining on any specific temporal limitations. The majority’s understanding of the trimester framework as *dicta* may also help explain the mystery of Justice Douglas joining the majority opinion, but then authoring a concurrence that referred to the “rightful concern of society” with “the life of the fetus after quickening.” In the majority’s internal deliberations, Justice Douglas had opposed setting viability as the cutoff point for abortion rights, and his concurrence may suggest that he thought the controlling line remained open for discussion.

So why would the Court address the duration of abortion rights, albeit in *dicta*, when it knew the issue was not really raised by the cases before it? One strong possibility suggested by the Roe and Doe papers is that Justice Blackmun wanted to provide guidance

---

103 *Id.*

104 Justice Harry A. Blackmun, *Memorandum to the Conference re: Abortion Cases* (Dec. 21, 1972), in Blackmun Papers, *supra* note 60, Box 151, Folder 6; see Garrow, *Liberty and Sexuality*, *supra* note 18, at 585-86.


106 See *supra* text accompanying note 94.
to legislators who would be revising state abortion laws after the decision came down. Justice Blackmun was aware that striking down the Texas statute would invalidate the majority of state abortion statutes. He had suggested to the Court that the Roe and Doe opinions should be released “no later than the week of January 15 to tie in with the convening of most state legislatures,” a target the Court missed by only a week. The manuscript Justice Blackmun prepared to read in announcing the opinions focused on the ongoing legislative process:

Fortunately, the decisions come down at a time when a majority of the legislatures of the states are in session. Presumably where these decisions cast doubt as to the constitutional validity of a state’s abortion statute, the legislature of that state may immediately review its statute and amend it to bring it into line with the constitutional requirements we have endeavored to spell out today. If this is done, there is no need whatsoever for any prolonged period of unregulated abortion practice.

Whatever its shortcomings, the trimester framework at least laid out a road map to show state legislators how they could reduce the risk that revised abortion legislation would face a constitutional challenge.

Beyond a desire to guide state legislators, Justice Blackmun may have had a more personal motive for deciding “just what aspects are controllable by the State and to what extent,” as he put it in his memorandum calling for reargument or, in the words of his law clerk, providing “a complete exposition of what the Court thinks would and would not be constitutional in this whole area.” Justice Blackmun clearly did not relish the reaction his opinions would elicit. A few days after the decisions came down, he gave a public address, commenting that “[n]o matter how the Court ruled, it will be excoriated from one end of the country to the other.” He revealed that he “really resent[ed] that [the abortion issue] had to

---

107 Garrow, Liberty and Sexuality, supra note 18, at 550 (“I should observe that, according to the information contained in some of the briefs, knocking out the Texas statute in Roe v. Wade will invalidate the abortion laws in a majority of our States. Most States focus only on the preservation of the life of the mother.”).

108 See id. at 585.

109 Justice Harry A. Blackmun, No. 70-18—Roe v. Wade; No. 70-40—Doe v. Bolton, at 7, in Blackmun Papers, supra note 60, Box 151, Folder 3.

110 See supra notes 68 & 72 and accompanying text.
come before the Court because it is a medical and moral problem.”¹¹¹ By dealing with most of the significant questions at one time, perhaps Justice Blackmun hoped to reduce the need for the Court to entertain further abortion cases in the future. When Chief Justice Burger raised the issue of the rights of fathers, Justice Blackmun relegated the question to a noncommittal footnote,¹¹² telling the Court he was “somewhat reluctant to try to cover the point in cases where the father’s rights, if any, are not at issue.”¹¹³ But in light of Justice Blackmun’s distaste for deciding abortion cases, one detects a note of lament when he adds, “I suspect there will be other aspects of abortion that will have to be dealt with at a future time.”

WHAT IF THE COURT HAD WAITED?

Justice Ginsburg’s comments on Roe invite us to consider what might have happened if the Court had not aspired to furnish such a “complete exposition” of the constitutional law of abortion. What if the Court had not announced the now-abandoned trimester framework—or its surviving component, the viability rule—as part of the initial Roe opinion? What if the Court had remained silent as to the duration of abortion rights, waiting to address the question in a case where it had to be faced?

If the Court had held out for a case in which counsel had a reason to litigate the line-drawing question, it presumably would have enjoyed the benefit of comprehensive briefing and argument and a factual record prepared to assist in its determination. Professor John Hart Ely criticized Roe’s identification of viability as the controlling line for the state interest in fetal life, contending that “the Court’s defense seem[ed] to mistake a definition for a syllogism.”¹¹⁴ The Roe opinion, in other words, did not adequately justify the viability rule in constitutional terms.¹¹⁵ Might the Court have chosen a different line for the duration of abortion rights, or offered a better

¹¹¹ Garrow, Liberty and Sexuality, supra note 18, at 607.
¹¹² Roe, 410 U.S. at 165 n.67.
¹¹³ Garrow, Liberty and Sexuality, supra note 18, at 586.
¹¹⁵ Beck, supra note 1, at 268-69.
defense of the line it chose, if it had acted in a case where the answer really mattered, in light of a complete record and on the basis of plenary briefing and argument?

The selection of viability as the threshold for state protection of fetal life produces odd consequences that seem difficult to explain in principled terms. Since the point of viability shifts over time in response to medical advances, the viability rule causes fetal and maternal rights to vary based on the existing state of obstetric medicine or the proximity of the mother to cutting edge medical facilities. Since viability is less an objective line than a somewhat subjective prediction informed by objective indicators, the rule subjects fetal and maternal rights to the skill and treatment philosophy of a particular doctor, who may have personal or ideological interests at stake in the viability determination. Moreover, given that prospects for survival depend on the race and sex of the fetus, a focus on viability introduces racial and gender disparities into constitutional law. One consequence of the viability rule, for instance, is that the right to abortion lasts longer, on average, for Caucasian women than for similarly-situated African-American women. Would the Court have been so convinced of the "logical and biological justifications" for the viability rule if counsel had brought such problems to its attention? Or what if the briefing had provided an international perspective demonstrating that drawing the line at viability would result in an abortion regime offering less protection for fetal life than most other countries in the world?

Such questions make for interesting speculation and perhaps provide lessons for courts in future cases. People will no doubt draw disparate conclusions concerning the wisdom of the dicta underlying the Roe Court’s trimester framework. But that the opinion did in fact make extensive use of dicta seems less in doubt, at least when viewed from the perspective of the Justices who participated in the decision.

---

116 Id. at 258-59.
117 Id. at 260.
118 Id. at 260-61.
119 Roe, 410 U.S. at 163.
120 Beck, supra note 1, at 262.