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Blackmun's Journey Toward Feminism;
And so Harry Blackmun retires from the U.S. Supreme Court knowing that his landmark legacy will indeed endure

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IT IS BEYOND argument that Roe vs. Wade, which dramatically expanded American women's reproductive rights, is the most important legacy of Harry A. Blackmun's 24 years as a justice of the U.S. Supreme Court. But between 1971, when Roe first came before the high court, and 1992, when the surprising endorsement of Roe by three conservative Republican justices guaranteed that a woman's right to choose abortion will remain protected by the U.S. Constitution, tremendous changes also took place in Blackmun's own appreciation of the constitutional status of reproductive rights.

When President Richard M. Nixon nominated Blackmun to the high court in early 1970 in the wake of successive Senate rejections of two earlier Nixon nominees, he was already 61 years old, and an 11-veteran of the Eighth Circuit Court of Appeals. Blackmun had an unremarkable record on the appellate bench, and Blackmun's childhood friendship with Nixon's newly named chief justice, Warren E. Burger, a fellow Minnesotan, further strengthened the belief that Blackmun would be a mainstream conservative. Only one abortion case, United States vs. Vuitch, involving a lower-court invalidation of the District of Columbia's anti-abortion law, was on the Supreme Court's docket when Blackmun came on board, and the widespread expectation that Blackmun would prove largely indistinguishable from Burger led to journalistic joshing about how the high court, like major league baseball, would now have "Minnesota Twins."

Blackmun came to the court with a decidedly humble estimation of his own intellectual qualifications, and during his first two years - in which many new justices have a difficult time adjusting to the workload - many of the court's young clerks wondered whether Blackmun was indeed up to the job. But Blackmun's most formative years had not been his decade on the eighth circuit, but his earlier stint, from 1950 through 1959, as resident counsel at Minnesota's famous Mayo Clinic. That experience had left Blackmun with a deep respect for the medical profession, and a good understanding of its work.

Vuitch was decided without great moment in April 1971, but two weeks later the Supreme Court announced it would review both Roe vs. Wade, in which a lower federal court had struck down Texas' anti-abortion law, and a highly similar case from Georgia, Doe vs. Bolton. Georgia's "reform" statute allowed a small number of women with unwanted pregnancies to receive legal abortions if they could convince a hospital review committee that they had a special "therapeutic" need. After Roe and Doe were first argued before the high court in December 1971,

Blackmun privately told his fellow justices that the Georgia law had been "a fine statute" before the lower court had liberalized the grounds on which a woman could obtain an abortion.

Those around Blackmun at the time believed he very much wanted the job of writing the Roe and Doe decisions (although Blackmun himself would not remember it that way in later years). When Blackmun's first draft of Roe explicitly dodged the central constitutional question, however, his supporting colleagues, William O. Douglas, William J. Brennan Jr., Thurgood Marshall and Potter Stewart, protested politely but firmly, and the cases were carried over to the fall of 1972 so that Blackmun could do further work, and so that the newly seated justices, Lewis F. Powell and William R. Rehnquist, could take part.

Abortion, Blackmun repeatedly reminded his fellow justices, was "so sensitive and so emotional an issue" that the court would be criticized no matter what it did, but by November 1972 Blackmun had moved to the point where his draft opinions in Roe and Doe now offered full constitutional protection for a woman's right to choose abortion up until the end of the first trimester of pregnancy. To some who saw Blackmun on a daily basis during those months, his work on the abortion cases afforded him an opportunity to establish himself as his own man, because - as one co-worker memorably put it - "there was no question that Blackmun was tired of being referred to as a 'Minnesota Twin' and tired of being leaned on by such an overbearing son of a bitch as Warren Burger." Brennan and Marshall gently and successfully lobbied Blackmun to shift Roe's and Doe's critical line of demarcation from the first trimester to the much later stage of fetal viability. But the most striking emphasis in Blackmun's drafts - namely the need for the abortion choice to reflect "the best medical judgment of the pregnant woman's attending physician" - persisted until the 7-to-2 decisions in both Roe and Doe were handed down on Jan. 22, 1973.

As commentators both supportive and hostile observed, the opinions in Roe and Doe seemed to have more to do with doctors than with women. "The abortion decision in all its aspects," Blackmun emphasized in Roe, "is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." Blackmun's medical orientation shone through again and again; as one Yale law professor hostile to Roe later sarcastically put it, Blackmun "treats the private physician with the reverence that one expects only from advertising agencies employed by the American Medical Association."

Given the many state and lower federal court decisions that had already struck down restrictive abortion laws, Roe vs. Wade, as Blackmun himself later put it, "was not such a revolutionary opinion at the time." And since abortion was "essentially a medical decision," he asserted, just a few days after the opinions were issued, "I really resent that it had to come before the court."

This perspective on reproductive rights continued until the late 1970s. But beginning with Ronald Reagan's November 1980 election to the presidency, Blackmun began to worry that Roe's long-term constitutional survival might become imperiled. Just a week after Reagan's triumph, Blackmun confided to Brennan and Marshall, "I fear that the forces of emotion and professed morality are winning some battles."

In 1983, newly named Reagan Justice Sandra Day O'Connor mounted an intense attack on Blackmun's Roe and Doe opinions while dissenting in an Ohio abortion case, and three years later, with Warren Burger's defection to the dissenters' side, what in 1973 had been a seven-vote majority shrank to a margin of five to four.

Blackmun responded to the court's shrinking support for Roe by expanding his own defense of it. Writing for a five-justice majority in a Pennsylvania case, he continued to stress how state anti-abortion limitations "intrude upon the physician's exercise of proper professional judgment." But in 1986 he gave greater attention than he had in 1973 to how the "Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental."

By 1987, Blackmun was terming Roe "a landmark decision" in the "emancipation of women." But in the 1989 Missouri abortion case of Webster vs. Reproductive Health Services, in which two new justices - Antonin Scalia and Anthony M. Kennedy - added their votes to the existing anti-Roe trio of Rehnquist, O'Connor and Byron White, Blackmun wrote a despondent first draft of a dissent declaring that "Roe no longer survives." Much to his relief, O'Connor soon came loose from the incipient Rehnquist majority, which sought to overrule Roe, but throughout the late 1980s and early 1990s, Blackmun regularly found himself in the minority on issues of women's rights.

In 1991 and 1992, with abortion rights hanging by only a thread, Blackmun's appreciation of Roe continued to move toward a feminist understanding of his own earlier handiwork. Roe, Doe and their progeny, he wrote in dissent in 1991, "are not so much about a medical procedure as they are about a woman's fundamental right to self-determination . . . 'Liberty,' if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions."

Then, in the spring and summer of 1992, came the remarkable outcome in Planned Parenthood vs. Casey, with Justices Souter, O'Connor and especially Kennedy upsetting all expectations by reaffirming with Justice John Stevens the constitutional nucleus of Roe vs. Wade. For Blackmun, the stunning result in Casey was both a professional triumph and a personal vindication. "[N]ow, just when so many expected the darkness to fall, the flame has grown bright," he wrote in his Casey concurrence. He praised O'Connor, Kennedy and Souter's joint opinion as "an act of personal courage and constitutional principle." By "restricting the right to terminate pregnancies," Blackmun wrote, "the state conscripts women's bodies into its service."

Blackmun ended his Casey opinion on an apprehensive and unusually personal note. "In one sense," he observed, the approach of the Casey majority "is worlds apart from that of the Chief Justice and Justice Scalia. And, yet, in another sense, the distance between the two approaches is short - the distance is but a single vote. I am 83 years old. I cannot remain on this court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."

But we, like Harry Blackmun, now know that Senate confirmation of Blackmun's successor will not require such a choice between two worlds, for it was the great accomplishment of the Casey decision - now aided by the election of a pro-choice president and the subsequent replacement of Byron White with Ruth Bader Ginsburg - to safeguard the constitutional core of Roe vs. Wade. For O'Connor, for Kennedy and for Souter, there is no going back on the dramatic commitment they made in Casey, and it is difficult to imagine any Senate Judiciary Committee

approving a Supreme Court nominee who refuses to endorse at least the O'Connor-Kennedy-Souter stance in Casey, just as past conservative justices had to pay fealty to the Brown vs. Board of Education desegregation decision and Griswold vs. Connecticut's protection of marital privacy.

And so Harry Blackmun retires from the U.S. Supreme Court knowing that his landmark legacy will indeed endure, and knowing, too, that its real meaning - as he came to see in the 1980s and 1990s - stands for much more than even he was able to articulate back when doctors rather than women were assumed to know best.

Newsday Illustration by Gary Viskupic-Harry Blackmun with a PRO- LIFE SIGN IN FRONT OF HIM.
Photo-**David J. Garrow**