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# Justice John Paul Stevens as Abortion-Rights Strategist

Linda Greenhouse\*

*During his thirty-four years on the Supreme Court, Justice John Paul Stevens has played a significant but largely unrecognized role in the evolution of the Court's abortion jurisprudence. For example, his behind-the-scenes intervention in 1992 was critical to the outcome in Planned Parenthood of Southeastern Pennsylvania v. Casey. In Casey, a majority of the Court came together against all expectations to speak with one voice for the preservation of the constitutional right to abortion. Such a role appeared most unlikely at the time of Justice Stevens's arrival on the Court in December 1975 — he was the first Justice named to the Court since the decision in Roe v. Wade nearly three years earlier — or during the first years of his tenure. The abortion issue had not previously engaged him. In 1985, he observed to his colleagues that he did not know how he himself might have voted had he been on the Court in 1973. But as the abortion issue grew increasingly politicized, and as the Supreme Court found itself enlisted as a prime scene of the conflict over abortion, the middle ground on which Justice Stevens might well have felt comfortable disappeared. When the time came to choose sides, he chose to embrace the full scope of the right to abortion. He became both an indispensable ally to Justice Harry A. Blackmun and a strategic advocate who won the trust of Justice Sandra Day O'Connor, without whose vote the right to abortion would not have been preserved. The purpose of this Article is to trace Justice Stevens's evolution and to give him his due as an important strategist of abortion rights.*

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\* Knight Distinguished Journalist-in-Residence and Joseph Goldstein Lecturer in Law, Yale Law School.

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## INTRODUCTION

John Paul Stevens was the first new Justice to arrive at the Supreme Court after *Roe v. Wade*.<sup>1</sup> Not quite three years separated the decision in the abortion case and the Senate's vote of 98 to 0 on December 17, 1975 to confirm Justice Stevens to the seat vacated by Justice William O. Douglas. The nomination sped through the Senate, with the vote taking place after five minutes of discussion on the Senate floor. President Gerald Ford had made the nomination less than three weeks earlier.<sup>2</sup>

Thirty-seven years and fourteen Supreme Court nominations<sup>3</sup> after the Court declared that the "right of personal privacy" includes the abortion decision,<sup>4</sup> the expectation is now built into the political system that the question of abortion will inevitably cast a long shadow over the nomination and confirmation process. From that perspective, it appears remarkable that no senator asked Justice Stevens a single question about abortion.<sup>5</sup> But, in the context of 1975, the omission was actually not surprising. *Roe* had, after all, been decided by a 7–2 margin, with Justice Douglas in the majority. The decision appeared solid, and it seemed unlikely that Justice Stevens's nomination would have an impact on its future. As the Senate's quiescence indicates, abortion had not yet become a flashpoint in national politics. That came later in the decade, when conservative Republicans made common cause with evangelical Christians in an alliance that helped to elect Ronald Reagan in 1980 and that transformed the antiabortion cause, initially perceived as a special interest of the Catholic Church, into a politically potent national movement.<sup>6</sup>

Although a full account of post-*Roe* politics is outside the scope of this Article, the abortion issue's trajectory on the national stage is a

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> Lesley Oelsner, *Senate Confirms Stevens, 98 to 0*, N.Y. TIMES, Dec. 18, 1975, at A1.

<sup>3</sup> In addition to Stevens: Sandra Day O'Connor, William H. Rehnquist as Chief Justice, Antonin Scalia, Robert H. Bork, Douglas H. Ginsburg, David H. Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, John G. Roberts, Jr., Harriet E. Miers, Samuel A. Alito, Jr., and Sonia Sotomayor.

<sup>4</sup> *Roe*, 410 U.S. at 153.

<sup>5</sup> *Nomination of John Paul Stevens to Be a Justice of the Supreme Court: Hearing Before S. Comm. on the Judiciary*, 94th Cong. (1975) [hereinafter *Nomination*], available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh94-63774/browse.html>.

<sup>6</sup> See, e.g., CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 334–51 (1998) (describing growth of antiabortion movement in national politics).

necessary lens for viewing the singular and unanticipated role that Justice Stevens came to play in preserving the right to abortion as the Court grew increasingly polarized and its adherence to *Roe* ever more tenuous. No one could have known at the time of his nomination that he would turn out to be the last of his kind: the last Republican-appointed Supreme Court Justice who was not vetted in light of the party's official opposition to *Roe*,<sup>7</sup> and who joined the Court before abortion became an essentially partisan issue.<sup>8</sup>

Within a decade of Justice Stevens's arrival on the Court, the abortion issue had become highly politicized, and the Supreme Court itself had been enlisted as a prime scene of the conflict. Both from his lack of prior engagement with the issue<sup>9</sup> and from his votes in the

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<sup>7</sup> Of the seven Justices who voted in the *Roe* majority, five — William J. Brennan, Jr., Potter Stewart, Warren E. Burger, Harry A. Blackmun, and Lewis F. Powell, Jr. — had been appointed to the Court by Republican Presidents. Only one Republican appointee, William H. Rehnquist, voted in dissent; the other dissenter was one of the three Democratic-appointed Justices, Byron R. White, named to the Court by President John F. Kennedy. The other two, who voted with the majority, were William O. Douglas and Thurgood Marshall.

<sup>8</sup> In 1980, the Republican Party platform called for a constitutional amendment to overturn *Roe*, also dropping the party's support for the Equal Rights Amendment, which the Republican platform had supported since 1940. COLUMBIA DOCUMENTARY HISTORY OF AMERICAN WOMEN SINCE 1941, at 340-45 (Harriet Sigerman ed., 2003).

<sup>9</sup> On the United States Court of Appeals for the Seventh Circuit, Judge Stevens had encountered the issue of abortion only once, in the 1973 case *Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973). This brief opinion revealed no abortion-related agenda on the part of its author. The issue was whether a Wisconsin hospital could refuse to permit a doctor who enjoyed staff privileges to perform abortions the *Roe* decision legalized three months earlier. *Id.* at 757. At that time, a recently published federal district court case from New York, issued before *Roe* but after New York had legalized abortion, had required a public hospital to provide abortions for indigent women, who would have received free care had they chosen to deliver their babies there. Failure to provide legally available abortions amounted to "[s]tate coercion to bear children which they do not wish to bear," the district court concluded. *Klein v. Nassau County Med. Ctr.*, 347 F. Supp. 496, 500 (E.D.N.Y. 1972). *Bellin Memorial* was a private hospital, however, and Judge Stevens determined that the New York court's invocation of the Constitution was "inapplicable to private institutions." Noting that the laws of the state of Wisconsin were "completely neutral on the question whether private hospitals shall perform abortions," Judge Stevens concluded there was no state action because the choice of each individual hospital was a private rather than a state-directed choice. *Bellin Mem'l Hosp.*, 479 F.2d at 759-60, 762. The National Organization for Women ("NOW") evidently thought otherwise. Testifying before the Senate Judiciary Committee against Stevens's nomination on December 9, 1975, the second day of the confirmation hearing, Margaret Drachsler of NOW noted that because so many medical facilities were closing their doors to women seeking abortions, the promise of *Roe* remained unfulfilled. "Judge Stevens is partly responsible for this tragic development," she said, citing the decision in *Bellin*

early post-*Roe* cases to uphold some challenged restrictions on access to abortion and to invalidate others,<sup>10</sup> it is easy to suppose that Justice Stevens could have resided comfortably for years in some middle position on abortion. But that was a luxury that he was not to enjoy. The middle ground disappeared. Every member of the Court eventually had to choose sides. The path Justice Stevens travelled to a position in favor of preserving the right to abortion to the maximum extent possible is the subject of this Article.

While the absence of interest in Justice Stevens's abortion views in 1975 is understandable, the real mystery is the lack of appreciation today of his role in the Court's abortion jurisprudence. Beyond describing how his views evolved, this Article's further purpose is to give Justice Stevens his due as a major contributor to the contours of the right to abortion that exists today. Indeed, he has served as an indispensable strategist in the preservation of that right at its moment of greatest need.

Much of the evidence for this conclusion is hiding in plain sight in the pages of the *United States Reports*. For the backstory to the cases in which Justice Stevens participated, this Article relies on the collected papers of Justice Harry A. Blackmun in the Library of Congress. That resource enables the reader to track a relationship between the two Justices that began in distance and wariness and ended in solid alliance, an evolution that reflected Justice Stevens's own deepening engagement with the right to abortion and his commitment to preserving it. Part I discusses the initial divergence between the abortion stances of Justices Stevens and Blackmun in the early post-*Roe* cases. Part II analyzes the growing convergence between the two Justices' approaches to the abortion rights issue. Part III explains how the alliance between Justices Stevens and Blackmun solidified as Justice Stevens began to wield more influence over the Court's abortion jurisprudence. Part IV demonstrates how Justice Stevens solidified his pro-choice stance while forging relationships with other members of the Court. This Article concludes with a discussion of how Justice Stevens continued to exercise strategic judgment to ensure that the right to abortion survived.

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*Mem'l Hosp. Nomination*, *supra* note 5, at 80. No senator chose to follow up on this assertion. It was the only time abortion was mentioned during the hearing.

<sup>10</sup> See generally *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

I. INITIAL DIVERGENCE BETWEEN THE ABORTION STANCES OF  
JUSTICES STEVENS AND BLACKMUN IN EARLY POST-ROE CASES

Justice Stevens's immersion in the intricacies of the Court's evolving abortion doctrine began almost immediately after his appointment to the Supreme Court. Justice Stevens did not align with Justice Blackmun in the early post-*Roe* cases. Justice Blackmun observed his new colleague's distance from his own abortion jurisprudence with concern and growing alarm. Justice Blackmun was not only *Roe*'s author, but by early 1976, he had endured three years of hate mail and had learned to expect pickets at his personal appearances. He had begun to internalize the role that he would fill for the remainder of his career: that of the chief protector and defender of *Roe*.<sup>11</sup> This Part describes Justice Stevens's responses to the state legislatures' novel questions presented in response to *Roe*. Subpart A discusses the issue of parental consent. Subpart B addresses statutory and constitutional concerns regarding public funding of abortions. With no precedents directly on point to guide their reactions to these issues, the Justices, including Justice Stevens, relied on their instincts during this formative period.

A. *Parental Consent in Planned Parenthood of Central Missouri v. Danforth*

From Justice Blackmun's perspective, Justice Stevens's initial encounter with the Court's abortion jurisprudence did not begin auspiciously. Almost three months after Justice Stevens joined the Court, the Justices heard argument in *Planned Parenthood of Central Missouri v. Danforth*,<sup>12</sup> a challenge to one of the numerous statutes enacted to limit the impact of *Roe*. The Missouri law contained two consent provisions. The first was a spousal consent provision, which required a married woman seeking an abortion to obtain the consent of her husband. The second was a parental-consent provision, which required an unmarried minor seeking an abortion to obtain the consent of at least one parent. In the majority opinion by Justice Blackmun, the Court held both provisions unconstitutional. It was inconsistent with *Roe*, the Court said, to allow a third party to come between a pregnant woman and her doctor and exercise an absolute veto over the decision to terminate a pregnancy.<sup>13</sup>

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<sup>11</sup> See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 101, 133-35 (2005).

<sup>12</sup> *Danforth*, 428 U.S. 52.

<sup>13</sup> *Id.* at 74.

Although Justice Stevens voted in conference to invalidate both consent provisions as unconstitutional, he ultimately departed from the majority on parental consent. Justice Stevens agreed that the spousal consent provision was unconstitutional, and he voted in conference to strike down the parental-consent requirement as well. But late in the decisional process, on June 17, 1976, he informed the other Justices that he had changed his mind on parental consent. Later that day, he sent Justice Blackmun a memorandum to say that, as he had indicated at conference that morning, he now agreed with Justice White's proposed dissent on the parental-consent issue and "therefore [would] withdraw [his] concurrence" from the majority.<sup>14</sup> The announcement could not have come as a surprise. Justice Stevens had been circulating a draft of his proposed separate opinion, departing from the majority on parental consent. On his copy of Justice Stevens's draft, Justice Blackmun had written a note to himself indicating his dismay: "Wd [would] drive to other States & we hv [have] t[he] old routine again. There is another world out there the Brethren do not appreciate."<sup>15</sup> That was an image that Justice Blackmun would soon find occasion to invoke again.

The separate opinion that Justice Stevens ultimately published in *Danforth* precisely tracked his draft in upholding the parental-consent provision, except for references to renumbered sections in the majority opinion. Justice Stevens concluded that "the State's interest in the welfare of its young citizens is sufficient, in my judgment, to support the parental-consent requirement."<sup>16</sup> Analyzing the issue, he noted that "a variety of protective measures" applied to minors, who could not enter into contracts, marry without parental consent below a certain age, or "even attend exhibitions of constitutionally protected adult motion pictures."<sup>17</sup> He recognized that the decision whether to have an abortion was more important than whether to go to a movie:<sup>18</sup> "But even if it is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be

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<sup>14</sup> Memorandum from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court (June 17, 1976), in Harry A. Blackmun Collection, Manuscript Division, Library of Congress, box 220, folder 9 [hereinafter HAB Papers].

<sup>15</sup> John Paul Stevens, Third Opinion Draft, in HAB Papers, *supra* note 14, at box 220, folder 9. This Article supplies full words instead of Justice Blackmun's shorthand for ease of reading.

<sup>16</sup> *Danforth*, 428 U.S. at 105 (Stevens, J., dissenting).

<sup>17</sup> *Id.* at 102.

<sup>18</sup> *Id.*

made correctly and with full understanding of the consequences of either alternative.”<sup>19</sup> Justice Stevens deferred to the Missouri state legislature’s conclusion that “most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision.”<sup>20</sup> The new Justice thus concluded his first encounter with abortion law with a foot in each camp. He would soon give Justice Blackmun even more cause for concern.

*B. Public Funding in Beal v. Doe, Maher v. Roe, and Poelker v. Doe*

Approximately six months after *Danforth*, the Court faced a trio of cases, all of which involved the availability of public funding for women who could not pay for abortions. *Beal v. Doe* was a statutory case that addressed whether the federal Medicaid program permitted Pennsylvania to deny Medicaid coverage for “non-therapeutic” abortions, or those deemed not medically necessary.<sup>21</sup> *Maher v. Roe*, from Connecticut, raised the same statutory issue, but also included a constitutional question: did the state’s policy of paying the expenses of childbirth under its Medicaid program, but not for a nontherapeutic abortion, amount to a denial of equal protection?<sup>22</sup> The third case, *Poelker v. Doe*, concerned the refusal of a Missouri public hospital that treated many indigent pregnant women to provide any abortion that was not medically necessary.<sup>23</sup>

Once again, Justice Blackmun could take little comfort from the performance of his newest colleague, as Justice Stevens rejected the statutory and constitutional claims for public abortion funding in all three cases. Even worse, Justice Blackmun lost his *Roe* majority.<sup>24</sup> The vote in each case was 6–3, with Justice Stevens silently joining Chief Justice Warren E. Burger and Justices Lewis F. Powell, Jr. and Potter Stewart (all of whom had voted with the majority in *Roe*), and the two *Roe* dissenters (Justices Byron R. White and William H. Rehnquist), to reject the statutory and constitutional claims. Justice Blackmun’s dissent in *Beal* picked up on the note he had made on Justice Stevens’s

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<sup>19</sup> *Id.* at 103.

<sup>20</sup> *Id.* at 104.

<sup>21</sup> *Beal v. Doe*, 432 U.S. 438 (1977).

<sup>22</sup> *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>23</sup> *Poelker v. Doe*, 432 U.S. 519 (1977).

<sup>24</sup> See cases cited *supra* notes 21–23.

draft dissent in *Danforth* of the previous Term: “There is another world ‘out there,’ the existence of which the Court, I suspect, either chooses to ignore or fears to recognize.”<sup>25</sup>

Although Justice Stevens silently joined the six-Justice majority in the trio of cases to Justice Blackmun’s dismay, there was evidence that his perspective on abortion- rights issues had begun to change. All three cases went to conference on January 14, 1977, and Justice Blackmun’s conference notes indicate that Justice Stevens’s vote was neither reflexive nor untroubled. The hospital policy at issue in *Poelker* was “hard to swallow,” Justice Stevens said, according to Justice Blackmun’s notes.<sup>26</sup> Justice Blackmun’s extensive notes on the conference consideration of the equal protection issue in *Maher* indicate that the Justices’ discussion was lengthy and intense. Justice Stewart said the equal protection claim was “very difficult.” Justice Powell said the case was “not easy for me.” Justice Stevens discussed the case at length, according to Justice Blackmun’s notes: “Important not to overrule Roe . . . Equal Protection difficult but State has an interest, and Roe so recognizes. But legislative arguments not so overwhelming. Impact of Roe is eaten away. Will [the] legislature make the necessary decision? I am concerned whether the democratic process will survive.”<sup>27</sup>

The education of John Paul Stevens had begun. Its fruits would soon be visible.

## II. JUSTICE STEVENS’S JUDICIAL PHILOSOPHY ON ABORTION BEGINS TO CONVERGE WITH JUSTICE BLACKMUN’S PRO-CHOICE STANCE

After the trio of public funding cases in 1977, a pattern emerged in the Supreme Court’s abortion docket. Every time the Court upheld an abortion restriction, jurisdictions around the country quickly adopted similar restrictions, some of which went even further. Every time the Court struck down an abortion restriction, jurisdictions would regroup and come back with a slight modification that might pass the Justices’ scrutiny. Subpart A discusses an example of this pattern in relation to Justice Stevens’s evolving stance on parental consent. Subpart B returns to the public funding issue and addresses Justice Stevens’s shifting abortion jurisprudence in light of the trio of cases

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<sup>25</sup> *Beal*, 432 U.S. at 463 (Blackmun, J., dissenting).

<sup>26</sup> Harry A. Blackmun, Conference Notes on *Poelker v. Doe* (Jan. 14, 1977), in HAB Papers, *supra* note 14, at box 240, folder 1.

<sup>27</sup> Harry A. Blackmun, Conference Notes on *Maher v. Roe* (Jan. 14, 1977), in HAB Papers, *supra* note 14, at box 246, folder 1.

discussed in Part I. In these cases, Justice Stevens became increasingly engaged with the Court's abortion jurisprudence, moving steadily toward Justice Blackmun's position.

A. *Parental Consent in Bellotti v. Baird*

Justice Stevens's evolving position became noticeable in his shifting stance on parental consent in the 1979 case of *Bellotti v. Baird*.<sup>28</sup> The Court reviewed a Massachusetts law that, as authoritatively construed by the highest Massachusetts court, required minors to obtain consent for an abortion from both parents or, alternatively, a judge.<sup>29</sup> The statute authorized judges to grant consent upon finding the abortion to be in the minor's best interest.<sup>30</sup> Conversely, a judge could withhold consent upon finding that abortion would not be in the minor's best interest, even if the minor was "capable of making, and ha[d] made, an informed and reasonable decision to have an abortion."<sup>31</sup> Thus, under the statutory scheme, the decision of a minor capable of giving informed consent to an abortion was nonetheless subject to judicial and parental veto. This rendered the statute unconstitutional, the federal district court held, because once a judge found that a minor was mature and capable of giving informed consent, the minor was entitled, under principles of both due process and equal protection, to be treated as an adult and to proceed with the desired abortion.<sup>32</sup> The Court affirmed, with only Justice White dissenting.

Justice Stevens's joining with the majority to strike down parental consent as unconstitutional in *Bellotti* marked his emergence from the shadows into the limelight of the Court's abortion jurisprudence. The new case provided a context in which his vote was particularly significant, considering his separate opinion that accepted the parental-consent requirement in *Danforth* three years earlier. No longer a passive onlooker, he would now be an active player. Justice Blackmun's conference notes indicate that Justice Stevens was deeply interested in the case, as Justice Blackmun's transcription of Justice Stevens's comments is twice as long as that of any of the other Justices. According to these conference notes, Justice Stevens explained how he would reconcile his vote in *Bellotti* with his vote in *Danforth*. He noted that the Massachusetts statute in *Bellotti* was "very dif" (difficult?

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<sup>28</sup> *Bellotti v. Baird*, 443 U.S. 622 (1979).

<sup>29</sup> *Id.* at 625.

<sup>30</sup> *Id.* at 630.

<sup>31</sup> *Baird v. Attorney Gen.*, 360 N.E.2d 288, 293 (Mass. 1977).

<sup>32</sup> *Baird v. Bellotti*, 450 F. Supp. 997, 1003-04 (D. Mass. 1978).

different?) because it required the involvement of both parents, and not just one as in the Missouri law at issue in *Danforth*.<sup>33</sup>

The Court's difficulty in reaching consensus in the reasoning of its decision motivated Justice Stevens to circulate a concurring opinion, which further indicated that his perspective on abortion-right issues had begun to move towards that of Justice Blackmun. Evidently, there had been earlier discussion in conference about whether portions of the statute that various Justices regarded as problematic might be severable. According to Justice Blackmun's conference notes, Justice Stevens rejected the idea of severability, declaring that he was "with [Justice Blackmun] to reject the whole thing."<sup>34</sup> Chief Justice Burger assigned the opinion to Justice Powell, who circulated a lengthy draft indicating how a legislature might go about crafting a constitutional parental-consent statute. A two-parent consent requirement was not necessarily a fatal flaw, Justice Powell wrote, as long as an adequate judicial bypass existed. Such a bypass would require the judge to accept the decision of a minor deemed mature and competent. The Massachusetts statute's flaw was its lack of such a requirement, Justice Powell concluded. However, Justice Stevens wanted a more straightforward invalidation of the statute, and he circulated the draft of a concurring opinion that demonstrated his evolution more decisively than any position he had yet taken in an abortion case.

In fact, one of Justice Blackmun's law clerks thought this development so worthy of attention that he made it the subject of a separate memorandum to his Justice. Justice Stevens's draft was a "surprise," the law clerk said in describing it as:

[O]bjecting to any form of 'judicial veto' and distaining [sic] any attempt to provide guidelines for the States in drafting a parental consent statute . . . I understand from his clerk that, for example, [Justice Stevens] is not sure that a court should ever be allowed to determine whether a minor is mature or immature, and is not sure that a court should even be allowed to determine whether an abortion is in the best interests of an immature minor.<sup>35</sup>

The law clerk told Justice Blackmun that there was movement toward Justice Stevens's approach of a "narrow, clean, unobjectionable

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<sup>33</sup> Harry A. Blackmun, Conference Notes, in HAB Papers, *supra* note 14, at box 293, folder 6.

<sup>34</sup> *Id.*

<sup>35</sup> Memorandum from Law Clerk to Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court (June 7, 1979), in HAB Papers, *supra* note 14, at box 293, folder 6.

opinion,” despite the fact that such an opinion “would not provide much guidance to the States.”<sup>36</sup> The memorandum continued: “I understand that there is considerable interest in the ‘liberal’ camp (TM [Thurgood Marshall], WJB [William J. Brennan], and now, JPS [John Paul Stevens]) in the possibility of pulling five votes together behind JPS.”<sup>37</sup>

Justice Blackmun, along with Justices Brennan and Marshall, did in fact migrate toward Justice Stevens’s concurrence. They abandoned the Powell opinion, which thus became an opinion for a four-member plurality. It was hardly surprising that Justice Blackmun’s law clerk placed Justices Brennan and Marshall in the Court’s “liberal camp.” The surprise was the law clerk’s placement of Justice Stevens in that camp as well. Certainly, that judgment may have reflected not only the case at hand, but contemporaneous nonabortion developments within the conference. But the appearance of the word “liberal” attached to Justice Stevens in the abortion context within Justice Blackmun’s chambers was highly significant nonetheless. Justice Stevens wrote:

It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. In Massachusetts, however, every minor who cannot secure the consent of both her parents — which under *Danforth* cannot be an absolute prerequisite to an abortion — is required to secure the consent of the sovereign.<sup>38</sup>

Further, he said, the “best interest” standard “provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor — particularly when contrary to her own informed and reasonable decision — is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision.”<sup>39</sup> This was hardly the same Justice who had argued in *Danforth* that the state was entitled to assume that “most parents” would act reasonably and responsibly in deciding whether to permit their daughter’s choice to terminate a pregnancy.<sup>40</sup> And just as he had been willing to take a

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring).

<sup>39</sup> *Id.* at 655-56.

<sup>40</sup> *See supra* Part I.A.

fresh look at parental consent, he was now willing to apply his new perspective to the old issue of public funding.

*B. Public Funding in Harris v. McRae*

Justice Stevens had the opportunity to revisit the public funding issue when the Court addressed it the next year in *Harris v. McRae*.<sup>41</sup> The question was the constitutionality of the Hyde Amendment, a federal budgetary measure that limited, and in most cases prohibited, the use of federal Medicaid money to pay for abortions, including those deemed medically necessary.<sup>42</sup> Justice Stewart's 5–4 majority opinion rested largely on the Court's decision three years earlier in *Maher v. Roe*: "The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest."<sup>43</sup> Justice Stewart acknowledged that "[t]he present case does differ factually from *Maher*"<sup>44</sup> in that the abortions that women sought in *Maher* were not medically necessary, while the plaintiffs challenging the federal law in *Harris* had been found by their doctors to have medical reasons for terminating their pregnancies. But that distinction did not matter, as the Court reasoned:

[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.<sup>45</sup>

Although Congress had chosen to subsidize other medically necessary procedures, that was no reason for it to subsidize abortion as well, the Court concluded: "[T]he fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she

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<sup>41</sup> *Harris v. McRae*, 448 U.S. 297 (1980).

<sup>42</sup> *Id.* at 300–01.

<sup>43</sup> *Id.* at 315.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 316.

would have had if Congress had chosen to subsidize no health care costs at all.”<sup>46</sup>

Although Justice Stevens had joined the majority in *Maier*, *Harris* presented a fundamentally different case for him, as Justice Blackmun’s notes demonstrate. The difference, in his view, was that while *Maier* concerned abortions that were not medically necessary, the Hyde Amendment cut off money for women who had medical reasons for terminating their pregnancies.<sup>47</sup> At conference on April 25, 1980, Justice Stevens declared that “*Maier* is correctly decided,” but that the new case was “not controlled by *Maier*” and “cannot square with *Roe*.”<sup>48</sup> According to Justice Blackmun’s notes, Justice Stevens was especially offended that the Hyde Amendment had not been proposed and debated as separate legislation, but rather had been enacted as a rider to the Department of Health, Education and Welfare appropriations bill. Such a strategy meant that then-President Carter would either have to accept the Hyde Amendment or throw a major Cabinet-level department into budgetary chaos. “We make federal policy by holding a revenue bill hostage — reprehensible!”<sup>49</sup> He described the measure as “a perversion of the spending power.”<sup>50</sup>

In his separate dissenting opinion, Justice Stevens noted that a poor woman ordinarily would be entitled to Medicaid coverage for all medically necessary care.<sup>51</sup> Consequently, given a woman’s constitutional right to abortion, “[T]he exercise of that right cannot provide the basis for the denial of a benefit to which she would otherwise be entitled.”<sup>52</sup> The Hyde Amendment was, he said, “an unjustifiable, and indeed blatant, violation of the sovereign’s duty to govern impartially.”<sup>53</sup> And he offered another objection as well:

Because a denial of benefits for medically necessary abortions inevitably causes serious harm to the excluded women, it is tantamount to severe punishment. In my judgment, that denial cannot be justified unless government may, in effect, punish

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<sup>46</sup> *Id.* at 317.

<sup>47</sup> *Id.* at 349-51 & n.3 (Stevens, J., dissenting).

<sup>48</sup> Harry A. Blackmun, Conference Notes, in HAB Papers, *supra* note 14, at box 316, folder 8.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Harris*, 448 U.S. at 356 (Stevens, J., dissenting).

<sup>52</sup> *Id.* at 351.

<sup>53</sup> *Id.* at 356-57.

women who want abortions. But as the Court unequivocally held in *Roe v. Wade*, this the government may not do.<sup>54</sup>

These were strong, even passionate words. In a much shorter dissenting opinion consisting of a single paragraph, in contrast to Justice Stevens's more than four pages, Justice Blackmun said he "agree[d] wholeheartedly."<sup>55</sup>

Justice Stevens's evolving positions regarding parental consent in *Bellotti* and public funding in *Harris* reveal an increasing engagement with the Court's developing abortion jurisprudence. He was working continuously to find a place to stand, one that made sense to him amid the roiling waters of the abortion controversy. As Justice Stevens would show throughout his career on the Court, he was never willing to take for granted that he had been right in the past without thinking the problem through in each subsequent iteration.<sup>56</sup> It is worth noting that the Court's membership had not changed during this time. Justice Stevens was not responding to a changed dynamic within the Court, but to his own deepening understanding of the issues at stake. And his colleagues were beginning to pay attention.

### III. JUSTICE STEVENS'S AND JUSTICE BLACKMUN'S ABORTION STANCES CONVERGE AND SOLIDIFY AS JUSTICE STEVENS BEGINS TO WIELD INFLUENCE ON THE COURT

Change came with Justice Sandra Day O'Connor's arrival at the start of the 1981 Term, named by then-President Reagan to succeed Potter Stewart. Justice Stewart had been part of the original *Roe* majority. Although he had joined the conservatives in the subsequent public funding cases, he, unlike Chief Justice Burger, had given no sign of wavering in his support for the underlying right to abortion. Despite the stresses evident in the public funding cases, the *Roe* regime had basically been stable, from the Court's point of view, for more than seven years, even as *Roe*'s storms played out across the political landscape. While public attention focused on Justice O'Connor's role as the first woman on the Court, it could not have escaped notice inside the Court that she was also the first nominee of the first president to have run for office on an official antiabortion platform.<sup>57</sup> What that would mean for the Court's internal dynamic soon became

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<sup>54</sup> *Id.* at 354.

<sup>55</sup> *Id.* at 348 (Blackmun, J., dissenting).

<sup>56</sup> See, e.g., *Baze v. Reese*, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring) (repudiating death penalty after 28 years on Court).

<sup>57</sup> See *supra* note 8.

apparent, as not only the Court's abortion precedents, but also the principle of stare decisis, came under attack from within as well as from outside.<sup>58</sup> Subpart A discusses how Justices Stevens and O'Connor initially diverged in their abortion stances. Subpart B discusses Justice Stevens's reliance on stare decisis and the emergence of his First Amendment Establishment Clause concerns regarding restrictions on abortion. Subpart C explains how Justice Stevens continued to rely on stare decisis and further developed his secular reasoning to uphold the right to abortion. Subpart D concludes by outlining how the abortion stances of Justice Stevens and Justice O'Connor began to align. Justice Blackmun's papers reveal that during this time, Justice Stevens's abortion stance converged and solidified with that of Justice Blackmun. Furthermore, as his position evolved, Justice Stevens began to wield significantly more influence on the Court in shaping its abortion jurisprudence.

A. *Justice O'Connor's and Justice Stevens's Divergent Stances in Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft*

Justice Stevens and Justice O'Connor took opposing stances on abortion shortly after her arrival, beginning with a trio of abortion-regulation cases that reached the Court during the 1982 Term.<sup>59</sup> In one of the cases, *Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft*, Justice O'Connor provided the fifth vote to uphold a Missouri law requiring the presence of a second physician at any post-viability abortion.<sup>60</sup> The doctor's job, in the words of the statute, would be to "take control of and provide immediate medical care for a child born as a result of the abortion."<sup>61</sup>

Although Justice Stevens had voted in conference to uphold the second-physician provision following the argument on November 30, 1982, he later changed his mind. On May 18, 1983, he called Justice Blackmun to say — according to a "note for the file" that Justice Blackmun dictated later that day — "that he had been persuaded by our circulation in *Planned Parenthood* on the second physician issue . . . ."<sup>62</sup> The reference was to Justice Blackmun's dissent, which

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<sup>58</sup> See *infra* note 62.

<sup>59</sup> *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983); *Simopoulos v. Virginia*, 462 U.S. 506 (1983).

<sup>60</sup> *Planned Parenthood*, 462 U.S. at 504 (O'Connor, J., concurring and dissenting in part).

<sup>61</sup> MO. REV. STAT. § 188.030.3 (1983).

<sup>62</sup> Harry A. Blackmun, File Note, in HAB Papers, *supra* note 14, at box 374, folder 1.

called the requirement “overbroad.” While the requirement applied to all post-viability abortions, which Missouri permitted only to preserve a pregnant woman’s life or health, many such abortions were performed with methods that offered no prospect of fetal survival.<sup>63</sup> Justice Stevens, along with Justices Brennan and Marshall, joined Justice Blackmun’s dissent. Justices White and Rehnquist, the two original dissenters in *Roe*, joined Justice O’Connor’s opinion and did not write separately. That these two senior Justices permitted their newest colleague to speak for them on an abortion issue was a way of anointing her as an ally in their anti-*Roe* cause.

*B. Justice Stevens’s Reliance on Stare Decisis and Secular Reasoning  
Emerge in Thornburgh v. American College of Obstetricians &  
Gynecologists*

The growing alliance between Justice Stevens and Justice Blackmun solidified in the next important abortion case, *Thornburgh v. American College of Obstetricians & Gynecologists*, in 1984. In *Thornburgh*, Pennsylvania appealed a preliminary injunction issued by the United States Court of Appeals for the Third Circuit against enforcement of the latest version of the state’s Abortion Control Act.<sup>64</sup> The Third Circuit cited several Supreme Court precedents, principally the holdings in the 1982 trio of cases, in invalidating the new law’s detailed informed consent and reporting requirements.<sup>65</sup> Justice Stevens began an effort to keep the case away from what he must have sensed would be an unfriendly majority. As an alternative to accepting the case for plenary review, he circulated a proposed dismissal by per curiam opinion, noting that the preliminary injunction was not a final judgment and therefore, the Court’s jurisdiction to review it was in doubt. Furthermore, Justice Stevens wrote, “[T]he policies disfavoring piecemeal appellate review and premature adjudication of constitutional questions persuade us that the appeal should be dismissed.”<sup>66</sup>

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<sup>63</sup> *Planned Parenthood*, 462 U.S. at 499-500 (1983) (Blackmun, J., concurring and dissenting in part).

<sup>64</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 750 (1986) (reviewing *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984)).

<sup>65</sup> *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 289-93 (3d Cir. 1984).

<sup>66</sup> Justice Stevens Proposed Per Curiam Opinion, in *HAB Papers*, *supra* note 14, at box 436, folder 1.

However, the other Justices did not instantly support Justice Stevens's proposal to dismiss the case. The proposed six-page per curiam opinion, which Justice Stevens circulated on January 10, 1985, elicited an immediate negative response from Justice Rehnquist. "Dear John," Justice Rehnquist wrote the same day, with copies to all of the other Justices, "It seems to me that the reasons you state in your *Per Curiam* for dismissing the appeal in this case are not reasons which fall within any of the traditional categories under which we have dismissed appeals in the past." Instead, Justice Rehnquist would vote to hear the state's appeal on the merits.<sup>67</sup> After Justice Rehnquist circulated the letter, the other Justices quickly weighed in. Justice Blackmun's notes show four votes — Justices Rehnquist, O'Connor, White, and Chief Justice Burger — to "postpone jurisdiction," that is, to hear the case on the merits and reserve the question of whether to treat it eventually as a mandatory appeal or an ordinary petition for certiorari.<sup>68</sup> With the argument calendar for the 1984 Term already full, the Court carried over the appeal to the following Term.

As the Justices continued to debate the question of their own jurisdiction at the conference of November 8, 1985, Justice Stevens began to invoke stare decisis to support his position. Justices Powell and Stevens expressed continued frustration over the decision to hear the case. "We should not review every abortion case that comes here," Justice Powell said, according to Justice Blackmun's notes. It "does the country no good . . . we will stimulate bitterness . . . no reason to take a case like this." Justice Stevens said he agreed. He said he did not know "how I would have voted in '73" but that stare decisis was now "strongly implicated." He added, "[L]et these decisions simmer a while."<sup>69</sup>

Justice Stevens continued to rely on stare decisis while helping Justice Blackmun shape the majority opinion in *Thornburgh*, as correspondence in Justice Blackmun's file discloses. Ultimately, the abortion "liberals" prevailed on the merits in *Thornburgh* by a 5–4

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<sup>67</sup> Letter from William H. Rehnquist, Assoc. Justice, U.S. Supreme Court, to John Paul Stevens, Assoc. Justice, U.S. Supreme Court (Jan. 10, 1985), in HAB Papers, *supra* note 14, at box 434, folder 10.

<sup>68</sup> Harry A. Blackmun, Conference Notes, in HAB Papers, *supra* note 14, at box 436, folder 1. Debates over the distinction between jurisdictional statements and petitions for certiorari, which used to consume a surprising amount of the Justices' docket-management time, all but ended in 1988 when Congress granted the Court's wish and abolished nearly all the Court's "mandatory appellate jurisdiction." EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 298-99 (9th ed. 2007).

<sup>69</sup> Harry A. Blackmun, Conference Notes, in HAB Papers, *supra* note 14, at box 436, folder 1.

vote. Justice Blackmun wrote a majority opinion that Justices Brennan, Marshall, Powell, and Stevens joined. The intervention of the Reagan Administration as *amicus curiae* for Pennsylvania substantially elevated the temperature of this case. The Solicitor General went beyond the state's own position to argue that the Court should overrule *Roe*. This intervention infuriated Justice Blackmun, who concluded the first draft of his majority opinion with these sentences: "For the Solicitor General to ask us to discard a line of major constitutional rulings in a case where no party has made a similar request is, to say the least, unusual. We decline the invitation."<sup>70</sup> Justice Stevens urged Justice Blackmun to omit the direct attack on the Reagan Administration, and he agreed to do so, informing the other members of his majority by letter:

Dear Bill, Thurgood, and Lewis:

I have been in communication with John by telephone several times this weekend. As you know, he had some reservations about Part V in its original form. Lewis shared some of those reservations.

I now enclose a revision of Part V which, I believe, has John's full approval. Actually, he made some positive suggestions about it which, I think, have strengthened it . . . .<sup>71</sup>

It was the first time, although not the last, that Justice Stevens would offer a calming hand to try to help Justice Blackmun out of a corner into which his fierce emotional attachment to *Roe* had led him. The letter indicates that the junior colleague who had caused Justice Blackmun such dismay a decade earlier had become a trusted advisor on the subject that was, to Justice Blackmun, more important than any other.

In a concurring opinion, Justice Stevens took direct aim at the dissenting opinion filed by Justice White and joined by Justice Rehnquist. The two Justices called for overruling *Roe* in order to "return the issue to the people."<sup>72</sup> Justice White asserted that "[t]he

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<sup>70</sup> Harry A. Blackmun, First Opinion Draft, in HAB Papers, *supra* note 14, at box 435, folder 3; see also GREENHOUSE, *supra* note 11, at 184 (quoting Blackmun's original draft).

<sup>71</sup> Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court (Feb. 10, 1986), in HAB Papers, *supra* note 14, at box 434, folder 10.

<sup>72</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 797 (1986) (White, J., dissenting).

governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb.” He said this interest existed from the moment of conception, and was “equally compelling” throughout pregnancy.<sup>73</sup> This assertion was “surely wrong,” Justice Stevens responded in his concurring opinion. He added, “I recognize that a powerful theological argument can be made for that position, but I believe our jurisdiction is limited to the evaluation of secular state interests.”<sup>74</sup> This foreshadowed the argument that Justice Stevens would later fully develop: that state laws incorporating an official view of the origins and development of human life were fundamentally theological in nature and thus, violated the First Amendment’s prohibition against the establishment of religion.<sup>75</sup>

C. *Justice Stevens Further Develops His Stance on Stare Decisis and Secular Reasoning in Webster v. Reproductive Health Services*

The Court’s continued adherence to *Roe* faced a moment of truth in *Webster v. Reproductive Health Services* in 1989.<sup>76</sup> At issue was a Missouri law that contained what by then were garden-variety abortion restrictions, with the addition of one feature, a preamble declaring: “The life of each human being begins at conception.” Chief Justice Rehnquist’s plurality opinion said this statement was without operative force, simply a “value judgment” that the state was entitled to make. Consequently, there was no need for the Court to pass on its constitutionality.<sup>77</sup>

Justice Stevens saw the matter otherwise, further developing the secular argument he had first advanced in *Thornburgh*. “I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution,” he wrote in his separate opinion, concurring in part and dissenting in part.<sup>78</sup> The preamble was “an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths” that “serve[d] no identifiable secular purpose.”<sup>79</sup> Justice

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<sup>73</sup> *Id.* at 795.

<sup>74</sup> *Id.* at 778 (Stevens, J., concurring).

<sup>75</sup> *See infra* notes 78-80.

<sup>76</sup> *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

<sup>77</sup> *Id.* at 505-07 (Rehnquist, C.J., plurality opinion).

<sup>78</sup> *Id.* at 566 (Stevens, J., concurring and dissenting in part).

<sup>79</sup> *Id.* at 566-67.

Stevens added that “[c]ontrary to the theological ‘finding’ of the Missouri Legislature, a woman’s constitutionally protected liberty encompasses the right to act on her own belief” as to when life begins.<sup>80</sup>

The *Webster* case found Justice Stevens deeply concerned about the future of the right to abortion. He sent an acerbic response to Chief Justice Rehnquist upon receiving his draft majority opinion (which did not turn out to be a majority opinion because Justice O’Connor, adopting a more cautious stance, declined to join it).<sup>81</sup> Chief Justice Rehnquist did not explicitly call for overruling *Roe*. Rather, he wanted to replace the strict scrutiny analysis of *Roe* with a new standard under which a regulation would be upheld if it “reasonably furthers the state’s interest in protecting potential human life.”<sup>82</sup>

“A tax on abortions, a requirement that the pregnant woman must be able to stand on her head for fifteen minutes before she can have an abortion, or a criminal prohibition would each satisfy your test,” Justice Stevens objected in a letter to Chief Justice Rehnquist, with copies to the other Justices. The letter ended: “As you know, I am not in favor of overruling *Roe v. Wade*, but if the deed is to be done I would rather see the Court give the case a decent burial instead of tossing it out the window of a fast-moving caboose.”<sup>83</sup>

#### D. *Justice Stevens Begins to Find an Ally in Justice O’Connor in Hodgson v. Minnesota*

Justice O’Connor’s refusal to join the call to overrule *Roe* — either Justice White’s explicit call in his dissent in *Thornburgh* or Chief Justice Rehnquist’s more oblique one in *Webster* — was significant beyond the outcome of those two cases. Her refusal demonstrated that the alliance she had formed with those two Justices soon after her arrival to the Court was not necessarily permanent. Rather, as with Justice Stevens himself ten years earlier, Justice O’Connor was open to persuasion — or at least, in the opinion of other chambers, to persuasion by Justice Stevens.<sup>84</sup> The first demonstrable opportunity came during the 1990 Term in *Hodgson v. Minnesota*, which posed yet

<sup>80</sup> *Id.* at 572.

<sup>81</sup> See *infra* note 83 and accompanying text.

<sup>82</sup> William H. Rehnquist, First Opinion Draft, in HAB Papers, *supra* note 14, at box 536, folder 5.

<sup>83</sup> Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Chief Justice, U.S. Supreme Court (May 30, 1989), in HAB Papers, *supra* note 14, at box 536, folder 2.

<sup>84</sup> See *infra* note 91.

another permutation of the old parental-involvement question.<sup>85</sup> Minnesota required minors seeking abortions to notify — i.e., to inform, not seek the permission of — both parents. The statute contained a judicial-bypass provision that was to be activated only if a court deemed a bypass to be constitutionally required.<sup>86</sup> The United States Court of Appeals for the Eighth Circuit had ruled en banc that the statute without the bypass was unconstitutional, but that the bypass saved it.<sup>87</sup>

The earlier parental-involvement cases, *Danforth* and *Bellotti*, had not required the Court to answer the question that this case presented: whether a two-parent notice statute posed the same unconstitutional burden as a consent statute and, if so, whether access to a judicial bypass could cure the problem. The two questions were raised separately in a petition from doctors challenging the Eighth Circuit's upholding of the statute-with-bypass, and in a cross petition from the state arguing that no bypass was necessary.<sup>88</sup> The two cases were consolidated for argument.

The variety of questions, including a 48-hour waiting period, made *Hodgson* a complex case, and Justice Blackmun's notes on Justice O'Connor's position are not clear. Justice O'Connor seems to have vacillated during the nearly seven months between the argument on November 29, 1989, and the decision on June 25, 1990. At conference, she seemed inclined to affirm the Eighth Circuit on both the notice and bypass questions. "Notification in general would be OK," she said, according to Justice Blackmun's notes. But she added, "two-parent entails risk, fails on rationality standard . . . No difficulty with the other provisions."<sup>89</sup>

According to Justice Blackmun's notes, Justice Stevens was definitive in rejecting the two-parent notice requirement. "Two-parent notification is outrageous and a terrible burden" that "could be counterproductive," he said.<sup>90</sup> Justice Brennan, as the senior Associate

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<sup>85</sup> *Hodgson v. Minnesota*, 497 U.S. 417, 422-23 (1990); see also *id.* at 436 (noting six previous abortion cases considering constitutionality of parental involvement statutes in Court's last 14 years).

<sup>86</sup> *Id.* at 423.

<sup>87</sup> *Hodgson v. Minnesota*, 853 F.2d 1452, 1456-59 (8th Cir. 1988); see also *Hodgson*, 497 U.S. at 431 (discussing Eighth Circuit's holding).

<sup>88</sup> Petition for Writ of Certiorari at i, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (No. 88-1125); Cross-Petition for Writ of Certiorari at i, *Minnesota v. Hodgson*, 497 U.S. 417 (1990) (No. 88-1309).

<sup>89</sup> Harry A. Blackmun, Conference Notes, in *HAB Papers*, *supra* note 14, at box 545, folder 10.

<sup>90</sup> *Id.*

Justice in the majority, assigned the opinion to Justice Stevens. Justice O'Connor appeared a sure vote to affirm on the unconstitutionality of the bare statute. Whether she would find the bypass adequate remained an open question, at least based on her comments at conference. In March 1990, midway through the decisional process, Justice Blackmun's law clerk advised him: "From what I can gather JPS [Justice Stevens] is walking a very fine line to try to draw SOC [Justice O'Connor] away from the conservatives. As we have discussed JPS is probably the only one who could succeed in reaching SOC."<sup>91</sup>

Justice Stevens came very close to attaining success in persuading Justice O'Connor to completely agree with his position.<sup>92</sup> In the end, total agreement eluded the tentative allies because they differed on their views of the adequacy of the bypass. Justice O'Connor agreed with Justice Stevens that without a bypass, the bare two-parent notice requirement was unconstitutional. Noting that only half the minors in Minnesota lived with both biological parents, she said the law swept too broadly and failed to "serve the purposes asserted by the State in too many cases."<sup>93</sup> She added, "I agree with Justice Stevens that Minnesota has offered no sufficient justification for its interference with the family's decisionmaking processes . . . ."<sup>94</sup> She found the bypass adequate, however, depriving Justice Stevens of a majority on this question. The Court's bottom line, in an opinion by Justice Anthony Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia and supported by Justice O'Connor's separate opinion, was that the bypass saved the statute.<sup>95</sup> In his opinion

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<sup>91</sup> Memorandum from Law Clerk to Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court (Mar. 15, 1990), in HAB Papers, *supra* note 14, at box 545, folder 10.

<sup>92</sup> Earlier, when a question was raised whether the Conference votes had been counted accurately and whether Brennan had properly assumed the position of assigning the opinion, Justice O'Connor wrote to Chief Justice Rehnquist: "John's views are close to my own in these two cases, and, if I understand his approach correctly, I think I can agree with it." Letter from Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Chief Justice, U.S. Supreme Court (Dec. 8, 1989), in HAB Papers, *supra* note 14, at box 545, folder 10. The assignment stood. *Id.*

<sup>93</sup> *Hodgson v. Minnesota*, 497 U.S. 417, 459-60 (O'Connor, J., concurring in part).

<sup>94</sup> *Id.* at 459.

<sup>95</sup> *Id.* at 497-98 (Kennedy, J., concurring in judgment in part and dissenting in part, as joined by Rehnquist, C.J., and White & Scalia, JJ.). Justice Stevens announced the judgment of the Court and delivered an opinion of the Court with respects to Parts I, II, IV, and VII, in which Justices Brennan, Marshall, Blackmun, and O'Connor joined, and an opinion with respect to Part III, in which Justice Brennan joined, and an opinion with respect to Parts V and VI, in which Justice O'Connor joined, and a dissenting opinion with respect to Part VIII.

dissenting from this holding, Justice Stevens said that while a bypass procedure “is designed to handle exceptions from a reasonable general rule,” a two-parent notice requirement was not reasonable; it was “aberrant.”<sup>96</sup> Notice to both parents rather than one was required for no other medical procedure in Minnesota or elsewhere. A minor should not have to “apply to a court for permission to avoid the application of a rule that is not reasonably related to legitimate state goals,” he said.<sup>97</sup> Despite Justice Stevens’s inability to convince Justice O’Connor to wholly join his side, her position is significant because it marked the first time she had ever found an abortion restriction to be unconstitutional.

From the point of view of the developing relationship of trust between Justices Stevens and O’Connor, there was much success embedded in what appeared on the surface to be a failure. The two had agreed that the statute’s 48-hour waiting period was constitutional, as it imposed “only a minimal burden,”<sup>98</sup> thus providing a fifth and sixth vote for the majority holding on that point.<sup>99</sup> On the sensitive question of which standard of review to apply to abortion regulations, Justice Stevens enticed Justice O’Connor by offering something more lenient than strict scrutiny, a middle-tier review under which obstacles to abortion would be struck down only if they were “not reasonably related to legitimate state interests.”<sup>100</sup> Strict scrutiny, by contrast, requires government actions that restrict the exercise of a constitutional right to serve a compelling interest, and to be tailored as narrowly as possible for that purpose.<sup>101</sup>

Although Justice O’Connor did not join the portion of Justice Stevens’s opinion that discussed the standard of review, Part III, she supported his stance in other ways. In her separate concurrence, she said she agreed with “some of the central points made in Part III,” and then used the occasion to attach to Justice Stevens’s “not reasonably related” test her own “undue burden” standard she had developed in earlier opinions.<sup>102</sup> “It is with that understanding that I agree with

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<sup>96</sup> *Id.* at 457 (Stevens, J., dissenting in part).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 449.

<sup>99</sup> *See id.* at 467 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) (“The 48-hour delay *after* notification further aggravates the harm caused by the *pre*-notification delay that may flow from a minor’s fear of notifying a parent.”).

<sup>100</sup> *Id.* at 436 (Stevens, J.) (opinion as to Part III, as joined by Brennan, J.).

<sup>101</sup> *E.g.*, *Parents Involved in Cmty. Educ. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

<sup>102</sup> *Hodgson*, 497 U.S. at 458-59 (O’Connor, J., concurring in part and concurring

Justice Stevens' statement that the 'statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests,' " she said.<sup>103</sup>

The difference between Justices O'Connor and Stevens on the appropriate standard of review had been reduced to a nuance, and the overlap was much more important than the difference. Justice Brennan provided Justice Stevens with legitimacy by joining his Part III, the only other Justice to do so. Earlier, Justice Brennan had offered Justice Stevens some suggestions on a draft opinion. "I realize that you are walking a tightrope in this one," Justice Brennan wrote.<sup>104</sup> Justice Brennan was evidently satisfied that while Justice Stevens applied middle-tier scrutiny — all that was necessary in this case, given the conclusion that the two-parent notice requirement could not survive it — the formula he adopted did not foreclose applying strict scrutiny in a future case. Justice Brennan also joined the portion of Justice Marshall's dissenting opinion that called for strict scrutiny, demonstrating that in his view, the two approaches were not mutually exclusive.<sup>105</sup> As at the beginning of his Supreme Court career, Justice Stevens was straddling two positions, but this time the choice was not between those who would uphold all restrictions on abortion and those who would uphold none. Rather, he was now mediating between the remaining *Roe* loyalists on the Court and Justice O'Connor, who was clearly on her own journey toward embracing the right to abortion.

#### IV. JUSTICE STEVENS SOLIDIFIES HIS PRO-CHOICE POSITION BY CONTINUING TO FORGE RELATIONSHIPS WITH OTHER MEMBERS OF THE COURT

The *Hodgson* experience left Justice Stevens in a singular position. No other Justice completely agreed with his approach to the abortion cases. That fact, which looked like a weakness, instead positioned him as an honest broker whom others could trust — Justices Blackmun,

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in judgment in part) (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in judgment); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting)).

<sup>103</sup> *Id.*

<sup>104</sup> Letter from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to John Paul Stevens, Assoc. Justice, U.S. Supreme Court (Mar. 22, 1990), in *HAB Papers*, *supra* note 14, at box 545, folder 10.

<sup>105</sup> *Hodgson*, 497 U.S. at 472 (Marshall, J., with Brennan and Blackmun, JJ., concurring in part, concurring in judgment in part, and dissenting in part).

Brennan, and Marshall to his left and Justice O'Connor, still so tentative but so essential an ally, to his right. More change was coming. Weeks after the *Hodgson* decision, Justice Brennan retired unexpectedly. The views of his successor, David H. Souter, on abortion and other major issues facing the Court were unknown. This meant that Justice O'Connor's evolving position was all the more crucial and Justice Stevens's task in cementing their tentative alliance and nurturing relationships within the embattled pro-*Roe* majority was all the more urgent. Subpart A describes how Justice Stevens began to forge relationships within the Court to ensure that a pro-choice majority would continue to survive. Subpart B explains how Justice Stevens strategically facilitated an unlikely alliance to preserve *Roe* and stare decisis. During this time, Justice Stevens proved that he had become an influential and successful advocate for the right to abortion.

*A. Justice Stevens's Response to Justice Blackmun's Reaction to the Positions of Justice Souter and Justice O'Connor in Rust v. Sullivan*

Justice Stevens's new role was evident the next Term in *Rust v. Sullivan*.<sup>106</sup> The case was argued during Justice Souter's first month on the Court. The other members of the Court knew that his vote was crucial to the fate of *Roe*. However, none of his colleagues knew how he would cast that vote when the time came. In addition, Justice O'Connor's tenuous position was cause for concern for Justice Blackmun. Justice Stevens ultimately attempted to assuage Justice Blackmun's negative reaction to the positions of Justice Souter and Justice O'Connor in *Rust*.

At issue in *Rust* was the validity of regulations adopted by the Reagan Administration in 1988 under Title X of the Public Health Service Act, which since 1970 had provided federal money for organizations offering "acceptable and effective family planning methods and services."<sup>107</sup> The statute excluded from eligibility "programs where abortion is a method of family planning."<sup>108</sup> The new regulations went further, withholding funds not only from grantees that provided abortions themselves, but also from those that counseled clients about abortion or made referrals to abortion services elsewhere, even in response to a pregnant client's specific request. No matter her preference, a client could be referred only to "providers that promote

<sup>106</sup> *Rust v. Sullivan*, 500 U.S. 173, 220-23 (1991) (Stevens, J., dissenting).

<sup>107</sup> 42 U.S.C. § 300(a) (2006).

<sup>108</sup> *Id.* § 300a-6.

the welfare of mother and unborn child.”<sup>109</sup> Additional restrictions on lobbying and educational activities were also part of the new regulations.<sup>110</sup> The issue before the Court was whether the regulations were valid under the statute and, if so, whether they violated the First Amendment’s Free Speech Clause or Fifth Amendment’s Due Process Clause.

Justice Blackmun’s conference notes from November 2, 1990 reveal that he watched with dismay as Justice Souter cast his vote with Chief Justice Rehnquist to uphold the regulations by what became a 5–4 majority. True, Justice Souter expressed some distaste for the regulations. “Staff went too far” in drafting them, making the government’s case “more difficult than needed,” Justice Souter commented.<sup>111</sup> There was a possibility that the new Justice might eventually change his mind, but the prospect was discouraging.

Moreover, Justice Blackmun’s notes reveal his concern regarding Justice O’Connor’s tenuous position. Justice O’Connor, continuing her drift from the conservatives, voted to strike down the regulations, but only on statutory grounds, without venturing into the constitutional territory of free speech and due process. The “[s]tatute cannot be reasonably interpreted to provide support for some of these regs,” she said.<sup>112</sup> This was a case-specific response, hardly enough to reassure Justice Blackmun about Justice O’Connor’s ultimate intentions.

The draft dissent that Justice Blackmun circulated in February 1991 reflected his fear and frustration over the newest members’ failure to commit explicitly to upholding the right to abortion. “While technically leaving intact the fundamental right protected by *Roe v. Wade*, the Court, ‘through a relentlessly formalistic catechism,’ once again has rendered the right’s substance nugatory,” he wrote in a concluding paragraph, adding: “This is a course nearly as noxious as overruling *Roe* directly . . . .”<sup>113</sup>

Justice Blackmun’s draft dissent prompted a cautionary private letter from Justice Stevens:

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<sup>109</sup> 42 C.F.R. § 59.8(a)(2) (1989) (amended by 65 Fed. Reg. 41270 (2000)).

<sup>110</sup> *Rust*, 500 U.S. at 177-81 (describing disputed regulations 42 C.F.R. §§ 59.2, 59.8(a)(1), 59.8(a)(2), 59.8(b)(5), 59.9, 59.10(a)).

<sup>111</sup> Harry A. Blackmun, Conference Notes, in *HAB Papers*, *supra* note 14, at box 568, folder 6.

<sup>112</sup> *Id.*

<sup>113</sup> *Rust*, 500 U.S. at 220 (Blackmun, J., dissenting) (footnote omitted).

Dear Harry:

You have written a powerful dissent, and I would like to join all of it. I am, however, troubled by the last paragraph. I think it may be poor strategy to assume that either Sandra and David — and certainly not both — are prepared to overrule *Roe v. Wade*. Your last paragraph implies that one who joins the majority opinion has that objective ultimately in mind.

Moreover, I really think that the opinion does not do quite that much damage because, at least for the woman who can afford medical treatment, the right remains intact.

In all events, if you could see your way clear to omitting that paragraph I will join you without reservation. Otherwise, I guess I would have to limit my join to parts I through III.<sup>114</sup>

Justice Blackmun's law clerk, who had in fact drafted the paragraph, recommended that his Justice now omit it. But Justice Blackmun stuck to it, and Justice Stevens ultimately did not join Part IV of Justice Blackmun's dissent. Although Justice Stevens's intervention did not succeed, it demonstrated his commitment to nurturing relationships that offered the only prospect of sustaining a pro-choice majority on the Supreme Court.

*B. Justice Stevens's Role in Preserving Roe and Stare Decisis in Planned Parenthood of Southeastern Pennsylvania v. Casey*

The outlook for sustaining a pro-choice majority dimmed within months, as Clarence Thomas replaced Justice Marshall while a new and possibly dispositive test of *Roe* was headed for the Court. On October 21, 1991, the United States Court of Appeals for the Third Circuit issued a decision on the constitutionality of Pennsylvania's latest set of abortion restrictions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>115</sup> The Third Circuit struck down a spousal-notice provision but upheld several other provisions, including two that the Court had found unconstitutional in earlier cases: a 24-hour waiting period for adult women and an elaborately scripted "informed consent" requirement imposed on doctors.<sup>116</sup> Furthermore, the Third

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<sup>114</sup> Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court (Feb. 7, 1991), in HAB Papers, *supra* note 14, at box 568, folder 4.

<sup>115</sup> 947 F.2d 682, 687 (3d Cir. 1991).

<sup>116</sup> *Id.*

Circuit refused to apply the strict scrutiny test, which was still the standard of review under existing Supreme Court precedent. Instead, the Third Circuit declared that Justice O'Connor's "undue burden" test was now the operative law.<sup>117</sup> The strict scrutiny standard of *Roe* was not "presently the law of the land," the Third Circuit said,<sup>118</sup> because it no longer commanded five votes on the Supreme Court. Rather, Justice O'Connor's "undue burden" test represented the "narrowest grounds" on which the current majority could agree, and thus, was now the standard for evaluating abortion restrictions.<sup>119</sup> The Third Circuit concluded that the spousal-notice requirement imposed an undue burden on the exercise of the right to abortion, while the other two challenged provisions did not.<sup>120</sup>

The plaintiffs had until late January 1992 to file their petition for certiorari, a timetable that would have foreclosed a decision in the case during the 1991 Term or, more importantly, before the 1992 presidential election. Assuming the possibility that *Roe* would be overruled, at the very least the plaintiffs wanted to be able to extract a potent election issue from that unfavorable outcome. So they accelerated their petition in *Casey*,<sup>121</sup> filing it on November 7, 1991, not even three weeks after the Third Circuit's decision.<sup>122</sup> In the ultimate manifestation of their doomsday strategy, they framed a single, provocative question for the Court's review: "Has the Supreme Court overruled *Roe v. Wade*, holding that a woman's right to choose abortion is a fundamental right protected by the United States Constitution?"<sup>123</sup>

Justice Stevens's fruitful relationship with Justice Souter was evident in their shared goal of avoiding the inevitability of the direct confrontation with *Roe* that the petitioners were seeking as a matter of political strategy. On the assumption that the Court would agree to hear the case, both Justices Souter and Stevens worked on rewording the petitioners' question to leave open more minimalist avenues for resolving the issues. On January 15, 1992, Justice Souter sent a

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<sup>117</sup> *Id.* at 693; *see also* cases cited *supra* note 102 (citing cases in which Justice O'Connor developed "undue burden" analysis).

<sup>118</sup> *Casey*, 947 F.2d at 691, 693.

<sup>119</sup> *Id.* at 719.

<sup>120</sup> *Id.*

<sup>121</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>122</sup> On the strategy behind the filing of the petition, *see* GREENHOUSE, *supra* note 11, at 200-02.

<sup>123</sup> Petition for Writ of Certiorari at i, *Casey*, 505 U.S. 833 (No. 91-744) (citation omitted).

memorandum to the conference proposing three questions as substitutes for the one in the petition:

1. Is the 'undue burden' standard of review the appropriate standard of review applicable to the regulation of abortion by the states?
2. If so, did the court of appeals correctly apply that standard to the challenged provisions of the Pennsylvania Abortion Control Act?

[3.]What weight is due to considerations of stare decisis in evaluating the constitutional right to abortion?"<sup>124</sup>

The following day, Justice Stevens proposed an even more understated formulation, one that did not commit the Court to choosing a standard of review. Justice Stevens adopted only Justice Souter's third question regarding stare decisis, and simply listed the challenged provisions of the Pennsylvania statute to ask: "Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act: . . . ?"<sup>125</sup> The Court granted certiorari on Justice Stevens's questions on January 17, 1992, in time to hear and decide the case during the Term that was due to end in fewer than six months.

The essential outline of what came next is, by now, well-known: how three Justices, Sandra Day O'Connor, Anthony Kennedy, and David Souter, secretly worked together to craft an opinion to "adhere to the essence of *Roe*'s original decision";<sup>126</sup> how in late May 1992, Justice Kennedy took Justice Blackmun by surprise in informing him of this fact;<sup>127</sup> and how Justices Stevens and Blackmun added their votes to those of the trio to preserve the constitutional right to abortion in the voice of a Supreme Court majority. Less appreciated is the role that Justice Stevens played in achieving this outcome.

As soon as Justice Stevens saw the trio's draft, he sprang into action, running interference between Justice Blackmun and the other three Justices with the ultimate goal of producing an opinion, or as much of an opinion as possible, for the Court. Justice Blackmun had been working on a dissenting opinion, and he and his law clerk focused on

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<sup>124</sup> Memorandum from David H. Souter, Assoc. Justice, U.S. Supreme Court, to Conference (Jan. 15, 1992), in HAB Papers, *supra* note 14, at box 601, folder 6.

<sup>125</sup> Memorandum from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to Conference (Jan. 16, 1992), in HAB Papers, *supra* note 14, at box 601, folder 6.

<sup>126</sup> *Casey*, 505 U.S. at 869.

<sup>127</sup> See GREENHOUSE, *supra* note 11, at 204-06.

the differences between his position and the analysis contained in the trio's draft; in his view, adherence to the strict scrutiny standard of *Roe* required invalidation of all three provisions.<sup>128</sup> The three Justices adopted Justice O'Connor's undue burden standard; no longer was the right to abortion protected by strict scrutiny. Applying that standard in their opinion, the trio invalidated Pennsylvania's spousal-notice provision, but upheld the "informed consent" provision and 24-hour waiting period that were unconstitutional under Supreme Court precedents directly on point.<sup>129</sup> Neither provision imposed an undue burden, they concluded.

For Justice Stevens, however, the glass was more than half full, as he was considering the long-term future of the right to abortion. "Your opinion is impressive; you are to be congratulated on a fine piece of work," he wrote to "Sandra, Tony, and David" on June 3, 1992.<sup>130</sup> Their decision to write jointly was "a wise one," he continued: "You have written an excellent opinion in which none of the 61 pages is wasted."<sup>131</sup> In his letter, Justice Stevens offered a "partial join" and listed the sections of the opinion that he could sign. Only by his omission of several portions, most notably all of Part I, which criticized *Roe*'s consideration of the trimesters of pregnancy, did he imply any disagreement.

Having pondered for two weeks how to proceed, Justice Stevens sent the trio a follow up letter on June 18, 1992, proposing a major restructuring of their opinion. Criticism of *Roe*, which neither Justice Blackmun nor Justice Stevens could join, would be moved to the end of the opinion, replaced at the beginning by discussions of stare decisis and substantive due process, to which the two could subscribe. Justice Stevens wrote:

In my view, an opinion that begins as an opinion of the Court and continues to speak for a Court for 25 pages would be far more powerful than one that starts out as a plurality opinion

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<sup>128</sup> Harry A. Blackmun, Memorandum of "Mr. Justice" (June 8, 1992), in HAB Papers, *supra* note 14, at box 602, folder 4.

<sup>129</sup> See, e.g., *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (affirming invalidation of provisions of Pennsylvania Abortion Control Act regarding informed consent); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (affirming invalidation of informed consent provision and 24-hour waiting period of city ordinance regulating abortion).

<sup>130</sup> Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court (June 3, 1992), in HAB Papers, *supra* note 14, at box 601, folder 6.

<sup>131</sup> *Id.*

and shifts back and forth between a Court opinion and a plurality opinion.<sup>132</sup>

After making his specific editorial suggestions, he concluded: "I have not discussed these specifics with Harry yet, but because time is short [the Term would end within 10 or 12 days] and I am convinced that there is great value in having an opinion that speaks for the Court for the first 20 or 25 pages, I am putting forward this suggestion now." He sent Justice Blackmun a copy of the letter.<sup>133</sup>

Things quickly fell into place. Justice Kennedy sent Justice Stevens a favorable reply later that day. "My initial inclination is that what you propose is quite feasible and I will recommend to Sandra and David that we accomplish your change in the next draft to see how it looks," Kennedy wrote, adding: "In some significant respects what you suggest would improve the opinion."<sup>134</sup> Justice Kennedy revised the draft overnight, and Justice Stevens pronounced it "much stronger" than the original version.<sup>135</sup> Justice Stevens sent the trio his formal "join" memorandum on June 22, 1992, agreeing to the first three sections, which encompassed the first 26 pages of the opinion, as well as to several of the specific applications of the opinion's analysis.<sup>136</sup> Justice Blackmun, kept abreast of developments by his law clerk as well as by copies of the correspondence going back and forth between Justice Stevens and the trio, reworked his dissenting opinion and sent his own "join" memorandum two days later.<sup>137</sup>

Justice Stevens was also working on his own separate opinion, concurring in part and dissenting in part. At only 11 pages, it was the shortest of the five opinions filed in the case. He dissented from the joint opinion's upholding of the "informed consent" requirement that doctors provide information intended to dissuade a patient from proceeding with an abortion, as well as from upholding the 24-hour waiting period. He avoided the problem of defining a standard of

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<sup>132</sup> Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court (June 18, 1992), in HAB Papers, *supra* note 14, at box 601, folder 6.

<sup>133</sup> *Id.*

<sup>134</sup> Letter from Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, to John Paul Stevens, Assoc. Justice, U.S. Supreme Court (June 18, 1992), in HAB Papers, *supra* note 14, at box 601, folder 6.

<sup>135</sup> Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court (June 19, 1992), in HAB Papers, *supra* note 14, at box 601, folder 6.

<sup>136</sup> Memorandum from John Paul Stevens, Assoc. Justice, U.S. Supreme Court (June 22, 1992), in HAB Papers, *supra* note 14, at box 601, folder 6.

<sup>137</sup> Memorandum from Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court (June 24, 1992), in HAB Papers, *supra* note 14, at box 601, folder 6.

review by taking the joint opinion's "undue burden" test and defining it to his own satisfaction: "A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification."<sup>138</sup> In a footnote, he suggested that the time had come to stop spending energy trying to reach agreement on a standard; it was the bottom line that should count. "The future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion."<sup>139</sup>

Most interesting in Justice Stevens's separate opinion was his own description of the heart of the matter: what the right to abortion meant. "The authority to make such traumatic and yet empowering decisions is an element of basic human dignity," wrote the Justice who had told his colleagues seven years earlier that he did not know how he would have voted in 1973 (in *Roe*).<sup>140</sup> "As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience."<sup>141</sup>

Justice Stevens assigned himself one final task in *Casey*, and in this he did not succeed. Justice Blackmun's separate opinion ended, now famously, with a *cri de coeur* that was all but guaranteed to be read as a call to arms: "I am 83 years old. I cannot remain on the Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today."<sup>142</sup> Justice Stevens tried to talk Justice Blackmun into dropping this paragraph. There is no available record of his reasons, but we can well imagine what they might have been: the paragraph was a distraction; it was inflammatory; it undercut the very premise of the majority opinion, which was that the right to abortion, anchored by *stare decisis* and grounded in a shared understanding of the meaning of personal liberty, had been preserved. The only record that does exist is a letter from Justice

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<sup>138</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 920 (1992) (Stevens, J., concurring and dissenting in part).

<sup>139</sup> *Id.* at 920 n.6.

<sup>140</sup> *Id.* at 916; see also *supra* note 69 (noting Justice Stevens's comments in *Thornburgh* conference).

<sup>141</sup> *Casey*, 505 U.S. at 916 (Stevens, J., concurring and dissenting in part).

<sup>142</sup> *Id.* at 943 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Blackmun, dated June 27, 1992, two days before *Casey* would be announced:

Dear John:

I appreciate your call Friday afternoon about part IV of my second draft. After lengthy discussions here, we have decided to leave that paragraph in. This does not mean that I do not appreciate your call.

Sincerely, Harry.<sup>143</sup>

#### CONCLUSION

Justice Stevens had only one more opportunity to influence the Court's course on abortion. In 2000, the Court struck down Nebraska's "partial-birth" abortion prohibition by a 5–4 vote in *Stenberg v. Carhart*.<sup>144</sup> Justice Kennedy voted in dissent, and the challenge to Justice Stevens, who had the assigning power as the senior Associate Justice in the majority, was to hold Justice O'Connor in the narrow majority. He assigned the opinion to Justice Breyer, whose opinion in *Stenberg*<sup>145</sup> was almost completely devoid of rhetoric, reading more like an article from a medical journal than a discussion of a constitutional right. The point was to reassure a wary Justice O'Connor that the Court was deferring to medical judgment, not expanding the right to abortion as articulated in *Casey*. The effort succeeded.

Seven years later, when a nearly identical federal abortion ban came before the Court in *Gonzales v. Carhart*,<sup>146</sup> Justice O'Connor was gone. With her successor, Justice Samuel A. Alito, Jr., voting the other way, Justice Kennedy wrote the majority opinion to uphold the federal Partial-Birth Abortion Ban Act. Justice Stevens did not write separately, permitting Justice Ruth Bader Ginsburg to speak powerfully for all four dissenters. It was, in a sense, a final strategic calculation from a Justice whose influence on the Supreme Court's abortion jurisprudence had for so many years depended not on the volume of his voice, but on the quality of his judgment.

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<sup>143</sup> Letter from Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, to John Paul Stevens, Assoc. Justice, U.S. Supreme Court (June 27, 1992), in HAB Papers, *supra* note 14, at box 601, folder 6.

<sup>144</sup> 530 U.S. 914 (2000).

<sup>145</sup> *Id.* at 920-46.

<sup>146</sup> 550 U.S. 124 (2007).