

1992

## The Paradox of United State Democracy

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### Recommended Citation

C. A. Gearty, *The Paradox of United State Democracy*, 26 U. Rich. L. Rev. 259 (1992).

Available at: <http://scholarship.richmond.edu/lawreview/vol26/iss2/2>

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## ARTICLES

### THE PARADOX OF UNITED STATES DEMOCRACY\*

*Narrated by C.A. Gearty\*\**

*GEARTY: This program is about a paradox at the heart of American democracy. We take it for granted that elected officials, like President Bush and members of Congress, run America. In fact, many of the country's most important decisions are taken by nine unelected lawyers accountable to no one. It is a paradox which is increasingly under scrutiny as more and more Americans are coming to question the power of their Supreme Court.*

(Crowd singing): In heaven the blessed your glory proclaim, On earth we your children, invoke your sweet name. Ave, Ave, Ave Maria . . .

*GEARTY: Seven o'clock one morning in Brooklyn, New York, a couple of bored police officers are keeping an eye on the unlikeliest group of demonstrators I have ever seen. Sensibly dressed middle-aged men and women fervently praying and protesting behind police barricades.*

(Background) . . . rejoice in mystery . . . hallowed be thy name, thy kingdom come, thy will be done. . . .

*GEARTY: It is a strange place to begin an inquiry into the American Supreme Court. But, this abortion clinic and the abortion issue more than any other reveals the full breadth of the Court's*

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\* Originally broadcast on BBC Radio 3 November 6, 1991. This program was commissioned by BBC Radio 3 and produced by Elizabeth Burke, and is published with their permission.

\*\* Senior Lecturer in Law, King's College, London; formerly a fellow of Emmanuel College, Cambridge; co-author of *FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN* (Oxford Univ. Press 1990).

*power. Eighteen years ago the court guaranteed the constitutional right to abortion, but now it is on the verge of taking it away.*

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(Gearty addressing the crowd.)

GEARTY: Can I just ask you all why you're here this morning, very early in the morning at this very busy junction?

A WOMAN: Because we have to be a witness to the slaughter that happens here. These babies have no voices. The most dangerous places you know now is in their mother's womb. There has to be something better, a better alternative than to kill our unborn.

GEARTY: Where? Where is this going on?

WOMAN: Here in this clinic; in all the clinics. They open here 6 o'clock in the morning on a Saturday and they are open at 7 o'clock in the morning and they are doing a business. When they open late there are fifteen women waiting in line to get in. It's almost like a bakery and we have to be a witness. They try to do it in secret. We're not gonna let that happen in secret. We're here praying for the mothers, for the doctors, and for the unborn.

GEARTY: But the Supreme Court said it is in the Constitution. They said that women in America have a constitutional right to privacy which includes abortion. So it's part of America's laws isn't it?

WOMAN: God's laws come first.

WOMAN 2: But that baby has no rights then and that is how we all got started, in a womb. I mean we would not be here if that law had been passed when it was our time to be conceived.

GEARTY: But don't you have to rely on the judges to tell you what's in your Constitution?

WOMAN 1: No.

MAN: No. They have no right.

WOMAN 2: No. They are not imperfect and they make mistakes and we have to live with these mistakes. Hopefully, this year we will have the votes to change the Supreme Court ruling. They were only men. They will have a five to four vote against the abortion

this year; hopefully, with God's help. But enough people have to pray for it.

MAN: I tell you most solemnly, you will be sorrowful, but your sorrow will turn into joy. Hail Mary full of grace. . . . (all continue in prayer).

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FAYE WATTLETON: What is sometimes forgotten is that the practice of abortion, an ancient practice, was not invented by the Supreme Court decision in 1973.

GEARTY: *This is the opposition. Faye Wattleton is head of Planned Parenthood. A powerful national organization leading the fight to protect the constitutional right to abortion.*

WATTLETON: The question is whether women will be injured or die. It will not be very different than the kind of world in which I grew up and was trained to be a nurse in — in which women died, poor women, who came into hospital emergency rooms and clinics. This really involves the entire country. Every sector of our country is now involved in this debate in one form or another. We're really talking about basic and fundamental freedoms, human dignity. What we face is a Court that is now clearly ideologically opposed to a whole series of rights that have been established over the last generation in this country's history.

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(A trumpeter opens, and a voice begins . . . )

Almost every modern nation has a supreme court, a high tribunal to pass final judgment on a case. But when the Supreme Court of the United States evolved the power to pass judgment on the law itself, and to check the power of the government, it became unique in the world. It has become a model for the courts of many countries, but it remains the most powerful judicial body on earth.

GEARTY: *Behind the massive classical facade of the Supreme Court building in Washington, the tourists videos play constantly. The Court foyer is a shrine to judicial power. The gloomy faces of forgotten justices look down on showcases of treasured judicial relics. Items of clothing worn by some long dead jurist. A former Chief Justice's family photograph. The occasional gavel. The place is a sort of paradise for believing lawyers.*

*But beneath the gloss lies the exercise of real political power. Justice Harry Blackmun is the author of the 1973 decision which gave women in America the right to an abortion. The case, which has entered the history books as Roe and Wade, involved a young woman from Texas who was denied an abortion under Texan law. She took her case all the way to the Supreme Court and won. All but two of Justice Blackmun's colleagues added their names to his opinion.*

*Harry Blackmun was then a relatively junior justice having been appointed by President Nixon only a short while before. Now eighty-three, and still on the Court, he told me how this one decision has dominated his whole career.*

JUSTICE BLACKMUN: I wasn't eager to catch it, but I caught it. I knew it was controversial. It is something that I will carry to my grave, but I'd like to think that I have written widely in many other areas of the law than this, and yet of course (chuckle) I say I'll carry it to my grave.

GEARTY: When you talked about the reaction that Roe and Wade created, at a personal level did you receive a lot of mail? Did you find that there were people outside your home or outside the Supreme Court building protesting? What kind of a reaction was there to the decision?

JUSTICE BLACKMUN: Well, yes. I must have, and I've saved them all, I must have at least 75,000 letters — pro and con. They are not all critical by any means. Some are abusive. They continue to this day. It is a rare day that goes by that I don't have four, or five, or six letters on the subject generally.

GEARTY: Did you have a police guard at home? Was that ever necessary?

JUSTICE BLACKMUN: Well, (chuckle) shortly after the opinion came down, I had a speaking commitment out in Cedar Rapids, Iowa, and I encountered my first picketing, which was a little strange and unusual for me. But that is not uncommon to this day, it depends where I go. If it is northern New Jersey, I am always picketed. Usually in my home state of Minnesota, I am picketed all . . . on my last two visits there. Los Angeles — always. Chicago — always. New York — never. And so it varies from place to place in the country. We did have a bullet come through the window in our apartment four years ago one night about 11:00 p.m. And over

there is the tear from the chair in which the investigators found the bullet. So, there has been some protection ever since that incident particularly.

GEARTY: Have you had a sense of the change in atmosphere within the Court? With colleagues indicating that they are less committed to a decision which is one of your decisions?

JUSTICE BLACKMUN: Well, as new faces have come on the Court, yes. But the old, the ones who were there in 1973; I haven't seen much variation. Justice, now Chief Justice Rehnquist, Justice White are still as firm in their opposition as they were eighteen years ago.

GEARTY: Does Chief Justice Rehnquist ever kid you about the fact that his point of view seems to be gathering more new justices?

JUSTICE BLACKMUN: He doesn't kid me about that. We don't kid about that kind of thing, it's too sensitive of an issue. Well I might say, and I'm surprised you haven't asked the question because everybody else does, do I think Roe against Wade was correctly decided? I thought it was correct in 1973, I think today it is correct.

GEARTY: But it might be overruled.

JUSTICE BLACKMUN: Well the votes are there to overrule it, but they haven't yet overruled it.

GEARTY: So your interpretation of the Constitution was right in 1973 and it might well be, suddenly and rather oddly, wrong in 1992?

JUSTICE BLACKMUN: Well, in the view point of the majority of the justices, yes.

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GEARTY: *Justice Blackmun has seen his majority disappear. Behind the scenes, powerful lobby groups have been at work, dedicated to the overthrow of Roe and Wade. Burke Balch is the state legislative director of the National Right to Life Committee. We met in his large Washington office which exudes an atmosphere of success. A gigantic plastic fetus towered over the director's desk as we spoke.*

BALCH: The decision in *Roe v. Wade* galvanized the pro-life public, and of course it was immediately apparent to us that in order to do anything to protect unborn children we would have to change that

decision. At first, there was a great focus on doing so by constitutional amendment. Of course in the States we have a written constitution, unlike the unwritten one in the United Kingdom. To change that, now that requires an extraordinary amount of legislative activity, you have to have, in the typical instance, two-thirds of both houses of the American Congress, and then you have to submit it in three-quarters of the legislatures of the states who have to vote. So, it became apparent pretty soon that that was an unrealistic expectation, and by the time of the election of Ronald Reagan in 1980, it was clear that the more realistic approach was to change the membership of the Supreme Court.

GEARTY: So the argument moved away from constitutional amendment and in the direction of targeting justices and . . .

BALCH: . . . exactly . . .

GEARTY: . . . trying to put political pressure on the President to appoint people who would take basically an anti-*Roe v. Wade* line.

BALCH: That's right.

GEARTY: How do you go about doing that? I mean you can't write the President "Dear President, please appoint a justice who will agree with us. Yours ever, Right-to-Life."

BALCH: No, it took many years for the movement to rise to the degree of ability that it could actually influence a presidential election. It was not until 1980, I think, that the pro-life movement had sufficiently organized, that it was really key, and I think most political commentators would say this, because what Ronald Reagan was able to do was to reach as a Republican candidate and get a lot of Democratic votes, and many of those blue-collar votes did come from the so-called social issues. Many of them came from pro-life Democrats who were willing to cross over and vote for the Republican president precisely because he was pro-life.

GEARTY: So then you put pressure on a President, in selecting justices, to remember that constituency, that's the point, isn't it?

BALCH: Yes, indeed.

GEARTY: So the President announces a new name to replace some retired justice, let's say.

BALCH: Yes.

GEARTY: And then, presumably, there comes a point where the National Right-to-Life Committee gives this justice a rating. You must make a decision: we back him or her or we don't back him or her. Does that happen? Is there a process of decision-making here?

BALCH: Well, it certainly is close to that. It's more likely for us to say, not so much that we back a particular candidate, as that this candidate is acceptable to us.

GEARTY: Sounds a bit like backing.

BALCH: Well, in a political race, you see, you'll sit down and you'll say, "This is the strongest pro-life candidate." But again, there's a certain decorum here. You can't quite say that a person is running for justice on the basis of will they reverse *Roe v. Wade* or not.

GEARTY: Well, now, that's the truth isn't it? This decorum business we've dragged up to try and hide the truth, which is this is politics, you've switched your political focus on a court. You're a bit embarrassed by it, so we talk about the need not to back [the candidate]. But this is the reality.

BALCH: It's a no-no to go out and say "Well this justice is going to vote to reverse *Roe v. Wade* or is not." It's considered that is an inappropriate thing for a justice to say, as opposed to, let's say, a political candidate, who can say "I'll take this position or I won't." So you have to understand that there has to be a certain decorum observed.

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(Interlude Music. Back at the Supreme Court Building)

"VIDEOTAPE NARRATOR: *The court is a place of simplicity and decorum, or as Justice Oliver Wendall Holmes observed, 'We are very quiet here.' But it is the quiet of a storm center.*"

(The NARRATOR is interviewing students outside the Court building.)

GEARTY: What does the Supreme Court mean for you? What does it stand for, this beautiful building around here?

STUDENT 1: Freedom and justice.

STUDENT 2: Yeah.

GEARTY: Freedom and justice. What about you?



STUDENT 2: Same thing, for the United States.

GEARTY: What about you?

STUDENT 3: Same thing.

STUDENT 4: It says "Equal law . . . equal justice under law" that means we all have the same rights.

GEARTY: Where does it say that?

STUDENT 4: It says it right up there on the top of the building.

GEARTY: And does it really mean that, or does it just mean what the judges want it to mean?

STUDENT 4: It really means that.

GEARTY: Are they more powerful than the President?

CHORUS OF STUDENTS: No.

UNIDENTIFIED STUDENT: Yeah, they can, can't they overrule the President?

ANOTHER STUDENT: No only Congress can.

UNIDENTIFIED STUDENT: Congress. I knew it was one of those two.

STUDENT 5: The President is the one who is elected and he's the one who's in charge. He controls them.

GEARTY: The Supreme Court can overrule him.

STUDENT 5: They can?

GEARTY: Yeah.

UNIDENTIFIED STUDENT: I was right, thank you, thank you.

GEARTY: And they can overrule Congress. Could you name any Supreme Court Justices? Could you? A little civics test?

STUDENT 5: Name the state name . . .

GEARTY: Name a couple. Yeah. Could you name any of them that are in there?

STUDENT 5: We just ate lunch there. We haven't toured it yet. (Laughter)

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GEARTY: *Whether they know about it or not, the country in which these school children are growing up has been shaped by the Su-*

*preme Court. Roe and Wade was simply the culmination of 30 years of radical decisions under two Chief Justices in particular, Earl Warren and Warren Burger. In the 50's, the Court ended racially segregated schooling. In the 60's, it greatly strengthened the rights of suspects and controlled the power of the police. Its determination to protect a free press led to the publication of the Pentagon Papers, and it was a unanimous Supreme Court decision against him that eventually forced the resignation of President Nixon. But in the 80's, this line of liberal victories came to an abrupt halt. The new justices appointed by President Reagan and now by President Bush are unsympathetic to the achievements of their predecessors. At times, they seem bent on undoing the work of the past. Anthony Lewis, author of a famous book on the Supreme Court and a distinguished liberal commentator, is not so much outraged as amused.*

LEWIS: "We live under a Constitution," Chief Justice Hughes said. "But the Constitution is what the judges say it is." That through the latter part of the 19th century, and on until, if one has to pick a date, 1936, the conservative forces in American society, which dominated the Supreme Court, felt that property was the dominant human right. The Supreme Court construed the Constitution to be fundamentally a protection of property. If you look at all of history, the Supreme Court has generally not been an enforcer of what we today would regard as fundamental humane values. Justice Jackson, who was appointed by Franklin Roosevelt, he wrote a book, he died before it was published, it was published posthumously, in which he said, among other things, the Supreme Court had never for a moment represented anything but the most conservative instincts in American life. Lawyers, appointed from the highest ranks, and they tend to be conservative. Maybe I'm too much of an optimist, or whatever, I'm a bit fatalistic about all this when people say, "Isn't it awful?" I say, "That's the system the Constitution imposed." It arranged that there should be one constraint, one majoritarian constraint on the extraordinary power of these nine people appointed for life to make the fundamental law of our country. That constraint is the President's appointment of the members of the Court with the advice and consent of the Senate. That's the system and that's what it is.

GEARTY: And they die.

LEWIS: And they die, eventually they die. They don't die soon, on the whole. They live long.

GEARTY: And they're pretty reluctant to retire?

LEWIS: They are usually reluctant to retire. Holmes served until over the age of 90 and he was a better judge at 90 than most people at any age.

GEARTY: And there are more recent examples, aren't there?

LEWIS: There are more recent examples.

GEARTY: And here we are, in what everybody agrees is the greatest democracy that has been developed, gossiping about individuals and talking about their desire to retain power and so on, and the great, tremendous influence they have on American law. And yet none of them is elected, none of them has ever even considered standing for election.

LEWIS: Right. They were all appointed to that position.

GEARTY: Is this paradoxical to American thinking?

LEWIS: Yes, oh, sure. Britain's not the only country with paradoxes. I mean, we have a somewhat Gilbertian system too.

GEARTY: You're proud of that?

LEWIS: Yes! I think it's wonderful. (*Laughter*)

GEARTY: Do you think the Supreme Court is a bit like the royal family? People rather admire its idiosyncracies and look up to it as a symbol of America?

LEWIS: No, I don't really think that's fair. There is, of course there's a symbolic value, at presidential inaugurations and sitting there at speeches to Congress and so forth, but there is a difference, and that is they have power. Lots of power.

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(The scene switches to an office where the phone is ringing.)

PLANNED PARENTHOOD STAFFER: Good evening, Planned Parenthood.

GEARTY: *The full reach of [the Court's] power is becoming apparent to a new generation of American women. The scene is a busy family planning clinic in downtown Washington.*

GEARTY: In the waiting room here, there is a framed extract from the Roe and Wade case, which gives women the right to reproduc-

tive freedom. Is that case important to you, that 1973 decision? You'd heard the name before, had you?

WOMAN 1: Yes, I had. It's the sort of tag line that people throw about whenever they talk about the debate of *Roe v. Wade*. It was only fairly recently, I think — I had always heard about *Roe v. Wade* — but I think it's only been in the last two weeks, I remember reading something about it in the newspaper, when I realized that we had only been given the right in 1973, which, I was too young to notice it at that time. But I remember reading that date in the newspaper, being quite shocked about how recently we had been given that right.

WOMAN 2: You know they're not going to have abortions. They're mainly men, with the one exception, and that personally is rankling too, that nine, basically old men, with that one exception, deciding something for somebody my age. In terms of having a body of elders who supposedly know, I don't really think that the Supreme Court is necessarily that. I think it's very political.

GEARTY: But if they were political, in the sense of elected, you know what you could do. You could write them letters, you could have a demonstration at Congress . . .

WOMAN 2: Well, that's what our legislature is.

GEARTY: Yes, so how do you influence the Supreme Court?

WOMAN 2: You don't. You can't. I participated in a rally a few years ago when I was in college. We came down from New Hampshire, which is about a nine hour drive, and we just came down for overnight to be in this rally. It was aimed at the Supreme Court because they were about to make a decision concerning *Roe v. Wade*. And that kind of thing might make me feel better, that I came down and participated in this, but I have no idea of what kind of effect it would have on Supreme Court justices. They say it has no effect. You know, who knows?

GEARTY: Here we have at the center of this great country — we're all taught how wonderfully democratic it is — we have this extraordinary fact, that these nine people, eight men, it used to be nine men, these eight men and one woman, can pick and choose which areas of American life to influence, and there's no accountability.

WOMAN 2: Right. Right.

GEARTY: What are you taught at school? That this is fundamentally antidemocratic?

WOMAN 2: We are taught that it is part of the system of checks and balances. Those are the words, and that's the way it is. It is very strange to have a body that is responsive to no one.

GEARTY: If you could ask the Supreme Court justices, or one of them, some questions, what would you ask them?

WOMAN 2: I would ask them, upon what do they base their decisions? Is it on a strict legal reading of the Constitution? Is it their sense of public opinion? Because those two things would probably generate very different results. I'm just very curious about what goes into their decision-making process.

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GEARTY: *One of the justices who voted in favor of Roe and Wade, is Justice Lewis Powell. Now 84, and retired from the Court, he gave a frank and surprising answer to this question when I met him in the Supreme Court office that he, like all retired justices, still retains.*

JUSTICE POWELL: One thing that influenced me in that case, that should not have influenced me, happened while I was practicing law. In a law firm in our country, we have messengers. We had several, we called them "office boys" regardless of their age. Well, I was awakened one morning, I've rarely told this story, and one of the office boys was on the phone. He was weeping and his story was, well, he asked me if he could see me at the earliest possible time and I met him down in my office, I don't know, it was early, say 6:30, 7 o'clock. And, the story he told me was a very sad one. It may have had some influence on my vote in *Roe* because he had been dating a divorced woman. This boy was about nineteen years old and had been dating a divorced woman who was 24 years old. And, she became pregnant. So she, with the help of this young man who was dating her attempted to commit an abortion. I don't know whether they used the proverbial wire coat hanger. I forget, but in any event, she died. And so you understand why this young man was terribly upset and weeping on the phone. I went down to see the prosecuting attorney in my City of Richmond and, of course, this young man could have been prosecuted for murder. And, to make a long story short, no prosecution was ever brought.

Now a woman, certainly before the fetus becomes viable, may obtain an abortion. At the time I described, that was unlawful. So I was in full agreement with the decision of the Court in *Roe*. I thought a woman ought to have the right, and I still think so. So I think *Roe* was correctly decided.

GEARTY: It was correctly decided because it was the right thing to do, but was it also the constitutional thing to do?

JUSTICE POWELL: That's a very insightful question. There was no direct authority.

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GEARTY: *This seems to be the core of the issue: However much we might sympathize with Justice Powell's moral predicament, the fact remains that the Court claimed that laws prohibiting abortion infringed the American Constitution. But, there's nothing specifically in the Constitution about abortion. I asked Justice Blackmun to defend what is, after all, his opinion in *Roe* and *Wade*. Where did he find this new right to privacy?*

JUSTICE BLACKMUN: We got into the penumbras of the Constitution and the Bill of Rights. Oh there are a lot of things that aren't specifically in the Constitution. After all, it's 200 years old.

GEARTY: These penumbras are visible only to the Justices?

JUSTICE BLACKMUN: Oh, no they're visible to the public obviously.

GEARTY: But we can have different perceptions of the penumbras?

JUSTICE BLACKMUN: Indeed. And valid points of view that differ. There's no question about this; I tell young people when I'm visiting law schools . . . that are disturbed about it to stick to their viewpoints. This is a controversial issue. I spelled it out in *Roe* against *Wade*. I couldn't do it any more to my satisfaction. The first two paragraphs indicate the agony of decision I think. And I did that in the face of advice that Justice Black had given me when I first came down there. He said, "Harry," calling me by my first name as we all do, "Never agonize in a decision. Make it sound just as clear as it can be." Well, I didn't do that in *Roe* against *Wade*. It was a hard decision, a difficult decision. But you see, the issue has been politicized which I personally think, this is just a personal remark, think is unfortunate. But I speak as a citizen, not as a member of the Court.

GEARTY: But this does bring us to a very important point which is that you were speaking just now as a citizen, but you were speaking as a Supreme Court Justice when you took what many people would think is a very political question and adjudicated upon it as a Court. So maybe there is a sense in which people feel that an issue that ought to be political became judicial.

JUSTICE BLACKMUN: Well, there are those who feel that way, yes. I don't think it was a political question. There are those who feel that this is something for the legislatures to enact. In opposition to that, there is a strong body of thought that if you do that, you're gonna have back-alley abortions.

GEARTY: Because we can't trust the democrats?

JUSTICE BLACKMUN: Something like that.

GEARTY: How, whilst we agree with many of the results, do we justify such a strong counter-majoritarian element in a democratic Constitution? Where is the legitimacy of traditional view where it takes on majority decisions and overrides them?

JUSTICE BLACKMUN: Well, there are some things, I suppose, one could say, one could argue, would never have been accomplished if this Court hadn't stepped in. There's a great quotation by Justice Jackson of some years ago. He said, "There are certain issues which are not subject to the will of the majority. And that's what the Bill of Rights is about."

GEARTY: The Bill of Rights as interpreted by people like Justice Jackson? With its penumbras?

JUSTICE BLACKMUN: Well. . .

GEARTY: I'm one of those old fashioned liberals that adored the Warren and Burger Court. But probably, if I'm being honest, because it did some wonderful things. Not because of your penumbras. Your penumbras were a useful way of getting them done. Thank goodness you spotted them.

JUSTICE BLACKMUN: That's a route to the result. Yes, sure.

GEARTY: But I'm an academic lawyer. I'm not supposed to be results based. I'm supposed to have some theory.

JUSTICE BLACKMUN: No, none of us will admit that's true.

GEARTY: This is lawyers' propaganda. This is the way we cover up the power we have.

JUSTICE BLACKMUN: (Laughter.) He's getting political now, I see.

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GEARTY: *It's hard not to get political where such deeply political issues are involved. Even when it means being almost rude to someone as distinguished as Justice Blackmun. Robert Bork certainly doesn't mince his words. Not surprising given that a few years ago, he became one of the most famous people not to serve on the Supreme Court after a bitter and acrimonious campaign against him led by liberal politicians and lawyers. His condemnation of Roe and Wade is unequivocal.*

BORK: It is the premiere example in this century of judges taking an issue away from the people without any warrant in law or the Constitution. If you read the *Roe* opinion, it's about fifty-one pages long, and it's taken up with the history of abortion in the Persian empire, as I recall, and in English common law. It goes through the views of the American Medical Association, the views of the American Hospital Association, or something like that. And on and on and on. And then it comes to the law. And it's the law, there is no legal reasoning in the opinion. It simply says wherever the right of privacy is located in the Constitution, they can't even agree about that, wherever the right of privacy is located, it is broad enough to cover a woman's right to have an abortion. That's all. Just flat assertion.

GEARTY: They say they find it in the penumbra of the Constitution. Justice Blackmun told us that yesterday.

BORK: (Laughter.) I know. They do. And it's a little odd that they should find rights to privacy that are not in any of the provisions of the Constitution relating to privacy but they have created an extra right to privacy which they will define from case to case. Actually, we have a lot of rights to privacy which are usually created legislatively. In fact, I am, myself, a person who has just created a new right to privacy. During my hearings my wife and I were standing in a videotape store when a man came in off the street and recognized me and said, "I just heard on my car radio every movie you ever rented." And I quizzed him while my wife was over strangling the store owner and it turned out that the reporter had come in and gotten a list of every movie we ever rented. They were



hoping for some big scandal. Unfortunately for them, it turned out to be Cary Grant, Alfred Hitchcock and so forth.

GEARTY: None of "The Beast Lurks in the Subway" movies at all?

BORK: None of those. No. No. But the politicians were quite worried about this. And now, as I understand, the Federal Government and the District of Columbia Government have passed what they call "Bork bills" which make it a misdemeanor for a video store to release the names of the movies somebody has rented. And various states have passed such bills.

GEARTY: You didn't think of suing the video store and asking the courts to do it for you, did you?

BORK: No. But, that's a new right of privacy, and it's created in the proper way. People decided there was some aspect of life they wanted private and they legislated about it. They just didn't say to judges, "Do whatever you want."

GEARTY: So your objection is primarily the democrats' objection?

BORK: You mean democrat with a small "d"?

GEARTY: Absolutely.

BORK: Yes. Entirely. In my view, a judge gets his or her only legitimate authority from law that exists outside the judge's desires. And to which the judge refers when he makes a decision. But these cases, the Court has, for the last couple of decades, been active in what they call "lifestyle areas" in protecting deviant or different lifestyles that they think worthy of protection although the legislatures did not.

GEARTY: So the Supreme Court, in your view, should be engaged in what kind of analysis when they are confronted by challenges to the constitutionality of legislation?

BORK: Well, one thing they should do is look at the text of the Constitution to see whether the subject is covered, and then look at the historical evidence. And there's quite a bit of that, and we have the records of the Philadelphia Convention; we have some records of the state ratifying conventions. We have the Federalist Papers; we have the anti-Federalist papers, debates of the day and so forth. So that I think they can usually find within a fairly acceptable range what was intended. Now that's not to say that a judge will always decide cases just as those people would have if we

could resurrect them today. But he can protect the values they want protected and leave to the processes of democracy the values they wanted left to the processes of democracy.

GEARTY: The effect of which is that if our interests are minority interests, we are left pretty vulnerable.

BORK: Well, minorities are people who lose in the legislative battle. That's what democracy means. If the Constitution doesn't prevent a minority from being picked on, the Constitution prevents racial minorities from being picked on, it prevents religious minorities from being picked on, et cetera, et cetera. But everybody is a minority as to some issues. And, if the Constitution doesn't speak, it merely means they lost in the democratic process. Justice Holmes used to say, as I recall, that if the American people through their legislatures, wanted to go to hell in a handbasket, it's his job to help them. And that's my view.

GEARTY: Some people would say that you have this view of the Supreme Court because you're not on it.

BORK: I had this view before, that's *why* I'm not on it. No, I expressed this view before that.

GEARTY: You're punished for the view, rather than have [been given] a great respect for it.

BORK: No, I didn't develop it that fast.

GEARTY: So if you want to be a Supreme Court justice, don't rent dirty videos and keep your mouth shut.

BORK: I think that's probably a good start, yes.

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GEARTY: *But this man who has given us such a straightforward almost conventional description of democracy is an isolated and lonely figure in the United States because of it. The leading law schools in America are packed with lawyers proud of the achievements of the Court that Robert Bork derides. Pre-eminent amongst them is Ronald Dworkin, Professor of Law at both New York University and Oxford. His books have gone a long way towards giving the Court a solid constitutional basis for the exercise of its power. They read like clarion calls for judicial activism. And Ronald Dworkin is almost contemptuous of Robert Bork's allegation that the Court's power is undemocratic.*

DWORKIN: As if there were a single meaning to the idea of democracy.

GEARTY: Well, let's take one meaning which is that the majorities should arrange matters in accordance with their wishes.

DWORKIN: That to me is an implausible conception of democracy. It's true that some countries and in particular, Britain, seem enamored of that conception of democracy. It has never from the very beginning been the American conception of democracy. If you use that notion of what a democracy is, you've got to just say in 1789 the United States decided not to be a democracy. So I prefer a different, more realistic, historically more accurate notion of democracy.

GEARTY: Which is what?

DWORKIN: Which is this, democracy is the state of affairs in which individual rights are protected to the extent necessary so that against that background it's fair that a majority can rule. The idea is that a majority rule isn't automatically a source of the legitimacy. Because majorities can be tyrannies.

GEARTY: Begs the question as to who's to decide when the majority can have its day and when human rights are to be protected. And those are the judges.

DWORKIN: Yes. Someone's got to decide, and in our system, it's, as you say, the judges that have to decide. What the Constitution invites is interpretation. And the difficulty I have with people who say go back to the original intention is they think that's an answer. That just rephrases the question. What's the correct way of interpreting the intention of people who lay down varied ground, even ground, delinquent language.

GEARTY: Do you ever have anxiety attacks that someday the Supreme Court, under its present Chief Justice will start striking down a whole bunch of progressive pieces of legislation quoting your writings about judicial activism. I know you hate the phrase, "judicial activism."

DWORKIN: Yes. Nightmares, that could happen. And I won't be around to worry about it but it could happen. And that is a cause for regret.

GEARTY: In the event of an activist right-wing Supreme Court destroying "President Cuomo's" progressive legislation of the nineteen-nineties, it would serve you right, wouldn't it?

DWORKIN: I see what you mean. Look, you ask a marvelous question and that is maybe we're all betting on the wrong horse. We're betting on the horse that used to be. Because it used to be a liberal horse, and now it can be a terrible conservative horse. It's a bet I would still take because the structure it seems to me is what's important to preserve. And you talk about the administration of President Cuomo, he'll have some justices to appoint.

GEARTY: Justice Dworkin?

DWORKIN: (Laughing) I think I'm very rather past it.

GEARTY: (Laughing) Well, Oliver Wendall Holmes lived 'till ninety.

DWORKIN: That's true. Put in a good word for me, will you?

GEARTY: But your betting analogy, I think, is crucial. Because at the end of this long inquiry, it seems to me that one comes to a certain conclusion. Which is that the best intellectual argument for Supreme Court activism is that you like the results.

DWORKIN: Yes. I, of course, won't accept that. I'd rather put it this way. The best reason, I don't like the term activism, the best reason for a responsible Supreme Court, attempting always to see each case as raising questions of principle that extend into the future. That's one description of an activist court. It's a court that sees each case as raising more general principles. Now the reason to embrace that vision, I think, is one of political morality. I think that, I passionately believe, that a just society is a society of integrity. By which I mean, it's a society in which the principles that are relied on and justified to defend what happens to you today are principles to which I'm entitled to appeal tomorrow. That seems to me an elemental requirement of fairness and decency in government. And that's what the Supreme Court is about and should be about. So I'd rather say it's integrity. It's that vision of principled government, rather than simply political government which endorses the grand scheme. However if you said to me, would you hedge your bet, I mean you love this principle, but supposing you thought it was going to produce an unbroken stream of disastrous retrograde decisions. Would that weaken your enthusiasm for the principle. I would reply, "I'm only human."

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GEARTY: *So even great liberal academic gurus are beginning to hedge their bets now that the Court is no longer behaving in the liberal way they want. The truth is that the Court grabbed a whole range of powers in the fifties and sixties, which it used to protect the liberals' version of freedom. So it wasn't really necessary to use the democratic process when the Court was doing the work for you. Now liberals are waking up to the fact that an America without the protection of the old Supreme Court may be a far uglier place. It's likely that the Constitutional right to abortion will be abolished during the next twelve months. The Court won't be prohibiting abortion, it'd just be saying that everything will depend upon how the local states vote. Rachael Pine is a lawyer with the American Civil Liberties Union, with a long experience of fighting for abortion rights in the U.S. courts. She's dismayed by this prospect of American democracy.*

PINE: What the legislatures would increasingly permit are the things that make abortion more expensive, more geographically unavailable, and available to an increasingly only upper class select educated group of women. That's the unfairness that's reflected in a legislative process which ought not be reflected in a constitutional process. We'll have poor women and we will have minors, teenagers, and we will have vulnerable groups that are not represented in the legislative process. Sacrificed, as political sacrifices. And that's what the constitutional principle's not supposed to allow.

GEARTY: Back to the 1950's. Back to the back street abortions.

PINE: For those women, for sure. And in addition you would have major differences between different regions of the country. You'd have major differences between one era and another era. And the question is whether this kind of decision is the kind where we want rich people and poor people to have entirely different options. Whether we want adult women and younger women to have entirely different options. Whether we want one generation and the next to have entirely different options because the composition in the political winds has changed in their state. And whether we want people in one state to have entirely different options than those in the state next door. Is this the kind of issue that ought to be subject to that kind of patchwork, and that kind of change in picture over time?

GEARTY: Roe and Wade delivered a fundamental right to women in 1973, and the women of America believed the Supreme Court when they said it was a fundamental right. So they thought they had the right, they didn't organize. They didn't develop a powerful lobby to defend this right. Meanwhile, on the other side, we had this very efficient, so called "right-to-life" group, which didn't see it as a fundamental right at all, but as a political decision which had to be overturned. They've organized, they have put enough pressure as a single issue group on presidents and Congress to ensure that their people have gotten on the bench. You could say, couldn't you, that in a sense the women's movement was rather complacent.

PINE: Well that's absolutely the case. It is absolutely true that the availability of the courts as a sort of bailout, if you will, as a way for long term protection nationwide at one fell swoop led to a very complacent movement.

GEARTY: So people are beginning to organize.

PINE: People are beginning to organize, but there is something that is inconsistent to me, the notion of something being a right is inconsistent with the notion that you have to fight for it with lots of money and lots of people year after year after year, in subdivision after subdivision after subdivision of political life.

GEARTY: But you fell for the legal lie. The legal lie was its a fundamental right. It's not a fundamental right. It's something that has to be fought for and retained every day.

PINE: That's probably true. That's probably true.

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COURT CRIER: Oyeah, Oyeah, Oyeah, all persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention for the Court is now sitting. God save the United States and this honorable Court.

