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My Body, Not My Say:
Justice Blackmun's Influential Decision in *Roe v. Wade*

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Summer Fellows 2016

Abstract:

Abortion laws have regulated women's bodies since the beginning of the country. Many people associate regulation with the case of *Roe V. Wade* in 1973, in which the Supreme Court ruled that states could not outlaw abortion during the first trimester. *Roe v. Wade* remains controversial to this day as it failed to establish consensus that women's decision whether or not to terminate a pregnancy falls within their constitutional right to privacy. Understanding the implications of this decision is fundamental to analyze the debate over the constitutionality of abortion today. This paper examines the opinion written by Justice Blackmun in *Roe v. Wade*, by examining the reasoning behind his decision as well as the man behind the decision. In addition to examining the pivotal role of Justice Blackmun, this paper looks at the impact his decision had in shaping reproductive freedom in the future. To do this, the paper summarizes previous research on Supreme Court cases post *Roe* that presented additional arguments on the constitutionality of abortion regulation. I additionally summarize the examination of multiple Supreme Court cases regarding the constitutionality of abortion regulation. Justice Blackmun paved the way to expanding women's right to make their own reproductive decisions by interpreting this as part of the right to privacy, but his decision did not go far enough. Because Justice Blackmun's decision allowed for competing interpretations, women's reproductive rights were not securely guaranteed, as subsequent Supreme Court rulings on abortion demonstrated. The paper concludes that many justices and legislators have denied the right to privacy that Justice Blackmun spelled out in *Roe*, supporting the infringement on women's rights by preventing women from having abortions or access to contraceptives. I use the *Roe* decision to examine the constitutionality of the current restrictions being placed on women's bodies and argue that these laws and

regulations against women infringe on their ability to participate equally in society, limiting their rights as citizens.

I. Introduction

Women's bodies have been legislated for years. The Supreme Court decided in *Muller v. Oregon* (1908) that women – unlike men – could not work more than ten hours a day since this could presumably jeopardize their health and reproductive ability. Until 1965, laws denied married women the right to use contraceptives and it was not until 1972 that unmarried women gained this right. Until *Roe V. Wade* (1973), state laws made it a felony for a woman to get an abortion. This has created tension between a women's right to regulate her individual fertility and reproduction and the state's interest in maintaining a healthy, growing population. This state interest has been historically reflected in the laws and strong social norms that specify women's primary roles in terms of childbearing, child rearing and motherhood. Post *Roe*, I have found that the law continues to regulate many aspects of American women's lives and restricts their reproductive freedom. In Supreme Court cases regarding reproductive freedom, many justices have supported the infringement of women's rights by restricting their access to safe and affordable abortions as well as their access to contraceptives.

There have been major improvements and large setbacks in reproductive rights since the 1960s. Many people argue that women's rights are no longer a pressing issue as abortion has been legal for decades. However, it is unfortunately not that simple. Katha Pollitt argues, "It is inaccessible-too far away, too expensive to pay for out of pocket, and too encumbered by restrictions and regulations and humiliations, many of which might not seem to be one of those "undue burdens" the Supreme Court has ruled are impermissible curbs on a woman's ability to

terminate a pregnancy, but which, taken together, do place abortion out of reach.”¹ American society would not accept extensive restrictions on any other constitutional rights, as we do towards women’s reproductive rights. Despite the fact that American society has increasingly accepted expanded rights for minorities and same-sex couples, it remains deeply divided over women’s reproductive rights, as shown by increasing legal restrictions on women’s bodies. Gallup shows that sixty-six percent of Americans now support same-sex marriage, which is the highest support since the question was first asked in 1996.² Another public opinion poll demonstrates the public progression toward same-sex marriage but not toward abortion, “From 1972 to 2006, the percentage of General Social Survey (GSS) respondents who said premarital sex was “not wrong at all” rose from 28 to 46. The percentage who said gay sex was “not wrong at all” tripled, from 11 to 32 percent. But the abortion numbers didn’t follow. From the 1970s to 2006, the percentage of GSS respondents who said it should be possible for a woman to get a legal abortion shifted two points to the left in cases where the woman “wants it for any reason,” six points to the right in cases of a “strong chance of serious defect in the baby,” and seven points to the right in cases where the family “cannot afford any more children.” By 2006, the last year these questions were asked, only a minority supported legal abortion in the “any reason” or “can’t afford” scenarios”.³ I argue that regulations against women’s reproductive freedom infringe on their ability to participate equally in society, limiting their rights as citizens. I further

¹ Katha Pollitt. *Pro Reclaiming Abortion as Good for Society*. (New York, New York: Picador, 2014), 25.

² Justin, McCarthy. "Record-High 60% of Americans Support Same-Sex Marriage." Gallup. Accessed July 17, 2016. <http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx>.

³ William Saletan. "Why Are We Becoming More Liberal on Homosexuality but Not Abortion?" Slate Magazine. 2012. Accessed July 17, 2016. http://www.slate.com/articles/news_and_politics/frame_game/2012/05/abortion_polls_gay_marriage_polls_why_are_we_becoming_liberal_on_some_issues_but_not_others_.html.

hold that Supreme Court decisions that uphold restrictions on abortion enacted by some state legislatures violate a women's constitutional right to privacy as defined by Justice Blackmun.

II. Do Women Have a Constitutional Right to Privacy over Reproductive Decisions?

The controversy around abortion is divided in two main interests: those of the state and those of the individual. It is important to first understand that the decisions regarding fertility and reproduction have not always been seen as individual rights. In some instances, the Supreme Court has ruled that women have a right to privacy to some reproductive decisions including but not limited to the right to not reproduce. However, in other cases, the Court has contrastingly concluded that reproductive policy may constitutionally limit women's individual rights due to a compelling state interest.

To understand the constitutionality of any decision, one must first examine the language used to write the law. The fundamentals of abortion and reproductive freedom regulation rely on the right to privacy granted by the Ninth and Fourteenth Amendments. The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".⁴ The Fourteenth Amendment reads, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".⁵ Although the Ninth and Fourteenth Amendments do not explicitly lay out the right to privacy, the Supreme Court has

⁴ "Ninth Amendment." LII / Legal Information Institute. Accessed July 04, 2016. https://www.law.cornell.edu/constitution/ninth_amendment.

⁵ "14th Amendment." LII / Legal Information Institute. Accessed July 04, 2016. <https://www.law.cornell.edu/constitution/amendmentxiv>.

traditionally accepted that the Constitution protects specific aspects of privacy in the Bill of Rights. In the early twentieth century, the Court came to interpret the Ninth and Fourteenth Amendments as protecting rights beyond those spelled out in the Bill of Rights. According to this privacy doctrine, the right to privacy not only protects the individual, it explicitly reduces the role of government power in areas such as child rearing, marriage and procreation. To understand how this privacy doctrine relates to reproductive decisions, we have to first go back to understand its roots in *Griswold v. Connecticut* as laid out by Jamal Green. “Justice Black wrote in dissent in *Griswold*, recognizing constitutional right of privacy ‘appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief.’ When Warren and Brandeis wrote of a right to privacy in their 1890 *Harvard Law Review* article, they had in mind civil suits against gossip-mongers and paparazzi, not constitutional defenses against abortion prosecutions. Privacy is protected by the Bill of Rights, Justice Douglas seemed to say in *Griswold*, but not in so many words. The right to privacy is to the First, Third, Fourth, Fifth, and Ninth Amendments what the right to association is to the First, an unspoken implication lying within the Amendment’s interstices and penumbras. Justice Douglas’s initial draft in *Griswold* did not ground the right of a married couple to use contraceptives in a right to privacy, and the briefs had not urged a privacy-based holding. Rather, that first draft had treated the intimacies of the marital relationship as protected by the First Amendment right of association”⁶. This demonstrates how the right of privacy has developed, adapted, and been molded to fit the issue on hand at the time. This means that the right to privacy is not as easily defined.

These Amendments focus on a right to privacy that is inferred in the Constitution as inalienable to all citizens. This came from Justice Brandeis’ creating a ‘right to be left alone’

⁶ Jamal, Green. The So-Called Right to Privacy. UC Davis. UC Davis Law Review. http://lawreview.law.ucdavis.edu/issues/43/3/liberty/43-3_Greene.pdf.

which developed into a right about personal privacy in the 14th amendment.⁷ These terms are the basis of the constitutionality of reproductive freedom.

III. Justice Blackmun's Background

Harry Blackmun always had a disconnect with his chosen profession. The Minnesotan attended Harvard Law School where he found himself designated as the graduate school representative to live with the underclassmen Harvard students. This created a physical distance between him and his colleagues at the law school campus. During his time at Harvard, he found that his undergraduate days were no match for his new all business atmosphere in the law school. While trying to balance his rigorous law courses, work, and activities, Blackmun found himself falling behind in his grade point average; he did not make law review, and ended up not winning his moot court competition. During the summers, Blackmun would return to Minnesota to work delivering milk to afford his next year of law tuition. Though Blackmun struggled through his law school journey, upon graduation, he was offered an impressive job with a Boston attorney. Unfortunately, his father fell sick and Blackmun instead returned home. This unconventional story does not seem like the making of a successful Supreme Court Justice that would impact lives and the future of America, but Harry Blackmun did not give up.⁸

In the 1965 case of *Griswold v. Connecticut*, in which the Court ruled on the constitutionality of a Connecticut law criminalizing counseling married couples on birth control, Blackmun was initially hesitant about expanding the definition of the right to individual privacy to include marital privacy; however, he expressed a willingness to do so. As he wrote in his

⁷ Jamal, Green. The So-Called Right to Privacy. UC Davis. UC Davis Law Review. http://lawreview.law.ucdavis.edu/issues/43/3/liberty/43-3_Greene.pdf.

⁸ Tinsley E. Yarborough, Harry A. Blackmun: The Outsider Justice. Oxford: Oxford University Press, 2008.

personal notes at the time, “I may have to push myself a bit, but I would not be offended by the extension of privacy concepts to the point presented by the present case [of *Griswold v. Connecticut*] ... (if the majority reached this issue) I could go along with any reasonable interpretation of the problem on principles of privacy”.⁹ Blackmun subsequently came to agree with Justice Brennan’s majority opinion in *Eisenstadt v. Baird*, regarding a case where William Baird was charged with a felony for providing contraceptives to unmarried people, that “if the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted government intrusion into... the decision whether to bear or beget a child”.¹⁰ This case set up a major precedent for *Roe* regarding the government’s role in privacy. While Justice Blackmun may have understood physicians’ rights and wanted to protect them, he also really fought for women’s rights, especially poor women. Blackmun’s ability to see this was demonstrated in *Vuitch*, in which a licensed physician was charged for violating the District of Columbia abortion statute by providing abortions that were not “necessary for the preservation of the mother’s life”, where Blackmun did not side with the physicians. He also disagreed with Justice Douglas who said, ‘leave to the experts the drafting of abortion laws that protect good-faith medical practitioners’”.¹¹ Justice Blackmun instead supported the side of the women seeking abortions who were being turned away due to the existing abortion statute. While many critics of Blackmun argue that his ties to the Mayo Clinic demonstrate absolute loyalty to medical professionals, cases such as *Vuitch* demonstrate his dedication to women’s rights.

The right to privacy needed a push in the Supreme Court to spread across the country and get attention. This started first with *Griswold*, when it introduced this constitutional right to

⁹ Hunter, 167.

¹⁰ Hunter, 167.

¹¹ Hunter, 165.

privacy protection. This opened the door for young academics and litigators to take reproductive freedom much further past just contraceptives – as they did. One major aspect of this right to abortion conversation is that it was the first time America publically suggested reproductive autonomy for women prior to 1963. *Griswold* changed that narrative and opened the door for many federal constitutional inquiries and claims filed across the country¹²

The Supreme Court's decision in *Roe V. Wade* has had a lasting impact on American culture and contributed to continuing debate by grounding the decision in the right to privacy. To understand that effect, we have to first examine what led to these decisions and this massive but problematic jump toward reproductive and gender equality. Justice Harry A. Blackmun wrote the decision of *Roe V. Wade* and many scholars have debated what caused Justice Blackmun, described by all as a modest man, to make this path-breaking, bold decision. Justice Blackmun's background as resident counsel for the Mayo Clinic demonstrates his positive impression of the medical profession and is a clear explanation for his decision.¹³ Certainly Blackmun's career with the Mayo Clinic, where he worked as general counsel during the 1950s, would seem to support such a view: "Harry Blackmun's admiration of physicians was certainly real. He 'always had a sympathetic attitude toward the medical profession and for the medical mind'"¹⁴. Furthermore, Justice Blackmun often spoke for the medical profession and stated, "I have always been surprised and disturbed by the lack of sympathy that judges often have for the problems that confront the medical profession. I have noticed this even at conferences of our Court. I have done my best to alleviate that feeling... Federal judges, I have learned, do not understand

¹² Garrow, 895.

¹³ Nan D. Hunter, "Justice Blackmun Abortion and the Myth of Medical Independence." *Georgetown Law*, 2006, 147.

¹⁴ Hunter, 151.

medical problems very well”.¹⁵ This sympathetic attitude might seem to suggest that Blackmun’s views on abortion were influenced by those of the medical professionals he worked with at the Mayo clinic, who did not look favorably on abortion. It is doubtful, however, that abortion was a significant issue for the doctors at the Mayo clinic: “Although it is impossible to know about conversations there which may have touched on abortion, or what Blackmun observed or absorbed of staff attitudes about the procedure, normal abortions –those not involving situations of extreme medical urgency- were not performed at Mayo. As Blackmun himself put it, ‘The clinic was not, and did not wish to be, an abortion mill of any kind’.”

Rather than focusing on Justice Blackmun’s connection to and admiration of medical professionals, it is more revealing to examine his views on the privacy doctrine.

IV: The Impact of *Roe*

Jane Roe challenged the constitutionality of a Texas law that prohibited abortions except to save pregnant women’s lives. The Court heard oral arguments twice, in December 1971 and October 1972, and issued its decision in January 1973. In May 1972 that is, after the first set of oral arguments but before the second, Justice Blackmun circulated a brief opinion in *Roe* that proposed the Court hold Texas’s anti-abortion law unconstitutional because the inclusion of only a maternal “life” exception was vague. Justices Brennan and Douglas expressed their differing complaints. At the same time, the justices were deliberating on another abortion case, *Doe v. Bolton*, in which they were asked to rule on the constitutionality of a Georgia law that outlawed abortion except where the mother’s life or health was seriously endangered, where the baby would be born with grave physical or mental defects, or in cases of rape. “In the weeks immediately preceding *Roe* and *Doe*’s scheduled re-arguments on October 11, 1972, Justice

¹⁵ Hunter, 156.

Lewis F. Powell Jr. gave Blackmun's earlier drafts his first careful reading. Powell had no doubt that Texas's anti-abortion law was "unduly restrictive of individual rights," as he jotted in the margin of Blackmun's Roe draft, but he also endorsed Byron White's critique, noting "I agree that the Texas statute is not unconstitutionally vague." At bottom, Powell wrote to himself, "Why not consolidate Texas + Ga. cases + rely on Ga. type analysis" to void both states' statutes on constitutional privacy grounds".¹⁶ Meaning, why not combine both the existing statutes of Georgia and Texas and determine them both constitutionally vague and open the door for new ideals that protected a right to privacy.

Toward his final drafts, Blackmun began debating the dual state interests in abortion - whether the state was protecting the mother's health and/or protecting potential life.¹⁷ Blackmun moved toward balancing a woman's privacy interests with the state's interest in protecting the fetus by gradually moving away from privacy rights as the fetus becomes increasingly viable outside the womb. This led him to suggest that an important shift occurred at the end of the first and second trimesters; as the fetus gains viability, the state arguably acquires an increasingly compelling interest in restricting abortion. Thus, Blackmun and the justices came to focus in their private exchanges on "the 'compelling' point, in the light of present medical knowledge, [which] is at approximately the end of the first trimester".¹⁸ "Thus, during the first trimester, before this "compelling" point is reached, a woman's privacy right arguably should be protected from state interference. After this point, however, the state steadily gains an increasingly compelling interest in regulating and restricting abortions: 'with respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because

¹⁶ Garrow, 907-908.

¹⁷ Garrow, 918.

¹⁸ Garrow, 919.

the fetus then presumably has the capability of meaningful life outside the mother's womb.”¹⁹ This idea of balancing individual rights and state interests was a large focus of the debates that occurred between the justices during the initial discussions and draft opinions when *Roe* was introduced.

Roe v. Wade was influenced deeply by other abortion-related cases also going on during the same time such as *United States v. Vuitch*, *Griswold v. Connecticut*, and *Doe v. Bolton*. “Blackmun’s view of abortion – either as social policy or constitutional law – was deeply submerged in the *Vuitch* decision. Disagreeing with Black’s conclusion that the Court had jurisdiction to decide the case, he had joined a dissenting opinion by Harlan that was addressed solely to the jurisdictional question”.²⁰ Blackmun used these decisions to influence the controversial *Roe* case by asking what the major legal issue was. After determining it was a jurisdictional issue, he was able to seek the privacy doctrine to apply to the *Roe* decision. These cases often referenced each other, “When examining *Doe*, “The court in Texas relied on language in the *Griswold v. Connecticut* decision (1965), which did not discuss abortion but held that married couples have a constitutional right to use contraception. Specifically, the district court based its abortion ruling on a concurring opinion in the *Griswold* case that found support for a right to marital privacy in the obscure language of the Ninth Amendment: “the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.””²¹ Although Blackmun preferred to make decisions on the constitutionality of reproductive policy by granting exceptions to restrictive statutes based on a broad interpretation of health considerations, he unexpectedly moved toward embracing the right to privacy as a

¹⁹ Garrow, 919.

²⁰ Greenhouse, 77.

²¹ Greenhouse, 78.

foundation for deciding *Roe*. If the majority was not inclined to decide the case by giving a broad definition to the health exception, he wrote, ‘then I think I could go along with any reasonable interpretation of the problem on the principles of privacy’.²² This right to privacy argument was the major theme in *Roe* but came from a thorough analysis of these previous cases. “Although Blackmun did not explain himself further, he was clearly aware of, and keeping the door open to, a line of reasoning derived from the Court’s decision six years earlier, in *Griswold v. Connecticut*, to strike down the state’s prohibition on birth control. That decision was based on the recently articulated “right to privacy” that lawyers challenging abortion statutes were now beginning to incorporate into their arguments”.²³

Blackmun was rather unpredictable on how his opinion would go. When he circulated his first draft of the *Roe* opinion, he had elected to declare the Texas statute unconstitutionally vague and avoided the privacy issues that *Roe* has raised.²⁴ Subsequently, however, Instead, he declared, “‘With its sole criterion for exemption as ‘saving the life of the mother, the law is ‘is insufficiently informative to the physician to whom it purports to afford a measure of professional protection but must measure its indefinite meaning at risk of his liberty’.”²⁵ An interesting point to note is Justice Blackmun’s hesitance and uncertainty in writing the *Roe* opinion. This partially came from the fact that right before *Doe* and *Roe* were set to be heard, the Court was at seven seats rather than the full nine pending the retirement of Justices Black and Harlan. This usually resulted in important cases being deferred without a full Court. To settle this matter, Chief Justice Burger appointed Justice Blackmun and Justice Stewart to screen the

²² Greenhouse, 76.

²³ Greenhouse, 76.

²⁴ Greenhouse, 76.

²⁵ Tinsley E Yarborough, Harry A. Blackmun: The Outsider Justice. Oxford: Oxford University Press, 2008., 214.

pending cases and recommend which ones should go forward, and they ultimately decided to recommend *Doe* and *Roe*. Justice Blackmun's lack of confidence in the decision shows because when those seats were filled, Blackmun asked for the two abortion cases to be re-heard because he thought they were important enough to have a full bench. Chief Burger never voted on Blackmun's proposal, leaving Blackmun to continue on with *Roe*.²⁶

Justice Blackmun turned to many resources when considering his *Roe* opinion. He turned to the Mayo Clinic where the library staff had collected a set of books and articles on the topic of abortion for his research. It was noted that he found particular inspiration from the *American Journal of Public Health* for March 1971, where he found that there was a lesser risk from legal abortion in the first trimester than carrying the pregnancy to term. That article covered a surveyed perspective of abortion in state legislatures, courts, and foreign countries.²⁷ In addition to the Mayo Clinic, Justice Blackmun also looked to his family for advice. "As his youngest daughter, Susan, described the episode later in her father's presence, while addressing a dinner in his honor: "All three of us girls happened to be in Washington soon after Justice Burger had assigned the opinion to Dad. During a family dinner, Dad brought up the issue. 'What are your views on abortion?' he asked the four women at his table. Mom's answer was slightly to the right of center. She promoted choice but with some restrictions. Sally's reply was carefully thought out and middle of the road, the route she had taken all her life. Lucky girl. Nancy, a Radcliffe and Harvard graduate, sounded off with an intellectually leftish opinion. I had not yet emerged from my hippie phase and spouted out a far-to-the-left, shake-the-old-man-up response. Dad put down his fork mid-bite and pushed down his chair. 'I think I'll go lie down,' he said. 'I'm getting

²⁶ Greenhouse, 86.

²⁷ Greenhouse, 90.

a headache.”²⁸ These various sources that Blackmun reached out to demonstrate his confusion but also his desire to truly understand the constitutionality of abortion in order to write an informed and accurate opinion.

However, his uncertainty did not end once the opinion was written. Once Justice William Rehnquist took over as Chief Justice, Blackmun discussed the case screening committee that he had served on. Blackmun expressed, ‘I was on that little committee. We did not do a good job. Justice Potter pressed for *Roe v. Wade* and *Doe v. Bolton* to be heard and did so in the misapprehension that they involved nothing more than an application of *Younger v Harris*. How wrong we were’.²⁹ Justice Blackmun was constantly not content with the outcome of *Roe*, knowing it would change the landscape of abortion nation-wide.

While Justice Blackmun’s research and opinion are important to understand, often when analyzing Supreme Court decisions, the thinking of the Justices is primarily studied and examined without taking into regard the importance of public opinion. *Roe v. Wade* had a substantial influence on public opinion but public opinion also shaped the ruling itself. When Justice Blackmun began composing his opinion, he took public opinion into consideration. To do this, Blackmun turned to George Gallup on his 1972 poll on attitudes toward abortion that expressed two thirds of American’s stating that women and their physicians should decide abortion matters.³⁰ This allowed him to scan a sense for how the public felt on the decision while he was getting torn opinions from his family and colleagues. The article reported “a ‘record high’ number of respondents favored ‘full liberalization of abortion laws.’ 64 percent agreed, 31 percent disagreed, and 5 percent had no opinion. There was almost no difference in responses

²⁸ Greenhouse, 83.

²⁹ Greenhouse, 80.

³⁰ Greenhouse, 91.

between men and women. Among college graduates, support for a right to abortion was 87 percent. A majority of Roman Catholics, 56 percent, also backed abortion rights. Among all demographic groups, only those whose formal education ended with grade school expressed a majority-view opposition to legal abortion”.³¹

It wasn't until October of 1972 when Justice Blackmun started to feel more certainty in his opinions. He was still unsure how the new Justices would respond but his mind was much clearer as he prepared for the October re-arguments. He wrote in his typical shorthand,

“Could a state outlaw *all* abortions?

Logically, on the fetal life thesis it could.

But there are opposing interests, too, as usual.

These deserve to be weighed.

They are: right of the mother to life, health, physical, and mental...

Translated this means 9th and 14th amendment rights.

Texas exception OK so far it goes but it does not go far enough”.³²

When contemplating the legal backing of the *Roe* opinion, Blackmun also took into account the legitimacy of the viability argument in addition to the right of privacy. Other Justices made their stances known to Justice Blackmun, “‘Viability,’ I have thought, is a concept that focuses upon the fetus rather than the woman,” Brennan said. He recommended that the notion that the state could regulate on behalf of the woman’s health as pregnancy advances and ‘abortions become medically more complex’ be spelled out. Viability was not relevant to that determination, Brennan observed. ‘then we might go on to say that at some later stage of pregnancy (i.e., after the fetus becomes ‘viable’) the state may well have an interest in protecting

³¹ Greenhouse, 91.

³² Greenhouse, 91.

the potential life of the child and therefore a difference and possibly broader scheme of state regulation would become permissible'.³³ This opened the door further into which interest was more important in the privacy doctrine – the interest of the individual, being the woman in this case, or the interest of the state to have a healthy and growing population.

V: Evolution of Supreme Court Cases

While the Court's decision in *Roe v. Wade* recognized a woman's right to make private choices free from state interference, by framing this in terms of privacy, the Court opened the door to subsequent rulings that authorized the state's right to regulate the conditions under which women may exercise their right to privacy. An analysis of legal statutes and Supreme Court decisions since *Roe* reveals significant variation in legal interpretations of reproductive rights. On the one hand, the Court rejected a number of statutes that placed conditions on women who sought abortions that were deemed to have been motivated by the desire to prevent women from having abortions rather than due to medical considerations (*Bellotti v. Baird*; *City of Akron v. Akron Center for Reproductive Health*; *Thornburgh v. American College of Obstetricians and Gynecologists*). On the other hand, the Court used the defense of abortion as a privacy right to argue that government bears no public responsibility for affirmatively guaranteeing this right, especially by providing financial assistance to cover abortion services for poor women (*Harris v. McRae*; *Webster v. Reproductive Health Services*; *Rust v. Sullivan*). While the changing composition of the Court explains a shift toward a greater willingness to accept restrictions on abortion, as explained below, part of the explanation for such decisions stems from the precedent set in *Roe v. Wade* which allowed for one protected right (a woman's right to privacy in decisions about her own reproduction) to be balanced against another constitutional right (the

³³ Greenhouse, 97.

state's right to issue regulations aimed at protecting future citizens as well as the health of pregnant women).

The initial concern with abortion cases was the determination of what constituted a woman's well-being and where the interests of the state lie. This concern stemmed from the question of what the right of privacy really means and whose interests were more important. The first Supreme Court ruling regarding abortion occurred in the 1971 case *United States v. Vuitch* in which Milan Vuitch, a licensed doctor who performed abortions in Washington, D.C., was indicted for violating anti-abortion statute that only authorized abortions necessary to preserve a woman's health. Ultimately, the Court declared that the "health" exception was not unconstitutionally vague as long as "health" was appropriately defined to cover a woman's psychological and physical well-being.³⁴

Bellotti v. Baird in 1979 argued that the rights of a (minor) woman to have an abortion must be balanced with the ability of her parents to make decisions for that minor. This contradicted a previous decision by the Supreme Court that held a parental veto over a minor's decision to terminate her pregnancy was unconstitutional. This decision wanted to balance the interests of the minor in terminating her pregnancy and her parents' interests in choosing how to raise their offspring.³⁵ This was interestingly an 8-1 decision and even Justice Rehnquist insisted on defending privacy rights. This progressing interest of the abortion cases demonstrate that even the Court was torn between the two interests in abortion cases.

In Harris v. McRae (1980), the Court argued that the right to privacy provided in *Roe v. Wade* does not compel states to use public funds to pay for poor women's abortions. The case

³⁴ David J. Garrow, "How Roe V. Wade Was Written." *Pitt Law*, April 2014, 901.

³⁵ 443 U.S. 622 (1979)

was brought by a pregnant Medicaid recipient who argued that the Hyde Amendment that prevented the use of federal funds to reimburse the costs of abortions under the Medicaid program was unconstitutional. A majority ruled that a woman's freedom of choice does not guarantee her a constitutional entitlement to financial resources. The dissenting justices on this case, Justices Blackmun, Brennan, Marshall and Stevens, argued that the Hyde Amendment's denial of funding for medically necessary abortions did intrude on a constitutionally protected choice. It coerced pregnant women to have children they would otherwise have elected not to have if they could have afforded an abortion. By funding all the expenses for childbirth but none regarding terminating pregnancy, the dissenting opinion argued that the government forced many women's hands into an offer they could not afford to refuse. While the minority insisted that the ruling violated the constitutional freedoms of *Roe v. Wade* by defining rights depending on a woman's financial status, the majority denied the claim that a woman's freedom of choice mandated "a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."³⁶

In *City of Akron v. Akron Center for Reproductive Health* of 1982, the Supreme Court ruled on the constitutionality of an ordinance that was enacted by Akron City Council which established seventeen provisions to regulate the performance of abortions, such as requiring all abortions performed after the first trimester to be done in hospitals, parental consent before the procedure could be performed on an unmarried minor, doctors to counsel prospective patients, a twenty-four hour waiting period, and the disposal of fetal remains in a "humane and sanitary manner."³⁷ This case affirmed the Court's commitment to protecting a woman's reproductive rights. This case held that the City of Akron's ordinance violated the Constitution because it was

³⁶ 448 U.S. 297 (1980)

³⁷ 462. U.S. 416 (1983)

intended to persuade women away from having abortions and was not motivated by medical considerations.³⁸

Similarly, the Court ruled in *Thornburgh v. American College of Obstetricians and Gynecologists* (1985) that requirements in a Pennsylvania statute restricting abortions “wholly subordinate[d] constitutional privacy interests and concerns with material health” and were aimed at discouraging abortions instead. The majority rejected provisions requiring “informed consent,” reporting and viability determination procedures as violations of the privacy rights of patients and physicians and further ruled that the requirement of a second physician for post-viability abortions jeopardized the health of the mother by increasing delays and medical risks.³⁹

In *Webster v. Reproductive Health Services* in 1989, however, the Supreme Court upheld similar restrictions on abortions imposed by the state of Missouri, which enacted legislation stipulating that the “life of each human being begins at conception” and banned public employees and public facilities from performing abortions, except when the mother’s life was in danger. The Missouri statute also prohibited abortion counseling and required physicians to perform viability tests upon women in or beyond their twentieth week of pregnancy. The Court held that Missouri was not required under due process (the requirement of the state to respect the rights of an individual) to enter into the business of abortion. In a split decision, the Court allowed Missouri to deny state resources for abortion services, concluding that the government had no obligation to provide accessible abortions for state residents and further concluding that the counseling and testing provisions were constitutional. Whereas a narrow majority had ruled against restrictions in *Thornburgh v. American College of Obstetricians and Gynecologists* in 1985, the composition of the Court had changed by 1989 with the appointment of Justice Sandra

³⁸ 462. U.S. 416 (1983)

³⁹ 476 U.S. 747 (1986)

Day O'Connor to the Court, who like Justice Byron White, consistently voted for restrictions on abortions. In addition, Justices Warren Burger and William Rehnquist came to support the argument that the rights of Missouri "as an individual" are greater than the rights of individual women and that the Equal Protection Clause did not create substantive rights and poverty did not qualify as a "suspect classification".⁴⁰

In *Hodgson v. Minnesota* in 1990, the Court found that a Minnesota statute requiring the notification of both parents for a minor to have an abortion was unconstitutional. The Court held that notification of both parents did not serve a legitimate state interest and concluded that notifying one parent and mandating a 48-hour waiting period were both sufficient and constitutionally permissible, given that the statute allowed the courts to waive the parental notification requirement if the young woman could demonstrate that this would be unwise.⁴¹ While the Court rejected the most onerous restrictions on abortion, it still approved the requirement of parental notification and a 48-hour waiting period.

The Court's decision in *Rust v. Sullivan* in 1991 regarded the constitutionality of using government funds to pay for family planning services under Title X of the Public Health Services Act. The Court held that the restrictions on funding abortion issued by the Department of Health and Human Services were constitutional since it was reasonable for the government to provide funding for preventive family planning but not for abortion services.⁴²

Planned Parenthood of Southeastern Pennsylvania v. Casey in 1991 reaffirmed *Roe v. Wade* and imposed a new standard to determine validity of abortion laws. This standard asked if the regulation has the purpose or effect of imposing an "undue burden", which is defined as a

⁴⁰ 492 U.S. 490 (1989)

⁴¹ 497 U.S. 417 (1990)

⁴² 500 U.S. 173 (1991)

“substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”⁴³The Court upheld a law that required informed consent and a 24-hour waiting period prior to abortions, arguing that these did not constitute substantial obstacles. Minors also were required to get parental permission to have abortions (although the statute also contained a judicial bypass procedure. The only provision that failed because it was deemed to be an undue burden was requirement that women had to notify their husbands before having abortions.⁴⁴ While the Court upheld a number of restrictions on abortion, thereby making the practice of abortions harder for women, the Court also upheld *Roe v. Wade*. In fact, the justices originally voted in conference to overturn *Roe v. Wade*, arguing that this case had been decided wrongly as abortion was not a constitutionally protected right. This anti-abortion view reflected the changed composition of the Court, as all of the justices who had joined the Court since *Roe* were appointed by conservative presidents. Nonetheless, Justices Kennedy, O’Connor and Souter carved out a middle position, reaffirming *Roe* but tightening regulations.

The case of *Schenck v. Pro-Choice Network of Western New York* (1996) stemmed from an action filed by the Pro-Choice Network to prevent protestors from engaging in disruptive activities outside of abortion clinics. This led to the establishment of “fixed buffer zones” that prohibited demonstrations within fifteen feet of the entrances to abortion clinics as well as “floating buffer zones” that would require protestors to be at least 15 feet away from people trying to access the clinics. The Court ruled that fixed buffer zones were constitutional since they allowed protestors to be vocally heard but prevented unlawful conduct such as spitting, blocking doors, and attacking women seeking abortions. However, the Court determined that “floating

⁴³ 505 U.S. 833 (1992)

⁴⁴ 505 U.S. 833 (1992)

buffer zones” imposed on free speech too greatly and could actually cause more of a public danger.⁴⁵

Mazurek v. Armstrong of 1997 ruled on a law that only licensed physicians could perform abortions. This law was challenged by a group asserting that this created an undue burden on women seeking an abortion because at the time only one physician in the state of Montana was able to perform an abortion. The Court held that there was no evidence of an unlawful motive on the part of the state legislature and the law did not create an undue burden.⁴⁶ The pattern of these cases following *Roe v. Wade* demonstrate over and over again that the Court will find loopholes and restrictions to prevent abortions from being tangible. This variation can be attributed to the contrasting interests in abortion between the individual and the state. Justice Blackmun wrote his opinion declaring abortions are legal due to a right of privacy, based on the evidence that the pregnancy is not viable in the first trimester. However, as the time passes, the right is less determined by viability and the privacy right is not a personal issue anymore as it takes over as a state interest. It is easy to determine that the Court faces a struggle to determine which interests take priority. Applying the constitutionality of the privacy doctrine creates an unavoidable argument over the extent of government’s responsibility. When talking about Blackmun’s decision with *Roe* and defining a woman’s right to abortion as a right to privacy, Blackmun opens a door to subsequent decisions on privacy that say that the government has no obligation to ensure that all women have access to safe and legal abortions.

Overall, it is demonstrated through these cases that the dialogue about women’s autonomy in making her own reproductive choices has not been successful. The few success cases such as *Roe v. Wade* are quickly diminished by the overwhelming number of cases that authorize

⁴⁵ 519 U.S. 357 (1997)

⁴⁶ 520 U.S. 968 (1997)

restrictions on women's reproductive choice, whether citing medical considerations or assessments of the viability of the fetus and the state's right to protect future citizens. These variations in case decisions demonstrate the changes in social behavior that began in the 1970's as there was a rise in sexual awareness and earlier sexual experimentation. When the desire for social change regarding reproductive rights surfaced in 1973 and *Roe v. Wade* was decided, women fighting for their bodies rejoiced. "Public opinion since the decision has remained widely divided. Justice Blackmun received many letters of thanks from women around the country, but also approximately 80,000 hate letters. Even some proponents of abortion rights have been critical of *Roe*. Justice Ruth Bader Ginsburg has said, "My criticism of *Roe* is that it seemed to have stopped momentum on the side of change." In other words, the decision came too soon, before a majority of public opinion came to support the cause. In fact, when the decision came down, 45 states were considering legislation to reform their abortion laws in some way."⁴⁷

However, the dialogue quickly changed as more and more people argued this decision as unconstitutional and non-traditional. In response to this, without explicitly reversing *Roe v. Wade*, justices found ways to restrict women's reproductive freedom by making abortions inaccessible. Ironically, women were more and more regulated rather than liberated as time went on. This problem comes from the court not respecting the decision of Justice Blackmun and not thinking of abortion as a private health matter.

VI: Conclusion

The law continues to regulate many aspects of American women's lives and restricts their reproductive freedom. The anti-choice proponents come from large sources of power such as in the government – through the courts, the legislature, and the bureaucratic rule making- that

⁴⁷ "Body Politic." Oyez. Accessed July 20, 2016. <http://projects.oyez.org/body-politic/ch1#ch1-quicktake>.

threatens to “take away” women’s reproductive autonomy.⁴⁸ The Supreme Court cases supported the infringement of women’s rights by restricting their access to safe and affordable abortions as well as their access to contraceptives. The Supreme Court has not only upheld a woman’s right to privacy in *Roe v. Wade* but subsequently has supported the infringement of reproductive rights which has worked to both grant and restrict women’s rights. This has been demonstrated in the various Supreme Court cases referenced earlier in the paper. These regulations are all based upon an interpretation of the Constitution that allows for the rights of women to be sidetracked compared to the right of privacy, the right of information, and other human rights, which are used to validate the ability to limit women’s reproductive freedom.⁴⁹ Women have a right to privacy and therefore abortions are legal. This is true in the first trimester, but as the time goes on, the right is less and less based on the viability. Then, the privacy right is not unrestricted and only given during the first trimester. Therefore, we are no longer at that point talking about privacy anymore but talking about state interest. This is essential in determining the constitutionality of these legal issues presented; to balance the contrasting interests to accurately represent what Justice Blackmun enacted in his opinion.

In addition, despite the fact that American society has increasingly accepted expanded rights for minorities and same-sex couples, it remains deeply divided over women’s reproductive rights, as shown by increasing legal restrictions on women’s bodies. “The differences in an emphasis on equality and an emphasis on autonomy fail to be recognized”.⁵⁰ “Women’s bodily freedom (the absence of physical, legal, or social constraints on one’s decision about one’s body)

⁴⁸ Heise, Lori L. "Freedom Close To Home: The Impact of Violence Against Women on Reproductive Rights." In *Women's Rights, Human Rights: International Feminist Perspectives*. Psychology Press, 1995, 206.

⁴⁹ Heise 206

⁵⁰ Petchesky 665

and the autonomy (the capacity to be self-determining, especially with respect to one's body) are the sine qua non for women's equality and full citizenship".⁵¹ We have seen minorities become more accepted with affirmative action. The United States came together to fight for African American's liberty by standing together to take down the Confederate flag. We have watched as many Americans rejoiced and celebrated as the Supreme Court ruled same-sex marriage legal in every state. The Catholic Church has even issued a statement accepting same-sex unions, yet it still considers contraceptives and abortions to be sins and cause for excommunication from the Church. While there are still restrictions on these groups, for the most part, they are advancing in society.

The rights of women as citizens who have rights to their personal decisions have not been respected and have contrasted differently with the rights of other social groups. This is not just about fundamental religious or cultural beliefs as much as it reflects deeply entrenched gender views on women's roles in society and a patriarchal sense of how women should and should not behave. The act of premarital sex is a sin for women but the men are never held in the same shameful regard. Many people have strong views on how women should behave in terms of their religious convictions but now also demand that everyone should be covered by these views. Often, these views do not reflect religious convictions, but rather they represent the gender norms that were translated into religious texts in the past. Recognizing a situation of real conflict between the survival of the fetus and the needs of the woman and those dependent on her, the feminist position says merely that women must decide, because it is their bodies that are

⁵¹ Overall 21

involved, and because they still have primary responsibility for the care and development of the children born.⁵²

These regulations against women's reproductive freedom infringe on their ability to participate equally in society, limiting their rights as citizens. Reproduction affects women as women in a way that transcends class divisions and penetrates everything – work, political and community involvements, sexuality, creativity, dreams.⁵³ Women will never be fully equal in society if they do not have reproductive rights. Women cannot be full citizens if they cannot have the right to determine when and if they get pregnant. Women's full citizenship entails having the ability to participate equally in society and having the right to personal choices about their own body. If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁵⁴ Control over one's body is an essential part of being an individual with needs and rights, a concept, which is in turn, the most powerful legacy of the liberal political tradition.⁵⁵ The desire for and the problems in securing abortion and contraception make for a shared female experience. The individual theory and practice of birth control stems from a biological female condition.⁵⁶ Women's roles have clearly grown in society in terms of the economy, politics, and the job market, yet reproductive rights have barely advanced over the years by still having numerous hurdles and barriers in the way between safe and healthy reproductive health options. Women's control over their bodies is not like a preindustrial workers' control over their tools; it cannot be wrested away simply through

⁵² Petchesky 669

⁵³ Petchesky 665

⁵⁴ Trakman/gati 125

⁵⁵ Petchesky 665

⁵⁶ Petchesky 666

changes in technology or legal prohibitions and repression –which is why no modern society has succeeded for long in preventing abortion or birth control, only in driving it “underground.”

Women’s connection to their bodies reflects the dialectical nature of the “biological female condition.”⁵⁷ The protection of procreative choices by means of the recognition of reproductive rights is necessary both to ensure that people’s lives go well and to prevent the misery, deprivation, and even oppression that results when people have little or no control over their procreative behavior. Because these rights are foundational, they cannot be disregarded or voided.⁵⁸ Reproductive services should be seen for what they are: a category of health care. They ought to be available to and accessible by potential patients on medical grounds.⁵⁹

The role of the Supreme Court is to uphold the Constitution and protect the rights of the citizens, which it represents. Justice Blackmun’s opinion in *Roe v. Wade* dictated that the Texas abortion statute should not stand and that Jane Roe’s right to privacy guaranteed her a safe and legal abortion. Increasingly, Supreme Court decisions enacted post *Roe* have moved toward invalidating women’s right to privacy. As Republican presidents appointed new justices to the Court, a majority of justices came to reinterpret reproductive policy, moving away from Justice Blackmun’s defense of privacy and personal rights and validating state laws that limited access to abortion. Led by Justice Blackmun, the Supreme Court made strides toward increasing women’s autonomy and reproductive freedom but continued to accept some limitations of this right. This set the stage for subsequent rulings that accepted more and more limitations. Although the Court’s most recent decision in *Whole Women’s Health v. Hellerstedt* rejected extensive

⁵⁷ Petchesky 666

⁵⁸ Overall 21

⁵⁹ Overall 22

restrictions on women's access to abortion, this paper has demonstrated that such a defense of abortion rights is vulnerable to change.

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