THE BRETHREN: INSIDE THE SUPREME COURT
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Introduction

What evidence is there to suggest thee Supreme Court is political?

Because the Supreme Court deliberates in secrecy it is often difficult to determine the motivations behind its decisions. *The Brethren* addresses this and other issues, taking a look at what motivated judges of the Burger court, who judged tumultuous decisions such as *Roe v. Wade.*

In the 1970's when Nixon was president, the public was relatively divided over the abortion issue. Nixon had made it clear that he opposed abortion rights. Nixon had appointed three of the justices on the Supreme Court (including the Chief)

Roe v. Wade reached the Supreme Court shortly before Nixon's reelection. The decision that emerged was the result of a complicated patter of interposal relationships among members of the Court, intensive internal lobbying of one judge to another, and ideological clashes. The vote of the justices was surprising. What was even more surprising was how the eventual decisions was released:

1972 Term

HARRY BLACKMUN RETURNED to Rochester, Minnesota, for the summer of 1972 and immersed himself in research at the huge Mayo Clinic medical library. Rochester and the clinic were home to Blackmun, a safe harbor after a stormy term. He worked in a corner of the assistant librarian's office for two weeks without saying a word to anyone on the Mayo staff about the nature of his inquiry.

In his summer office in a Rochester high-rise, Blackmun began to organize the research that would bolster his abortion opinion. He talked by phone nearly every day with one of his clerks who had agreed to stay in Washington for the summer.

Blackmun pondered the relevance of the Hippocratic oath, which prohibits doctors from performing abortions. He also wanted to understand the positions of the medical organizations and to learn more about the advances in sustaining the life of a fetus outside the womb.

One by one, new elements found their way into his draft. His clerk worked each change into the text back in Washington. The language remained Blackmun's; the more rigorous analysis was the work of the clerk. For the first time, the right to privacy emerged explicitly. It was not absolute. It was limited by the state's interest in protecting the pregnant woman's health and the potential life of the fetus.

As they developed their analytic basis, Blackmun and his clerk tried to answer the crucial question: when did the state's interest in protecting the life of the fetus become overriding and outweigh the woman's right to privacy? Clearly there was such a point. The state's interest increased with time. But no definite answer could be derived from the Constitution.

Blackmun turned to medicine. Doctors often divided pregnancies into three equal stages, or trimesters, each of roughly three months. Abortions were generally safe in the first trimester and, under proper medical conditions, could be performed safely in the second. It was at about this time, at the end of the second trimester, that the fetus became *viable*, or capable of living outside the womb. That was at about twenty-four to twenty-eight weeks, six months for all practical purposes. Therefore, the two medical interests—protecting both the

health of the mother and the potential life of the fetus—seemed to converge and become overriding at about this six-month point. Abortions during the first two trimesters could and should be permitted. The draft gradually emerged as a strong, liberal prescription. It would prohibit states from interfering until the third trimester.

The clerk who was working on the opinion began to worry that one of the other clerks, strongly opposed to abortions, might try to change their boss's mind. He took no chances. Each night he carefully locked up the work he had been doing for Blackmun. At the end of the summer, he carefully sealed the latest draft in an envelope, put his initials across the tape, and had it locked in Blackmun's desk. Only Blackmun's personal secretary knew where it was.

Powell also made abortion his summer research project. As a young lawyer in Richmond in the 1930s, Powell had heard tales of girls who would "go away" to Switzerland and New York, where safe abortions were available. If someone were willing to pay for it, it was possible to have an abortion.

Powell understood how doctors viewed abortion. His father-in-law had been a leading obstetrician in Richmond, and his two brothers-in-law were obstetricians. Powell had heard all the horrifying stories of unsanitary butchers and coat-hanger abortions.

Nevertheless, Powell came quickly to the conclusion that the Constitution did not provide meaningful guidance. The right to privacy was tenuous; at best it was implied. If there was no way to find an answer in the Constitution, Powell felt he would just have to vote his "gut." He had been critical of Justices for doing exactly that; but in abortion, there seemed no choice.

When he returned to Washington, he took one of his law clerks to lunch at the Monocle Restaurant on Capitol Hill. The abortion laws, Powell confided, were "atrocious." His would be a strong and unshakable vote to strike them. He needed only a rationale for his vote.

In a recent lower court case, a federal judge had struck down the Connecticut abortion law.* This opinion impressed Powell. The judge had said that moral positions on abortion "about which each side was so sure must remain a personal judgment, one that [people] may follow in their personal lives and seek to persuade others to follow, but a judgment they may not impose upon others by force of law." That was all the rationale Powell needed.

Brennan and Douglas worried that votes might have shifted since the previous spring. Blackmun remained a question mark, Stewart might defect, and they were not sure what Powell would do.

* *Markle v. Abele*,

At conference on October 12, Blackmun made a long, eloquent and strongly emotional case for striking down the laws. Stewart too seemed ready to join. But the big surprise was Powell. He made it 6 to 3.

Immediately after conference, Douglas called Blackmun to tell him that his presentation had been the finest he had heard at conference in more than thirty years. He hoped the call would sustain Blackmun for the duration.

Before the end of October, Blackmun's new draft in the abortion case was circulated to the various chambers.

Brennan read it carefully. He waded through the positions of the medical professional organizations, the expanded historical section, the long-winded digest of the medical state of the art. Despite all this, Blackmun's bottom line was acceptable. The states would be prohibited from regulating abortions until "viability." That meant state regulation only during the third trimester. But Brennan spotted a weakness in the argument. Connecting the state's interest in the fetus to the point of viability was risky. Blackmun himself had noted that medical advances made fetuses viable increasingly early. Scientists might one day be capable of sustaining a two-week-old fetus outside the womb. Advances in medicine could undermine the thrust of the opinion.

Brennan had other concerns. Blackmun had focused on the rights of the doctor and the rights of the state. The most important party, the woman, had been largely neglected. Her rights were the ones that needed to be upheld.

Brennan found yet another analytical fault in the draft. Blackmun had discussed at length the state's dual interests in protecting the pregnant woman's health and the potential life of the fetus. Both interests were closely intertwined in Blackmun's draft. Brennan thought they were quite distinct. He handed Blackmun's draft to one of his clerks. "It doesn't do it," he said.

Brennan's clerks worked up a long memorandum. The delicate question, however, was how to communicate Brennan's thoughts to Blackmun. If Brennan phoned and said, "Harry, here are my ideas," Blackmun might be intimidated or fumble for months and still not change the draft adequately. On the other hand, if Brennan sent a printed opinion to the conference, Blackmun might think he was trying to steal the majority. The last thing Brennan wanted was to author the Court's abortion decision. He could imagine too vividly what the Catholic bishops would say.

In mid-November, Brennan took his clerks' memo and recast it as a series of casual thoughts and suggestions. It was important that it not appear to be an alternative draft. Brennan addressed a cover memo to Blackmun saying he fully agreed with his draft, but wanted to pass

along some ideas. Brennan's thoughts ran forty-eight pages. Copies were sent to all the Justices.

Blackmun liked some of Brennan's suggestions. He quickly sent a memo to the Justices saying that he was incorporating them. Before he revised his draft, however, he decided that there was another set of views to be taken into account.

The Chief had made it clear to Blackmun that he would "never" join the draft as it stood, permitting unrestricted abortions up to viability, or the end of the second trimester. Blackmun wanted the Chief's vote, and he thought he saw a way to get it while still taking into account Brennan's suggestions. Instead of the one demarcation line, viability, Blackmun would create two. This would also be more medically sophisticated; it would show that the two state interests—protecting the pregnant woman's health and protecting potential life of the fetus—arose at different times. He settled on a formula.

1. First 12 weeks (first trimester); no state interest at all; abortions unrestricted and left up to the medical judgment of the doctor.
2. 12 to 24 weeks (second trimester); state interest arises and abortions can be regulated only to protect the woman's health.
3. After 24 weeks (third trimester); state interest arises to protect the potential life of the fetus.

This formula had the effect of somewhat limiting abortions in the second trimester. But eliminating viability as the dividing point, Brennan's worry, guaranteed that medical science could not keep reducing the time period during which abortions would be legally available.

Marshall was not happy with Blackmun's proposal. It was too rigid. Many women, particularly the poor and undereducated, would probably not get in touch with a doctor until some time after the first 12 weeks. A woman in a rural town might not have access to a doctor until later in pregnancy. And according to the Blackmun proposal, the states could effectively ban abortions in the 12-to-24-week period under the guise of protecting the woman's health. Marshall preferred Blackmun's original linkage to viability. If viability were the cut-off point, it would better protect the rural poor. Clearly, viability meant one thing in Boston, where there were fancy doctors and hospitals. There, a fetus might be sustained only a few months. But in rural areas with no hospitals and few, if any, doctors, viability was probably close to full-term, or late in the third trimester.

Marshall presented all this to Blackmun in a memo.

Blackmun respected Marshall's point of view. Marshall clearly knew a lot about many real world problems that Blackmun would never see. He incorporated all of Marshall's suggestions. His new draft specified:

1. For the stage up to "approximately" the end of the first trimester, abortions would be left to the medical judgment of the doctor.
2. For the stage after "approximately" the end of the first trimester, abortion procedures could be regulated to protect the woman's helath.
3. For the stage after "viability," abortions could be regulated or even prohibited, to protect the fetus.

The clerks in most chambers were surprised to see the Justices, particularly Blackmun, so openly brokering their decision like a group of legislators. There was a certain reasonableness to the draft, some of them thought, but it derived more from medical and social policy than from constitutional law. There was something embarrassing and dishonest about this whole process. It left the Court claiming that the Constitution drew certain lines at trimesters and viability. The Court was going to make a medical policy and force it on the states. As a practical matter, it was not a bad solution. As a constitutional matter, it was absurd. The draft was referred to by some clerks as "Harry's abortion."

Stewart had one more change that he insisted on before he would join the opinion. It was imperative that they say more clearly that a fetus was not—as far as the Fourteenth Amendment was concerned—a person. If the fetus were a person, it had rights protected by the Constitution, including "life, liberty and property." Then the Court would be saying that a woman's rights outweighed those of the fetus. Weighing two sets of rights would be dangerous. The Court would be far better off with only one set of rights to protect. Stewart was certain that in legal terms a fetus was not a person. No previous case had held so. States conceded that, where the mother's life was at stake, a fetus had no rights. When the Fourteenth Amendment was passed in 1868, abortions were common enough to suggest that the state legislatures that had ratified the Amendment did not consider fetuses to have rights.

Blackmun did not disagree, but he felt the point was implicit in the opinion. Why expand it and stir up trouble?

Stewart was insistent, and Blackmun finally agreed to say clearly that a fetus was not a person.

After he had joined Blackmun's opinion, Stewart still wanted to add his own concurrence. Unlike Douglas, he was not inclined to write separate opinions spelling out small, technical disagreements with the majority. Stewart often joined inadequate opinions—"junk," he once called them—believing that this was a vital part of the compro-

mising process. It also left him more time to write his own majority opinions.

But the Blackmun opinion lacked an explicit constitutional foundation for the abortion ruling. In a middle section providing his legal reasoning, Blackmun had brought the broadest arguments against restrictive abortion laws. He had written a sweeping general conclusion that the basis for lifting the restrictions could be found in the Ninth and Fourteenth, even in the First Amendment, and that it was implied in a series of privacy cases, ranging from the 1965 Connecticut contraceptive case to the previous term's contraceptive case so carefully tailored by Brennan (*Eisenstadt v. Baird*).

"Zones of privacy," Blackmun had written, do exist "under the Constitution." Stewart could not fully accept that. It was too broad. It was precisely the cause of his dissent in the 1965 Connecticut contraceptive case and of his hesitancy the previous year in *Eisenstadt*. He wanted to identify the part of the Constitution that conferred the freedom to have abortions during the early months of pregnancy. Stewart believed that a woman's right to an abortion in the early months was a "liberty" protected under the due process clause of the Fourteenth Amendment. But that approach carried with it historical baggage that Stewart would rather avoid.

In the 1930s the Court had used the clause to strike down key New Deal legislation. Since "liberty" could be construed to mean anything that five Justices agreed should be protected, critics charged that the Court had become a superlegislature, substituting its judgment for that of elected legislators. This approach, called "substantive due process" (to differentiate it from the more common procedural rights covered by due process), had been gradually discredited.

Since Stewart felt that "substantive due process" was the real basis for the Blackmun opinion, he believed that Blackmun was hesitant to admit it in the opinion. Stewart circulated his own concurrence, joining Blackmun's opinion, but adding his observations on the real roots of the opinion.

Reading Stewart's concurrence, Douglas found it laughable that Stewart, of all people, was concerned with constitutional purity. Douglas believed that Stewart's real motive in writing a concurrence was to put some distance between himself and Blackmun's opinion, which Stewart obviously thought was poorly reasoned and written.

Douglas shot back a memo arguing that Stewart had the history all wrong. This was not "substantive due process," Douglas said. He had been one of the earliest and most vociferous critics of that doctrine. The basis for the decision was clear. The Blackmun opinion was based on the right to privacy, Douglas countered.

Blackmun wanted no part of the Stewart-Douglas debate. He was tired of compromising and dealing with everyone's gripes. This latest "sniping" was ridiculous. The important thing was that he already had six votes.

Given his gloomy expectations at the outset of the abortion debate, Douglas felt the Court had come a long way. The right to privacy was being given constitutional foundation in a major opinion. He dropped his debate with Stewart. It was a great victory, and Douglas wanted to add a concurring opinion underscoring its significance.

He decided to revise a lyrical concurrence that he had drafted the previous term about what he called the

> customary, traditional, and time-honored rights, amenities, privileges and immunities that come within the sweep of "the Blessings of Liberty."
>
> First is the autonomous control over the development and expression of one's intellect, interests, tastes and personality.
>
> Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.
>
> Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.

A clerk urged him to go beyond his discussion of a right to privacy and conclusively nail down a right to abortion.

Douglas responded, "I'm only writing this for me."

White shortened his dissent from the previous term. The states, not the courts, should decide the question of limits on abortion. Blackmun's trimester-and-viability scheme was pure legislation. "As an exercise of raw judicial power, the Court perhaps has authority to do what it does today," White wrote. But he expressed doubts about a constitutional sanction that would allow a woman to get rid of an unwanted child on a "whim" or out of "caprice."

"The Court," White wrote, "apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries."

Rehnquist's dissent had little to do with abortion. As always, Rehnquist pushed his views on restricting federal court powers and the women's rights to bring these cases into court. First, he attacked the most basic element of the cases. No one had standing to bring these cases into court, he said. Assuming the women were pregnant when the suit was brought, they would be at least in their third trimester by the time the lower court decided the case. Since Blackmun's opinion held that states could deny abortions during the third trimester, there was no claim for the women to bring.

Rehnquist pointed out that in 1868, when the Fourteenth Amend-

ment was adopted, at least thirty-six states or territories had laws on the books limiting abortions. It did not appear that the framers of the Fourteenth Amendment intended to bar the states from regulating abortions.

By early December, Blackmun's final draft had circulated. Stewart's and Douglas's concurrences were finished, and White's and Rehnquist's dissents were ready. There was still nothing from Burger.

White was particularly unhappy with the progress of the term. Dozens of cases were ready to come down except, more often than not, for the Chief's vote. He wrote a memo pointing out the bottleneck.

By early January, there was still nothing from the Chief. Blackmun grew increasingly nervous. He was worried about his reputation for being chronically late. He had not yet brought down an opinion for the term. Abortion was ready; he wanted it to come down at once. Blackmun and the others in the majority finally began pointing toward a Monday, January 15, announcement of the abortion decisions. Still there was nothing from Burger.

On January 12 at conference, Stewart put it to the Chief directly. "Vote now or let the decision come down with only eight votes," Stewart suggested.

To the majority's surprise, Burger said that he had decided to join the Blackmun opinion but, like some of the others, he wanted to add his own concurring remarks. "I'll get it to you next week," he promised.

Stewart and Brennan thought he was stalling. The Chief was scheduled to swear in Richard Nixon for his second term as President on January 20. It would undoubtedly be embarrassing for Burger to stand there, swearing in the man who had appointed him, having just supported a sweeping and politically volatile opinion that repudiated that man's views.

At the Friday, January 19, conference, the Chief said that his schedule had been busy, and he still had not gotten to the abortion decision. Stewart figured that, having manipulated a delay until after the Inaugural, Burger would acquiesce. The others wanted a Monday, January 22, announcement, three days later, and Burger said that he would have something.

Over the weekend, he wrote a three-paragraph concurrence. Ignoring the sweep of the opinion he was joining, Burger said that one law (Texas) was being struck because it did not permit abortions in instances of rape or incest, and he implied that the other law was being struck because of the "complex" steps that required hospital board certification of an abortion. He did not believe that the opinion would have the "consequences" predicted by dissenters White and Rehnquist, and he was sure that states could still control abortions.

"Plainly," he concluded, "the Court today rejects any claim that the Constitution requires abortion on demand."

The day of the scheduled abortion decision the Chief sat in his chambers reading the latest edition of *Time* magazine. "Last week TIME learned that the Supreme Court has decided to strike down nearly every anti-abortion law in the land," an article said. The abortion decision had been leaked.

Burger drafted an "Eyes Only" letter to the other Justices. He wanted each Justice to question his law clerks. The responsible person must be found and fired. Burger intended to call in the F.B.I. to administer lie-detector tests if necessary.

Dutifully, Rehnquist brought up the matter with his clerks. It was harmless in this case, he said. But in a business case, a leak could affect the stock market and allow someone to make millions of dollars. None of Rehnquist's clerks knew anything about the leak, but they asked him if it were true that the Chief was thinking of lie-detector tests. "It is still up in the air," Rehnquist said. "But yes, the Chief is insisting."

Rehnquist's clerks were concerned. Such a witch-hunt would be met with resistance. Certainly, some clerks would refuse to take such a test and would probably have to resign. The Chief is mercurial, Rehnquist explained. "The rest of us will prevail on him."

Brennan summoned his clerks and read them the Chief's letter. It was another example, he said, of the Chief usurping the authority each Justice had over his own clerks. "No one will question my law clerks but me," Brennan said. Then in a softer voice, he added, "And I have no questions." The real outrage for Brennan was not the leak but the delay. If the Chief had not been intent on saving himself and Nixon some embarrassment on Inauguration day, there probably would have been no damaging leak.

Marshall asked what his clerks knew about the incident. When he was assured that they knew nothing, he told them to forget it.

Douglas treated the letter as he had treated a request from the Chief the previous term that all clerks be instructed to wear coats in the hallways. He ignored it.

Powell was out of town, so one of his clerks opened the Chief's letter. The clerk had talked to the *Time* reporter, David Beckwith, trying to give him some guidance so he could write an intelligent story when the decision came down. But the delay in announcing the decision had apparently left *Time* with a scoop, if only for half a day.

The clerk called Powell and told him about the Chief's letter and his own terrible mistake in talking to Beckwith. He volunteered to resign.