THE BURGER COURT

Counter-Revolution or Confirmation?

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75. 381 U.S. 479 (1965).
76. Id. at 486.
77. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972).
78. 410 U.S. 113 (1973).
79. 458 U.S. 719 (1982).
80. Id. at 724–25.
81. Id. at 725.
82. Id. at 726.
83. Id. at 728 (quoting Weinberger v. Wiensenfeld, 420 U.S. 636, 648 (1975)).
84. Id. at 729–30.
85. Id. at 729 n. 15.
86. 511 U.S. 127 (1994).
87. Id. at 132.
88. Id. at 135 (citations omitted).
89. Id. at 138 (citation omitted).
90. Id. at 138–39 (footnote omitted).
91. Id. at 140.
92. Id. at 141–42 (footnote and citation omitted).
93. 116 S. Ct. 2264 (1996).
94. Id. at 2275.
95. Id. at 2276 (footnote and citations omitted).
96. Id. at 2280.
97. Id.
98. Id. (footnotes and citations omitted).
99. Id. at 2281.
100. Id. at 2282.
101. 458 U.S. at 724 n. 9.
102. 511 U.S. at 137 n. 6.
103. *VMI*, 116 S. Ct. at 2274.
104. Id. at 2275 (quoting *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring)).

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LIBERTY AND SEXUALITY

DAVID J. GARROW

My assigned topic is one with which most students of the Burger Court are already relatively familiar, but Judge Henry's essay, earlier in this volume, has eased my task even further. When Judge Henry first emphasized that "activism is here to stay," that sounded like a statement that might come back to haunt him at his next confirmation hearing. But when he chose to underscore that exact same point a second time, I began to appreciate more fully how he had very succinctly captured an essential truth that applies not only to the history of the Burger Court but also—particularly in light of *Planned Parenthood of Southeastern Pennsylvania v. Casey* [1] as well as other decidedly different rulings such as *Dolan v. City of Tigard* [2] and *United States v. Lopez*[3]—to the still-evolving record of the Rehnquist Court.

Judge Henry's observation—that "activism is here to stay"—underscores the fact that the two most important Burger Court decisions in my subject area are also undoubtedly the two most famous (or infamous) legacies of the entire Burger Court: first, *Roe v. Wade*,[4] which now quite surprisingly the Rehnquist Court has vindicated in *Casey* and second, *Bowers v. Hardwick*,[5] which now even more surprisingly the Rehnquist Court has sotto voce vitiated in *Romer v. Evans*.[6]

The evolutionary relationship between the Warren Court and the Burger Court is especially important for this essay because of the degree to which *Roe v. Wade* and its equally momentous partner case, *Doe v. Bolton*,[7] and indeed most everything pertaining to abortion rights jurisprudence in the early 1970s, was doctrinally so directly descended from the Warren Court's 1965 decision in *Griswold v. Connecticut*.[8] The historical record is undeniably clear that without *Griswold*, and without the vindication of a constitutional right to privacy that *Griswold* represented, anything like *Roe*'s holding would have been very difficult to imagine as a "privacy" or a substantive due process liberty holding.[9]

When one looks carefully at the development of abortion rights litigation and chronologically at the way in which the Burger Court responded to the appearance of abortion rights cases, *Griswold*'s significance becomes all the more critical. The interest in its doctrinal potentials that *Griswold* stimulated among constitutional litigators, and particularly at law schools during 1965–68, was *the* most influential

underpinning for the flood of abortion rights cases that began to be filed in federal district courts all across the country—including New York, Texas, and Georgia—in 1969 and 1970 and continued onward right up through 1971 and 1972.[10] In fact, a very strong argument can be made that given *Griswold*'s privacy analysis, the abortion–liberty conclusion that the Court by a margin of 7–2 drew in *Roe v. Wade* and *Doe v. Bolton* was almost inevitable. Indeed, a few years ago in *Casey* Justice John Paul Stevens observed how *Roe*'s central holding "was a natural sequel to the protection of individual liberty established in *Griswold*."[11] In addition, *Roe* and *Doe*'s direct derivation from *Griswold* also merits emphasis because some commentators with a highly incomplete appreciation of the Court's history may see, and present, *Roe* and *Doe* as the beginning of the abortion story when they most decidedly were not.

Given *Griswold*'s doctrinal originality concerning reproductive privacy rights, it should not be seen as surprising in the least that so much abortion litigation activity, particularly on the part of young lawyers in their mid to late twenties, began spreading across the country in the immediately ensuing years. Indeed, by the time that the U.S. Supreme Court first accepted *Roe* and *Doe* for review, there were already more than a dozen other similar abortion cases pending in the lower federal courts.[12] Thus, when the Court, in May 1971, decided that it was going to address the substantive claim that abortion was a constitutionally protected right, it faced a situation in which the doctrinal underpinning was supplied by its own six-year-old ruling in *Griswold*—and then notably amplified by a strong endorsement from retired Justice Tom C. Clark[13]—and when an impressive number of abortion cases were moving forward in courts throughout the country.

The first time that the Burger Court—or indeed any prior "Court"—really confronted abortion as a subject matter came in early 1971 in *United States v. Vuitch*,[14] which started as a criminal prosecution of a doctor in the District of Columbia, a doctor who for many years was metropolitan Washington's best known abortion provider, Milan Vuitch, a Serbian immigrant. *Vuitch*, as it was argued and decided by the Burger Court in the early months of 1971, was essentially a case that ended up being primarily focused on a question of appellate jurisdiction—namely whether a case such as *Vuitch* could be appealed directly from the federal D.C. District Court to the Supreme Court without first passing through the U.S. Court of Appeals for the D.C. Circuit—and only secondarily concerned with whether the "health" language in the relevant statute was unconstitutionally vague. Only as tertiary issues were the constitutional rights claims that were spreading throughout the lower courts really brought before the high Court in *Vuitch*.[15]

The January 1971 Supreme Court oral arguments in *Vuitch* did, however, illuminate several important elements. One surprising one was that Justice Potter Stewart, who was one of the two dissenters in *Griswold* six years earlier,[16] now seemed potentially sympathetic to constitutional protection for abortion.[17] Second, Justice Hugo Black, who in many overly simplistic ways was then—and still is now—thought of as a predictable "liberal,"[18] came across instead as an instinctive right-to-life advocate concerned first and foremost with the status of the fetus. Indeed, during the oral argument, Justice Black questioned Washington attorney Joseph Nellis, who was speaking on behalf of Dr. Vuitch, about the status of "the child" who might be aborted. Politely but firmly, Nellis told the Justice that he was unwilling to accept Black's use of the word "child" as pertaining to a fetus.[19] This story from January 1971 underscores very memorably how the abortion arguments of these last twenty-five years since *Roe* and *Doe* have been a debate—including struggles over word usage—that did not in any way only first begin *with Roe* and *Doe* but very much, even in these modest details, *predated Roe* and *Doe*.

In May 1971, when the Burger Court accepted *Roe v. Wade* from Texas and *Doe v. Bolton* from Georgia for review, the political climate for abortion liberalization, which was so bright in 1969–70, was beginning to take a very decisive *downward* turn. When we look carefully at the political history of those years, that record again and again highlights how the issue with which the Burger Court was now starting to wrestle was already being debated—and litigated—so widely and fervently all across America that the Court was not "pushing the envelope" in any significant way, politically or legally, relative to what already was blossoming throughout American public life.

In 1970, abortion liberalization forces had won what in retrospect would be seen as their two greatest political victories. First came the passage of an abortion *repeal* statute in New York state. That new law took effect in July 1970 and essentially made abortion on request available to any woman with the wherewithal to afford the procedure and to travel to New York.[20] Indeed, people old enough to have been adults in 1970 may well remember how many women with unwanted pregnancies did in fact travel to New York during the early 1970s. Second, in November 1970, in a statewide referendum in the State of Washington, a similar abortion law repeal measure was adopted by popular vote.[21] At that time it appeared that this indeed represented the beginnings of a liberalizing wave that would spread further and further, from state to state.

However, by March and April 1971, when *Vuitch* was being decided and when the Justices were agreeing to review the proliberalization rulings that had been handed down by special three-judge federal district courts in both Texas and Georgia in *Roe* and *Doe*, the political climate was starting to change. Abortion rights forces were beginning to realize that all of a sudden *they* were on the defensive and were starting to lose ground. Both the New York and the Washington state victories were also battles that had witnessed the first popular emergence, and quick political growth, of the right-to-life organizations and campaign tactics that have been seen in much fuller flower in the years since 1973.[22] However, the years 1971 and 1972 were characterized by exactly those same political dynamics and featured exactly the same sort of photos that were utilized in much more recent times in the debate over President Clinton's 1996 veto of the Partial-Birth Abortion Ban Act.[23] All we have seen in the abortion debates of the 1980s and 1990s was also present in those 1971–72 days prior to *Roe* and *Doe*.

When the Burger Court first heard argument in *Roe v. Wade* and *Doe v. Bolton* in December 1971, it was a Court of seven rather than nine Justices, for at that point neither Justices Powell nor Rehnquist had yet taken their seats as the successors to Hugo Black and John Harlan.[24] Following those initial oral arguments, the Justices' private conference discussion of *Roe and Doe* would in time become perhaps the most infamous single event in the Court's unpleasant internal debates about War-

ren Burger's honesty and competence as Chief Justice of the United States. This issue need not be revisited here in its full particulars, but in *Roe* and *Doe* several Justices initially were concerned with whether Chief Justice Burger was seeking to assign both the *Roe* and *Doe* majority opinions to Justice Harry Blackmun despite the fact that he himself at conference had sounded more like a dissenter than a member of the nascent majority.[25]

The story of Justice William O. Douglas's anger at Burger over the assignments in *Roe* and *Doe*, and particularly with respect to the subsequent Court decision, initiated by Justice Blackmun and supported by Justices Powell and Rehnquist as well as the Chief Justice, to hold *Roe* and *Doe* over for reargument in the subsequent term that fall, is already well-known within the historiography of the Burger Court.[26] The ensuing situation, and the embarrassing upshot of how news of Douglas's complaint about Burger's behavior leaked to the *Washington Post* and resulted in an (unbylined) front-page story (*not* written by Bob Woodward!), a story that at that time was utterly unprecedented in the Court's history, has also been related more fully elsewhere.[27] But feelings about Burger's behavior were perhaps most strongly felt not by Justice Douglas but by Justice Potter Stewart, and it may be insufficiently appreciated that the tensions about Burger's handling of his job were both personal and professional rather than in any way ideological.

Throughout the six months following those initial oral arguments in *Roe* and *Doe*, the substantive situation within the Court was extremely unsettled and uncertain. Justice Blackmun, and what, in retrospect, looks like a decidedly firm majority of Justices, believed that the very old-fashioned, nineteenth-century Texas antiabortion statute that was struck down by the special three-judge panel that had first heard *Roe* was indeed at least constitutionally void for vagueness. Blackmun as well as several of his colleagues were considerably more uncertain, however, about what the Court should do with the more basic constitutional challenge that *Doe v. Bolton* posed to Georgia's decidedly more liberal therapeutic "reform" law that was enacted less than three years earlier in 1968.

In May and June 1972, Justice Blackmun took the lead, notwithstanding objections from Justices Douglas, Brennan, and Marshall, in recommending that both *Roe* and *Doe* should be held over for reargument in the fall, particularly so that the two newest members of the Court, Justices Powell and Rehnquist, could hear the reargruments and thereby allow for the abortion cases to be decided by a full Court of nine rather than by simply seven. That initiative provoked considerable outrage on the part of some of the expectant members of the supposed *Roe* majority, but when Chief Justice Burger and Justices White, Powell, and Rehnquist all joined with Blackmun in advocating reargument, the cases indeed were carried over.[28]

The situation within the Court shifted quietly but very significantly between June and October 1972. What at the conclusion of O.T. 1971 was a very uncertain situation for the two abortion cases was, by the beginning of O.T. 1972, no longer much in doubt. Nineteen years earlier, much the same thing had happened in the months preceding the reargument of the five cases that comprised *Brown v. Board of Education*.[29] In 1953, after setting down four questions for the reargument, the Court returned in October to find itself no longer much in doubt about what it soon would hold.[30] Much the same thing happened in the fall of 1972 with *Roe v. Wade* and *Doe v. Bolton*.

William O. Douglas's concerns to the contrary notwithstanding, Harry Blackmun was never really in much doubt about what he would do on the underlying constitutional question of abortion.[31] The numerical gap inside the Court widened even further when, to at least some people's surprise, Lewis F. Powell during September privately concluded that he too without question was going to vote in favor of a *Griswold*-type constitutional privacy holding.[32] Thus by the time that the cases were indeed reargued in October 1972, the fundamental constitutional outcome was no longer in any significant doubt.

However, what nonetheless *did* prove to be an important and surprising development was the manner in which the *Roe* and *Doe* majority opinions and holdings evolved following Justice Blackmun's first circulation of revised drafts in late November. In those drafts, Blackmun laid out an analysis under which constitutionally protected access to abortion would be available *only* up through the end of the first trimester of pregnancy. After that point, abortions would be subject to extremely far-reaching state regulation and prohibition.[33] Then, beginning in late November and reaching into mid-December, both the Brennan and Marshall chambers, in a crucially important and analytically impressive way, successfully lobbied Justice Blackmun toward an appreciation that viability, rather than the end of the first trimester, should be the fundamental cutoff point that was utilized in the *Roe* and *Doe* opinions. It was out of that process, and largely out of the impressive and well-honed input that the Brennan and Marshall chambers offered to Justice Blackmun, that *Roe* and *Doe*'s subsequently famous three-stage analysis of pregnancy arose.[34]

In retrospect, there are two primary points that ought to be emphasized about the final and official versions of the *Roe* and *Doe* opinions. Number one, as Justice Blackmun later said publicly, with his eye in part on how many earlier lower court opinions already had articulated much the same constitutional conclusion, in January 1973 *Roe* was "not such a revolutionary opinion at the time."[35] No one who has read all the decisions from that 1969–72 period preceding *Roe* and *Doe* could argue successfully against Justice Blackmun's observation.

Number two, surprising as it may seem to some people, was how relatively modest and indeed almost understated the two dissents in *Roe* and *Doe*—one by Justice White and the other by Justice Rehnquist—actually were. Both of those Justices, even in the weeks after the *Roe* and *Doe* reargruments in October 1972, said privately within the Court that they might well concur in at least some parts of the *Roe* and *Doe* holdings.[36] Indeed White's eventual dissent, if read very carefully, seems to acknowledge that perhaps the Constitution would indeed require states to allow at least those "therapeutic" abortions when an individual woman could demonstrate a particular "life" or "health" reason for terminating a pregnancy.[37] Somewhat similarly, Justice Rehnquist in his additional dissent went out of his way to acknowledge that Justice Blackmun's work on behalf of the seven-Justice majority "commands my respect."[38] These qualifying concessions or acknowledgements, it is fair to say, are a significant part of the Burger Court's experience with *Roe* and *Doe* but are also undeniably a part of the story that in subsequent years has been almost totally omitted from virtually all renditions or recapitulations of abor-

tion law history. Highlighting the relative modesty of those two 1973 dissents also helps underscore how the internal divisions within the Burger Court over abortion grew much more intense in the years after 1973, and particularly in the years 1980–86, than was the case at any time during the 1970–73 period.

Part of that intensified divisiveness resulted from the intensely critical reactions of legal academia to *Roe* and *Doe*. Most students of abortion law will remember John Hart Ely's famous and influential article that in many ways stimulated and encouraged criticism of the Blackmun opinions.[39] Ely's essay represented a stance that a number of voices, particularly the *New Republic* magazine, continued to articulate all throughout the 1970s and 1980s in what became an unfailingly sustained drumbeat of criticism.[40] At least at the *New Republic*, that criticism intensified even further in the wake of the *Casey* decision in 1992.[41]

One need touch only briefly on what happened within the Burger Court during the late 1970s and early 1980s with respect to the abortion funding cases. First in *Maher v. Roe*[42] from Connecticut in 1977, and then more notably in *Harris v. McRae*[43] in 1980, the outcomes—particularly the 5–4 split in *Harris*—very much raise the question whether or to what extent we should speak of the 1970s and 1980s as having been the "Powell Court" rather than the "Burger Court," in much the same way that we at times wonder whether we should talk about the "Brennan Court" rather than the "Warren Court." Particularly when one looks at the period from 1980–86, when Justice Powell time and time again was the decisive vote in a host of areas, not just abortion and sexual privacy, the Court's track record requires us to acknowledge explicitly the extent to which Justice Powell represented the balance wheel of the Burger Court.

When one examines the post-*Roe* abortion cases such as *Danforth*[44] in 1976, *Colautti v. Franklin*[45] in 1979, *Akron Center*[46] in 1983, and *Thornburgh*[47] in 1986, two points most need to be underscored. One is the visibly increased intensity and emotional energy that both Justices White and Rehnquist brought to their dissents. When, for example, one looks at Justice White's opinion in *Thornburgh*,[48] it may come as something of a surprise to contrast that declaration with the much more calm and understated White dissent back in *Roe v. Wade*.[49] The increased intensity that both Justice White and Justice Rehnquist brought to the abortion divisions within the Burger Court during the 1980s was at least in part an intensity that was fueled by the criticisms and political arguments that were being voiced outside the Court itself.

Second, in addition to the intensification of White's and Rehnquist's dissents, the abortion stance that was taken by Justice O'Connor in her first two abortion cases—*Akron Center* and *Thornburgh*—and the 1986 change of heart by Chief Justice Burger in *Thornburgh* accounted for how, by 1986, what had been a 7–2 margin back in *Roe* and *Doe* in 1973 became instead a much narrower 5–4 margin in *Thornburgh*. By 1986, it again was Justice Powell who represented the fifth and determinative vote for upholding and reaffirming *Roe* and *Doe*.

But what was most notable about the final days of the Burger Court, preceding Chief Justice Burger's retirement in the summer of 1986, was not the narrow reaffirmation of *Roe* in *Thornburgh* but was instead the Burger Court's second "great"—or infamous—sexual privacy decision: its upholding of Georgia's criminal sodomy

statute in *Bowers v. Hardwick*.[50] Any discussion of *Bowers* requires us to remember the particular circumstances that gave rise to the case: namely, how Michael Hardwick and his publicly unnamed sexual partner were arrested in Hardwick's own bedroom, for engaging in mutual oral sex, by a police officer who had entered Hardwick's home on other business.

Nowadays there is something of a consensus among most historians and commentators that in retrospect it was a huge error for Hardwick's attorneys to take the case forward. If interested litigators had been more painstaking and less naive in looking at what the Burger Court was doing with sexual privacy petitions prior to 1985, they could have had much more accurate—and pessimistic—expectations about what would probably come to pass in *Bowers*. Two very explicit earlier warning signs were among those that were fatally passed over. First, back in 1976, in an underappreciated case called *Doe v. Commonwealth's Attorney*,[51] from Richmond, Virginia, a declaratory judgment suit against Virginia's sodomy statute was rejected by a 2–1 margin in a three-judge federal court.[52] That defeat was appealed immediately to the Supreme Court, which, much to the amazement and consternation of the plaintiffs' attorneys, summarily affirmed the district court ruling by a 6–3 margin without even hearing arguments.[53]

Seven years after *Doe v. Commonwealth's Attorney*, an even more obscure sexual activity case, *Uplinger v. New York*,[54] was accepted for full Supreme Court review—as we in retrospect can tell from the docket sheets in the Thurgood Marshall Papers[55]—by a minimum vote of four Justices: Chief Justice Burger and Justices White, Rehnquist, and O'Connor. Argument was heard in early 1984, but four months later, *Uplinger*, by a 5–4 vote (with those four in dissent), was dismissed as improvidently granted because a prior New York state case, *People v. Onofre*,[56] on which *Uplinger* was premised, had already been denied High Court review.[57] If interested observers had paid far more careful attention at that time to what happened with *Uplinger*, they might well have realized and appreciated what would most probably come to pass in *Bowers*.

The inside-the-Court history of *Bowers* is about as fascinating a Burger Court story as there is. The latter part of that story, concerning Justice Powell's ambivalence, his switching of his vote from affirmance to reversal, and then his subsequent, postretirement acknowledgement that he believed he indeed had erred in making that switch, is already well-known among students of the Court.[58]

But the earlier part of the *Bowers* history is as good a single-case window as one can find concerning just how strategically calculating so much behavior within the Burger Court was in the mid-1980s. The initial four votes to grant were cast by Justices White, Rehnquist, Brennan, and Marshall—what we might call both ends against the middle. However, at least one Justice in that middle, Harry Blackmun, could, unlike the litigators, see what might well be coming, and Justice Blackmun went to Justice Brennan and persuaded him to withdraw his vote to grant. Nevertheless, when Brennan circulated a Memorandum to the Conference saying that he had taken a "second look" and was changing his vote to "deny," within twenty-four hours Chief Justice Burger circulated a similar memo saying that "I, too, have taken a second look" and that he would now vote to grant certiorari. Efforts to persuade Justice Marshall to shift his vote in the same way that Justice Brennan had

were without avail, and hence *Bowers* in the end actually was taken by just four votes—those of Justices White, Rehnquist, Burger, and Marshall, the latter of whom certainly disagreed with the other three on the merits but who apparently did not want to so visibly follow Justice Brennan in making such a stark shift of votes.

Justice White's eventual majority opinion in *Bowers* is unquestionably the most widely and harshly criticized Supreme Court opinion of the last fifty years,[59] perhaps since *Korematsu*[60] back in 1944. However, as opposite as *Bowers* and *Roe* are, there nonetheless is no getting around the fact that within the entire substantive due process/fundamental liberty arena, those two decisions are for better and for worse the two great legacies of the Burger Court.

In conclusion, one must highlight how in the intervening ten or more years since the end of the Burger Court, the ensuing Rehnquist Court has—perhaps very surprisingly in *both* instances—vindicated one of those Burger Court legacies—*Roe*—while appearing to vitiate the other. In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[61] and most particularly in the O'Connor-Kennedy-Souter joint opinion, a Rehnquist Court majority provided not only a fundamental reaffirmation of *Roe*'s constitutional core but also what in many particulars, as any number of commentators have highlighted, was a *better* enunciation and defense of the fundamental rights at issue in *Roe* than had been offered by the majority back in 1973.

Finally, as is already clear to many observers and students of the Court, the 6–3 decision written by Justice Kennedy in May 1996 in *Romer v. Evans*,[62] the gay rights case from Colorado, started to pull the rug out from under *Bowers v. Hardwick* to at least a very significant extent. If the utter silence of the Kennedy majority opinion in *Romer* about *Bowers* was by itself not enough to point anyone toward that conclusion, then Justice Antonin Scalia's angry dissent more than completed the requirement. Scalia's *Romer* dissent—in which, in all-too-typical emotive language, he protested the majority's refusal to say anything at all about, or even cite, that ostensible precedent from only ten years earlier—actually left *Bowers* even more visibly abandoned than would have been the case if Scalia too had ignored rather than highlighted it.

Thus, it more than plausibly appears to be the case that not only is *Roe v. Wade* a *living* legacy of the Burger Court, but *Bowers v. Hardwick* now appears to be a dying legacy of the Burger Court. Indeed, both *Planned Parenthood v. Casey* and *Romer v. Evans* suggest that just as the Burger Court often extended as well as followed the work of the Warren Court, now very similarly too the Rehnquist Court has followed the Burger Court in illustrating and endorsing Judge Henry's observation that activism indeed is "here to stay."

Notes

1. 505 U.S. 833 (1992).
2. 114 S. Ct. 2309 (1994).
3. 115 S. Ct. 1624 (1995).
4. 410 U.S. 113 (1973).
5. 478 U.S. 186 (1986).
6. 116 S. Ct. 1620 (1996).
7. 410 U.S. 179 (1973).

8. 381 U.S. 479 (1965).
9. See generally Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade 335–472 (1994).
10. See id. at 335–39.
11. 505 U.S. at 912.
12. See generally Garrow, supra note 9, at 379–491.
13. See Clark, "Religion, Morality, and Abortion: A Constitutional Appraisal," 2 *Loy. U. L. Rev.* 1–11 (1969); see also Garrow, supra note 9, at 372, 416, 453, 471, 481.
14. 402 U.S. 62 (1971).
15. See Garrow, supra note 9, at 318, 350, 382–83, 417–18, 468–70.
16. See 381 U.S. at 527.
17. See Garrow, supra note 9, at 475.
18. But see Garrow, "Doing Justice," 260 *The Nation* 278–81 (Feb. 27, 1995) (reviewing Newman, *Hugo Black: A Biography*); Gerhardt, "A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia," 74 *B.U. L. Rev.* 25–66 (1994).
19. See Garrow, supra note 9, at 476.
20. See id. at 418–21, 456.
21. See id. at 466.
22. See id. at 483–84.
23. See, e.g., Garrow, "The Perils of Congress Imposing Its Medical Ideas," *Philadelphia Inquirer*, Sept. 25, 1996, at A23.
24. See Garrow, supra note 9 at 521–22.
25. See id. at 533–34.
26. See id. at 548, 552–55.
27. See id. at 555–58.
28. See id. at 552–56.
29. 347 U.S. 483 (1954).
30. See Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961*, 203–04 (1994).
31. Garrow, supra note 9, at 558–59.
32. Id. at 575–76.
33. Id. at 580–81.
34. Id. at 581–86.
35. See id. at 599.
36. Id. at 581.
37. See 410 U.S. at 222–23.
38. 410 U.S. at 171.
39. See Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale L. J.* 920–49 (1973). See also Garrow, supra note 9, at 609–11.
40. See Garrow, supra note 9, at 606–07, 616, 692 (discussing *The New Republic*); see also Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 *N.C. L. Rev.* 375–86 (1985), as discussed in Garrow, supra note 9, at 613, 616.
41. See Garrow, supra note 9, at 701 (discussing *The New Republic*, July 27, 1992, at 7).
42. 432 U.S. 464 (1977).
43. 448 U.S. 297 (1980).
44. Planned Parenthood of Cent. Mo. v. Danforth, 438 U.S. 52 (1976).
45. 439 U.S. 379 (1979).
46. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).
47. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

48. Id. at 785.
49. 410 U.S. at 221.
50. 478 U.S. 186 (1986).
51. 425 U.S. 901 (1976).
52. 403 F. Supp. 1199 (E.D. Va. 1975).
53. See generally Garrow, supra note 9, at 621–22.
54. 467 U.S. 246 (1984).
55. See Garrow, supra note 9, at 644–46.
56. 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).
57. 451 U.S. 987 (1981).
58. See Garrow, supra note 9, at 659–61, 663–64, 666. See also Jeffries, *Justice Lewis F. Powell, Jr.* 514–30 (1994).
59. See Garrow, supra note 9, at 665–66.
60. Korematsu v. United States, 323 U.S. 214 (1944).
61. 505 U.S. 833 (1992).
62. 116 S. Ct. 1620 (1996).

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FREEDOM OF SPEECH

BERNARD SCHWARTZ

In August 1996, President Clinton announced new Food and Drug Administration regulations which limited cigarette advertising to which children are exposed.[1] In particular, the regulations restricted advertisements on billboards and in publications to black-and-white text-only messages and prohibited billboards with cigarette advertising within 1,000 feet of schools and playgrounds.[2] Tobacco companies responded by promising a long legal war on the restrictions, maintaining that the restrictions violated the industry's free speech rights under the First Amendment.[3] Even a *New York Times* editorial conceded that "[t]he most worrisome element of the new plan is a crackdown on advertising that may infringe the commercial free-speech rights of the tobacco industry."[4]

Commercial Speech

Before the Burger Court decisions on the subject, the term "commercial free-speech rights" was, at best, an oxymoron. That was true because, in earlier Courts, commercial speech was not protected by the First Amendment. Whatever restrictions may otherwise be imposed on governmental power over expression, affirmed *Valentine v. Chrestenson*,[5] the leading pre-Burger Court case, "the Constitution imposes no such restraint on government as respects purely commercial advertising."[6]

This was all changed when, in 1976, *Virginia State Board of Pharmacy v. Virginia Consumer Council*,[7] ruled squarely that commercial speech came within the protection of the First Amendment. A consumer group had brought an action challenging a state statute barring a pharmacist from advertising prescription drug prices. With only Justice Rehnquist dissenting, the Court struck down the law restricting prescription price advertising. Speech "which does 'no more than propose a commercial transaction'"[8] was ruled squarely within the protection of the First Amendment. Society has a strong interest in the free flow of commercial information, even advertisements.

But the Burger Court's protection of commercial speech did not stop with the prescription-price type of commercial advertising. The *Virginia State Board of*