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My Body, Not My Say:
How *Roe v. Wade* Endangers Women's Autonomy

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I. Introduction

Reproductive rights have been improving since the 1960s; however, they have also faced many setbacks. 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. Even though the Supreme Court recognized a women's right to abortion in *Roe*, this right was restricted to the first two trimesters of pregnancy, after which time the fetus was considered to be viable and the state retained the right to regulate abortions. 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. Katha Pollitt argues that abortion "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

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

Although many have argued that women's rights are no longer a pressing issue since abortion has been legal for decades, regulations against women's reproductive freedom are evident in our legal system. Supreme Court decisions that uphold these restrictions violate women's fundamental rights. This paper examines the opinion written by Justice Blackmun in *Roe v. Wade*, 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 Supreme Court cases since *Roe* that further examined arguments on the constitutionality of abortion regulation.

Because of the way in which *Roe* defined reproductive rights, a number of restrictions have been allowed that effectively limit women's autonomy over their own bodies. By defining women's rights to reproductive decisions in terms of the privacy doctrine and balancing women's right to privacy against the state's interest in regulating health, Justice Blackmun's standard allows the government to deny women full access to abortion services. This can be shown by the subsequent Supreme Court decisions on privacy that allow the government to overrule the right of the individual woman. This allows for the government to effectively deny women the right to abortion and ultimately prevents women from making independent, autonomous decisions. 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.

The paper begins with background on the history of reproductive freedom. I describe the sexual awakening that occurred in the 1950s to explain why reproductive freedom was necessary in order to avoid putting women at risk by forcing them to resort to dangerous, illegal abortions. I also discuss how women lived pre-Roe, in terms of their procreative decisions. This is helpful to see the meaningful impact of reproductive rights. I then lay out the right to privacy and explain how this has been applied to reproductive autonomy. The paper then provides background on Justice Blackmun and provides a detailed analysis of Justice Blackmun's majority opinion in *Roe*.

Next, I provide a discussion of feminism and its specific application to feminist legal theory. Feminist perspectives on women's reproductive rights will be contrasted to arguments that ground such rights on the right to privacy as well as legal arguments that the right to privacy, as it has been applied to abortion, provides an overly vague and therefore problematic legal foundation. Before moving on to a detailed analysis of the history of abortion and the evolution of the law on reproductive rights, I explain my own position that feminist arguments are persuasive but they need to be supplemented by legal critiques of the right to privacy.

The paper goes on to provide background on the effect of restrictions on women's access to contraception and abortion prior to *Roe*, highlighting the feminist argument that women have faced considerable discrimination. Next, the paper will provide an in-depth analysis of the landmark 1973 *Roe v. Wade* decision, beginning with a brief discussion of the privacy doctrine that would serve as the foundation for Justice Blackmun's majority opinion. The paper concludes by arguing that *Roe* does not meet the goal of granting women the right to safe and legal abortions and that gender equality requires that women be granted a moral right to decide what to do with their bodies. The right to abortion is vital for individual women to achieve their full potential.

II. Sexual Awakening

To help better explain the pivotal role of *Roe* in 1973, we must look at the history of sexual evolution and reproductive freedom. The number of young people having sex in the 1950s and 1960s increased dramatically as the sexual revolution began. Odds were that women would have sex before they reached age twenty.² In the 1950s, about 39 percent of unmarried girls had gone all the way before they were 20 years old. This increased to 68 percent by 1973.³ This recent change in attitude about sex came from a revolution in dating behavior that began in the 1920s. The change happened as teens, rather than their parents, started having

² Ann Fessler, *The Girls Who Went Away: The Hidden History of Women Who Surrendered Children for Adoption in the Decades before Roe v. Wade* (New York: Penguin Press, 2006), 7.

³ Fessler, 29.

control over their dating behavior. “Unlike their Victorian predecessors who courted on the front porch where their behavior could be closely monitored, the young people in the 1920s enjoyed a degree of privacy and mobility. As dating moved off the porch and into the community, parents were no longer present to set limits. Teens themselves began to determine what was appropriate sexual behavior and to enforce their own standards through peer pressure.”⁴

These dating changes also resulted in more young couples having sex before marriage at younger and younger ages. Ann Fessler began comparing white, unmarried women who turned eighteen between 1956 and 1958 with those who did so between 1971 and 1973, and found that the percentage that had their first premarital sexual intercourse at age 15 quadrupled, from 1.3 percent to 5.6 percent. Those in the same cohort who had premarital sex before age twenty jumped from 33.3 percent to 65.6 percent.⁵ “In the mid-1950s, about 40 percent of first births to girls age 15 to 19 were conceived out of wedlock. By 1971-74 the number of first births conceived outside of marriage to teenage girls had reached 60 percent”.⁶ Although women had more freedom to engage in premarital sex, they had much less freedom to decide whether to become pregnant and whether to terminate the pregnancy if they did.

⁴ Fessler, 30.

⁵ Fessler, 32.

⁶ Fessler, 30.

III. What Women Did Before Reproductive Rights

Women suffered great emotional turmoil before they had the right to a safe and legal abortion. There was an increase in young people having sex after the sexual awakening, which resulted in an increase of unwanted pregnancy.

Understanding what women did in the past when they did not have the right to a safe and legal abortion makes it clear that women will have abortions regardless, and they will continue to do so in the future even if their reproductive rights are limited or taken away. Young unmarried women who got pregnant were shunned in their community. "The social stigma of being an unwed mother was so great that many families - especially middle class families - felt it was simply unthinkable to have a daughter keep an illegitimate child. These women either married quickly or were sent away before others could detect their pregnancy in the community. Between 1945 and 1973, one and a half million babies were relinquished for nonfamily or unrelated adoptions."⁷

Once private sexual behavior was made visible and public by pregnancy, it could not be denied. Given the social stigma of unwed pregnancy at the time, members of the community who wanted to be perceived as maintaining a higher moral standard had to refrain from association with a pregnant girl. Accepting her condition or helping her keep the child might be perceived as condoning her actions. Most members of society felt they must distance themselves in order to make their

⁷ Fessler, 8.

position clear.⁸ These unplanned pregnancies were handled in a form similar to victim blaming. “In one of the strictest forms of banishment, high schools and most colleges required a pregnant girl to withdraw immediately. It was not until Title IX of 1972 that federally funded high schools and colleges, by law, could not expel a pregnant girl or teen mother”.⁹ This is a clear example of the lack of equality women face against men. Creating a pregnancy takes two people but only inversely affects one, the woman. The woman is shamed and left without equal opportunities and rights.

Before women had access to reproductive rights, they would seek unsafe alternatives that were detrimental to their health. Women often took turpentine, bleach, detergents, and homemade teas. They would use quinine and chloroquine (malaria medicines) and put potassium permanganate in their vaginas, which resulted in chemical burns. They would also squirt toxic solutions into their uterus, such as soap or turpentine, which often resulted in kidney failure or death.¹⁰ Women literally poisoned themselves in search of a solution. They also would insert foreign bodies, which proved to be more effective. They would use coat hangers, knitting needles, bicycle spokes, ballpoint pens, chick bone, or catheters. They would try to throw themselves off stairs or roofs to attempt to end a pregnancy.¹¹ “The

⁸ Fessler, 72.

⁹ Fessler, 72.

¹⁰ David A. Grimes, "The Bad Old Days: Abortion in America Before Roe v. Wade," *The Huffington Post* (January 15, 2015).

¹¹ Grimes.

dynamic compelling consideration of abortion law reform is that criminalization of a practice that each year worldwide an estimated 20 million women seek in unsafe conditions denies their right to reproductive health in particular, and to respect for their human rights in general. To focus of concern arises, however, not just from the cumulative impact of 20 million cases, but from the risk posed to each individual woman".¹² That is why reproductive freedom is important.

IV. History of Progression of Reproductive Rights

Means of reproductive control for women have only progressed recently. In the 1950's, the only effective means of birth control - the pill and intrauterine device - were either unavailable or inaccessible to single women. The pill was available for the regulation of menstrual periods beginning in 1957 and was approved for contraceptive use by the FDA in 1960. The IUD became available in 1960.¹³ The lack of effective means of birth control, especially at a time of changing sexual behavior, led to more and more women finding themselves unintentionally pregnant. In addition to not having adequate birth control, parents and schools feared that sex education would promote or encourage sexual relations and so they thought it was best to leave young people uninformed.¹⁴ Even when both the pill and the IUD were introduced, they both posed safety concerns and were not generally considered safe

¹² Rebecca J. Cook and Bernard M. Dickens, "Human Rights Dynamics of Abortion Law Reform," *Human Rights Quarterly*, Vol. 25, No. 1 (2003), 59.

¹³ Fessler, 41.

¹⁴ Fessler, 8.

until the 1970s.¹⁵ Ultimately, even after contraceptives were regarded as safe, it was state laws or personal moral values that prevented doctors in the 1960s from prescribing the pill.¹⁶

Abortions have been occurring before *Roe*. They weren't always safe or legal, but women found alternatives, which often jeopardized their health. In the 1950s there were estimates of 200,000 to 1.2 million abortions happening annually.¹⁷ Women forced to hide this part of their reproductive health forced them to endure danger and abuse, sometimes sexual.¹⁸ In 1947, more than 700 women died from abortions. In 2010, only 10 deaths were reported. "It seems clear: Access to safe, legal abortion saved women's lives".¹⁹

Despite the fact that abortion services became legal after 1973, many women face difficulties accessing and affording abortion services. Beginning in 1977, clinics and providers have been targeted for harassment and violence and more than 80 percent of all abortion providers report having been picketed or seriously harassed.²⁰ In part due to such intimidation and harassment, abortion services are unavailable in many parts of the country: "In the United States, 87 percent of all

¹⁵ Fessler, 41.

¹⁶ Fessler, 41.

¹⁷ Grimes.

¹⁸ Grimes.

¹⁹ Grimes.

²⁰ Lynne E. Ford, *Women and Politics: The Pursuit of Equality*, 3rd ed. (Boston: Wadsworth, 2011), 386.

counties have no abortion services, and 97 percent of rural counties have no abortion providers.”²¹ Moreover, very few ob-gyn programs in the country train medical students to perform first-trimester abortions. In addition to the difficulty locating an abortion clinic and trained abortion provider, the cost of abortion services is too expensive for many women. “Medicaid funding has restricted abortions for low-income women for nearly thirty years, and eleven states now restrict abortion coverage in insurance plans for public employees.”²²

As discussed more fully in Section XI, the Supreme Court has allowed states to enact a wide variety of restrictions and regulations so long as these do not pose an “undue burden” on a woman’s right to terminate a pregnancy, that is, so long as their purpose or effect is not to “place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”²³ Between 2011 and 2013, states have enacted 205 new restrictions, more than there have been in the previous ten years. These restrictions are waiting periods, inaccurate scripts that doctors must read to patients (abortion causes breast cancer, mental illness, suicide), bans on state Medicaid payments, restrictions on insurance coverage, and parental notification and consent laws.²⁴ The government is finding ways to take money away from support centers. In Ohio, for example, lawmakers took money away from a welfare program for low-income families and reallocated it to crisis-pregnancy

²¹ Ford, 387.

²² Ford, 387.

²³ *Planned Parenthood of Southeastern Pennsylvania v. Casey* 500 U.S. 173 (1991)

²⁴ Pollitt, 24.

centers that are created to discourage pregnant women from having abortions. “These crisis centers rely on a paternalistic view of women seeking abortion as childlike, ignorant, and confused. It’s worked well: there are now 2,500 such centers in the US. As of 2013, 13 states fund them directly. In 2011, Texas increased funding for CPCs while cutting family planning money by two-thirds. The money came from a budget for women’s health”.²⁵ This program gives money to embryos and fetuses instead of the actual living children.²⁶ Instead of using the money for women’s health to help give women contraceptive, reproductive care, and abortion assistance, the money would be reallocated to be used to discourage abortion.

The government also uses extensive regulations and rules to prevent abortion clinics from operating. Twenty-seven states have passed laws that demand expensive and unnecessary renovations and burdens of medical regulations to make clinics impossible to staff and operate. This resulted in at least 73 clinics closing between 2011 and 2013.²⁷ These regulations limit women’s accessibility to a safe abortion. Closing down clinics results in women having to travel extensive distances to find clinics willing to help them, which many women cannot afford to do. “In 2000, according to the Guttmacher Institute, around one-third of American women of reproductive age lived in states hostile to abortion rights. As of 2011, more than half of women lived in hostile states. In 2013, only one state, California, made

²⁵ Pollitt, 35.

²⁶ Pollitt, 24.

²⁷ Pollitt, 25.

abortion easier to obtain”.²⁸ Currently, 38 states require parental approval for a minor to have an abortion and 33 states do not even cover abortions under Medicaid.²⁹ A right includes the freedom to use it in ways others find distressing or even wrong.³⁰

V. Feminism, Feminist Legal Philosophy and Women’s Reproductive Rights

Feminism champions the ideal of equality for men and women. Although feminists differ in a number of important ways, as will be discussed below, they share the desire to achieve social, political, and personal rights for women. Feminists also offer a critical focus on women’s historical subordination to men. As Sylvia Law argues, “women’s inequality has never not existed, so women’s equality never has.”³¹ Critical feminists argue that women have not been given the same rights and opportunities as men due to the pervasive influence of patriarchy, which privileges men and reinforces dominant masculine norms. They focus on the concept of gender, which refers to “a set of socially constructed characteristics describing what men and women ought to be” which changes over time and across cultures.³² Gender norms exercise a subtle but powerful influence on social

²⁸ Pollitt, 25.

²⁹ Pollitt, 26.

³⁰ Pollitt, 38.

³¹ Sylvia A. Law, “Rethinking Sex and the Constitution,” *University of Pennsylvania Law Review*, Vol. 132 (1983-1984), 1007

³² J. Ann Tickner and Laura Sjoberg, “Feminism,” in T. Dunne, M. Kurki and S. Smith, eds. *International Relations Theory: Discipline and Diversity* (New York: Oxford University Press), 186.

relations, perpetuating power inequalities between men and women by privileging dominant, masculine views of reality. As Laura Sjoberg describes, "in social life and in global politics, men and characteristics associated with masculinity are valued above women and characteristics associated with femininity."³³ Women have typically been seen through gendered lenses as emotional, passive, nurturing, domestic and subordinate whereas men are generally considered to be rational, aggressive, competitive, political and dominant.³⁴

While feminists share a commitment to advancing women's status in society, they differ in terms of their ideas on how best to do so. Liberal feminists insist that women are just as intelligent and capable as men, so that women should have an equal opportunity to participate in the same things that men do. Liberal feminists work within the system to emphasize equality amongst the sexes, whereas radical feminists discard the current system. Liberal feminists advocate for an increase in the number of women involved in politically and economically important roles, promoting political and legal reforms as a way of producing such an increase. Liberal feminists therefore focus their criticism on laws that distinguish between men and women based on sex, advocating gender-neutral laws instead.

Whereas liberal feminists advocate reforms in existing laws, radical feminists point to the need for systemic reforms in both public and private spheres, arguing

³³ Laura Sjoberg, *Gendering Global Conflict: Toward a Feminist Theory of War* (New York: Columbia University Press, 2013), 5-6.

³⁴ Leslie Francis and Patricia Smith, "Feminist Philosophy of Law," *Stanford Encyclopedia of Philosophy*.

that sexism, rather than sex-specific laws, are at the root of women's inequality. Radical feminism is the belief that women should have a complete equality to men. Radical feminists base the root of their cause in the oppression of women due to the patriarchal society. They urge to demolish the patriarchy, but do not want to work within the system.

Despite these differences, feminists agree that gender inequalities are reflected in political, economic and societal institutions, as well as in culture and personal relations. Since law both influences and is influenced by all of these, it is not surprising that feminists argue that gender inequality is reflected in the law as well. Feminist legal theory rests on the argument that women's rights as citizens require their equal treatment under the law, so feminist legal theorists work to advance the rights and status of women through incorporating gender into the law.

According to Wex Legal Dictionary, "Feminist jurisprudence is a philosophy of law based on the political, economic, and social equality of sexes".³⁵ Feminist legal theorists call for equal treatment under the law and point to problems that women have in securing equal justice under the law. Feminist legal theorists focus on the ways in which legal institutions reinforce dominant masculinist norms and call for changes in the law to shift from gender inequality to equality between men and women.³⁶ Feminist critics contend that existing law tends to reinforce

³⁵ "Feminist Jurisprudence." LII / Legal Information Institute. August 06, 2007. Accessed April 16, 2017. https://www.law.cornell.edu/wex/feminist_jurisprudence.

³⁶ Francis and Smith.

predominant norms and these norms legitimize unequal relations of power. Catherine MacKinnon argues that political institutions and social arrangements reflect differences in power and serve to mask systemic bias; as she insists, “feminism has no theory of state. It has a theory of power.”³⁷ According to MacKinnon and other feminist legal theorists, the law serves to make inequalities appear natural, desirable or inevitable. As such, there is often generalized support for dominant norms, even among groups that are disadvantaged by these.

While feminists share a focus on the need for gender equality, they differ over what equality requires. Liberal feminists advocate equal treatment, objecting to the fact that differences between the sexes are often exaggerated and have historically been used to justify women’s exclusion from power. Different feminists call for different treatment based on the observation that there are indeed differences between men and women, including the fact that only women can become pregnant and bear children. As Sylvia Law notes, laws against reproduction do not affect men and women equally because they have a sex-specific impact.³⁸ In addition to such biological differences, different feminists point to historical and societal differences, including the fact that

“women but not men have been systematically subordinated because of their sex—unable to vote, to own property, or to enter into legal contracts. Women are much more at risk to be raped. Women are much more likely to be responsible for caregiving in the family. Women are likely to earn less for the same work, and likely to be segregated in jobs that pay less than work that is

³⁷ Law, 635.

³⁸ Law, 1007.

male dominated. The feminist challenge is whether and how to acknowledge certain differences without entrenching stereotypes, reinforcing detrimental customs, promoting sexist socialization, or incurring backlash.”³⁹

The challenge of acknowledging differences without entrenching stereotypes raises the dilemma over equal treatment. Here, too, feminists adopt different approaches. On the one hand, since women have historically faced unequal opportunities, it would seem that gender justice demands equal treatment. On the other hand, since women face disadvantages that men do not, it seems that women sometimes need unequal treatment to compensate for these disadvantages. Feminist legal theorists push back against the claim that provisions for unique to women entail special treatment:

“Feminist critics of the view that pregnancy leave is a special benefit, for example, point out that the only way these benefits can be judged special is if the norm against which they are being evaluated is male. If the standard was female, or even human, such benefits could not be considered special (or even unusual) since they are far more commonly needed than, say, benefits for a broken leg, or prostate cancer (neither of which are considered special benefits). The underlying male standard is invisible because it is traditional for most workplaces, and pregnancy leave would require a change to these norms; but in the view of feminist critics, this underlying standard needs to be exposed as male because in fact it is not equal.”⁴⁰.

Thus, feminist legal theorists support a conception of equality that insists that recognition of difference is different from unequal treatment.

Liberal feminists, like the proponents of the privacy doctrine discussed below, emphasize the importance of a “domain of private life that should be

³⁹ Francis and Smith.

⁴⁰ Francis and Smith.

reserved for individual choice.”⁴¹ Radical feminists, in contrast, insist that patriarchal relations govern private relations and contend that legal structures that “permit or reinforce dominance within intimate relationships are thus deeply problematic and must be overturned.”⁴² Radical feminists therefore emphasize the need to overcome structural inequalities and propose that active measures are needed to remove systemic bias. From this point of view, institutional change is necessary in order to truly achieve equal rights for women and men not only in terms of political and economic equality but in terms of reproductive rights as well.

Feminist legal theorists argue that the law has been used to restrict women’s reproductive rights, using traditional appeals to the sanctity of life and the state’s interest in a healthy population as justification for continuing the status quo. U.S. constitutional law generally privileges the interests of the individual over those of the state, so long as the state does not have a compelling interest that overrides that of individuals, but feminists argue that women’s individual right to regulate their own fertility and reproduction has been subordinated to the state’s interest in maintaining a healthy and growing population. Instead of granting women broad autonomy in controlling reproduction, the law works to preserve traditional gender roles that assign women a social duty to bear children and engage in child rearing. Feminists insist that women cannot be free and equal citizens if they do not enjoy reproductive autonomy.

⁴¹ Francis and Smith.

⁴² Francis and Smith.

Given deep moral and political disagreements about abortion, the feminist argument for reproductive autonomy is not reflected in the law. Indeed, in response to arguments by opponents of abortion that the fetus has moral status as an unborn yet potential person, the Supreme Court came to embrace a compromise stance that seeks to balance women's reproductive autonomy with the state's interest in protecting potential life. Although feminists object that women's reproductive rights should not be restricted by government, the Supreme Court came to defend such restrictions by using the privacy doctrine to specify a certain set of conditions under which women are legally entitled to reproductive liberty.

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

To understand the constitutionality of any decision, one must first examine the language used to write the law. The constitutional basis for reproductive freedom defended in *Roe v. Wade* relied on the right to privacy as 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."⁴³ 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

⁴³ "Ninth Amendment." LII / Legal Information Institute. Accessed July 04, 2016. https://www.law.cornell.edu/constitution/ninth_amendment.

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".⁴⁴ 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. These amendments focus on a right to privacy that is inferred in the Constitution as inalienable to all citizens. This derives from Justice Brandeis' creating a 'right to be left alone' which developed into a right about personal privacy in the Fourteenth Amendment.⁴⁵

Although the Ninth and Fourteenth Amendments do not explicitly lay out the right to privacy, a general right to privacy has come to be accepted and is strongly supported by the Supreme Court as well as the public.

According to this privacy doctrine, the right to privacy not only protects the individual, but it also explicitly reduces the role of government power in areas such as child rearing, marriage and procreation.

Despite such early reservations, the Court ultimately ruled that individuals enjoy a constitutional right to privacy with respect to certain decisions affecting their private lives, and particularly decisions about marriage, family, sexual intimacy, and procreation⁴⁶. As will be discussed more fully below, the Court's

⁴⁴ "14th Amendment." LII / Legal Information Institute. Accessed July 04, 2016. <https://www.law.cornell.edu/constitution/amendmentxiv>.

⁴⁵ Jamal Greene, "The So-Called Right to Privacy," *UC Davis Law Review*, Vol. 43, No. 3 (February 2010), 724.

⁴⁶ Francis and Smith.

decision in *Roe v. Wade* also applied the right to privacy, granting pregnant women the right to abort their fetus so long as the fetus was unable to survive on its own outside the mother's womb. However, after the point of viability, the Court restricted women's right to privacy by acknowledging the state's interest in protecting the fetus.

The right of privacy has developed to include some reproductive decisions, including the right to use birth control and the right to have an abortion in the first trimester. However, states are not required to support such these rights if a woman cannot afford to pay for them. Moreover, women's privacy rights are balanced against the state's interests in regulating reproduction. Thus, the constitutionality of reproductive freedom has been upheld but subject to significant limitations. Before analyzing the difficulties that have arisen because of the way that the privacy doctrine has been applied to women's reproductive autonomy, a more extensive discussion of Justice Blackmun's decision in *Roe v. Wade*.

VII. Justice Blackmun's Background

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 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".⁴⁷ 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".⁴⁸ 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'.⁴⁹ 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

⁴⁷ Nan D. Hunter, "Justice Blackmun, Abortion, and the Myth of Medical Independence," *Brookings Law Review*, Vol. 72 (2006), 167.

⁴⁸ 405 US 438 (1972)

⁴⁹ Hunter, 165.

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 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 country⁵⁰

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.⁵¹ 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

⁵⁰ David J. Garrow, "How *Roe v. Wade* Was Written," *Washington and Lee Law Review*, Vol. 71 (April 2014): 895.

⁵¹ Hunter, 147.

admiration of physicians was certainly real. He ‘always had a sympathetic attitude toward the medical profession and for the medical mind’.⁵² 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 medical problems very well”.⁵³ 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.

VIII. What Led to The *Roe* Decision

⁵² Hunter, 151.

⁵³ Hunter, 156.

Roe v. Wade is the landmark 1973 Supreme Court case that is commonly considered to be the turning point of abortion laws in the United States. Jane Roe challenged the constitutionality of a Texas law that prohibited abortions except to save pregnant women's lives. 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.

For the *Roe* case, 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. It did not clearly define what the boundary was for determining if the life of the mother was at jeopardy. 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 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”.⁵⁴ What Justice Blackmun meant by this was, 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: the state’s interest in protecting the mother’s health and the state’s interest in protecting potential life.⁵⁵ 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”.⁵⁶ “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

⁵⁴ Garrow, 907-908.

⁵⁵ Garrow, 918.

⁵⁶ Garrow, 919.

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 the fetus then presumably has the capability of meaningful life outside the mother’s womb.’”⁵⁷ 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”.⁵⁸ 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

⁵⁷ Garrow, 919.

⁵⁸ Greenhouse, 77.

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.”⁵⁹ 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 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’.⁶⁰ 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”.⁶¹

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

⁵⁹ Greenhouse, 78.

⁶⁰ Greenhouse, 76.

⁶¹ Greenhouse, 76.

raised.⁶² 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’.”⁶³

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 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*.⁶⁴

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

⁶² Greenhouse, 76.

⁶³ Tinsley E Yarborough, *Harry A. Blackmun: The Outsider Justice* (New York: Oxford University Press, 2008), 214.

⁶⁴ Greenhouse, 86.

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.⁶⁵ 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 a headache.’”⁶⁶ 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

⁶⁵ Greenhouse, 90.

⁶⁶ Greenhouse, 83.

committee that he had served on. Blackmun expressed, 'I was on that little committee. We did not do a good job. Justice Stewart 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.'⁶⁷ 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.⁶⁸ 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 between men and women. Among college graduates, support for a right to abortion was 87 percent. A majority

⁶⁷ Greenhouse, 80.

⁶⁸ Greenhouse, 91.

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”.⁶⁹

It was not 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”.⁷⁰

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

⁶⁹ Greenhouse, 91.

⁷⁰ Greenhouse, 91.

interest in protecting the potential life of the child and therefore a difference and possibly broader scheme of state regulation would become permissible'.⁷¹ 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.

In summary, the language in *Roe* held that the right to privacy must be considered against state interests and therefore does in fact include abortion but is not an absolute right. Further that before the first trimester, abortions are left to physicians' judgment, even though it was intended to be in the woman's judgment but the state may regulate for their personal interest in the health of the mother and that near viability, the state may prevent abortion based on interest in potential life.

"In *Roe*, the Court held that a state may not limit a woman's constitutional right to choose an abortion for any reason prior to fetal viability, and after viability the state may not prohibit a woman from exercising her constitutional right to choose an abortion if her health or life is in danger. On the other hand, the Court has ruled that it is constitutional for the state to protect the fetus throughout pregnancy by encouraging women to choose childbirth".⁷²

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 for the question of what the right of privacy really means and

⁷¹ Greenhouse, 97.

⁷² McDonagh, Eileen L. "My Body, My Consent: Securing The Constitutional Right to Abortion Funding," *Albany Law Review* 62 (1999), 1065.

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 an 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 women's psychological and physical well-being.⁷³

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 less accessible. 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.

IX. Why Privacy Does Not Protect Women's Bodies

In addition to feminist legal theorists who focus on the way in which legal decisions have been used to reinforce gender inequality, some legal scholars draw on constitutional law and precedence to criticize the application of the privacy doctrine to abortion rights. Justice Ruth Bader Ginsburg argues, "The court went too far in the change it ordered and presented an incomplete justification for its

⁷³ Garrow, 901.

action”.⁷⁴ Justice Ginsburg claims, “Roe did not demand government neutrality, the Court reasoned; it left room for substantive government control to this extent”.⁷⁵ The argument against the privacy doctrine is strong alone, but in order to demonstrate why it endangers women’s autonomy, it is important to combine the legal and feminist perspective. This allows us to look at both what the Constitution grants to women as rights but also takes a social approach to understand what implications inequality has.

I propose that the privacy doctrine was incorrect when applied to *Roe v. Wade* because it works to protect the state rather than the woman. In doing this, *Roe* limits women’s rights as citizens rather than protecting their reproductive freedom. This relates to why I approach a hybrid theoretical approach. I find that we need to balance the rights of women as citizens that feminist theorists propose along with the current standing of *Roe*. We currently see restrictions enacted on women in regard to their reproductive freedom, which would be avoided if *Roe* instead protected women based on gender equality rather than the Privacy Doctrine.

The controversy around abortion within the privacy doctrine 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

⁷⁴ Law, 376.

⁷⁵ Ruth Bader Ginsburg, “Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*,” *North Carolina Law Review*, Vol. 63, No. 2 (January 1985): 376.

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. The Court has recognized that the state has an "important and legitimate interest in protecting the potentiality of human life" and has defined the "compelling" point at which this interest takes precedence as viability. The Court reaffirmed this position in *Casey*, insisting that the state has a legitimate and "profound" interest in protecting the fetus "throughout pregnancy".⁷⁶ Thus, a woman's right to choose an abortion is balanced against the state's interests in fetal protection. Feminist scholar Sylvia Law states, "The compelling state interest analysis leads one to conclude that once the fetus has reached the-point of viability the state may restrict the availability of abortions, except in cases where the life or health of the mother would be endangered if the fetus were carried on to term. Notwithstanding this understanding of the nature of fetal life and the related strict scrutiny of the government's interest, three powerful ideas continue to fuel the effort to criminalize abortions. I believe that none of these ideas could provide the state with an interest compelling enough to justify any additional limits on access to abortions".⁷⁷ These three ideas are primarily, that many people believe that human being exists from the moment of conception, second the right to life movement, and finally that the

⁷⁶ McDonagh, 1064.

⁷⁷ Law, 1025.

drive to criminalize abortion is animated by an affirmation of the value of a patriarchal society.⁷⁸ Law refutes all three of these claims. She addresses the first, regarding the moment of conception by quoting Professor Lawrence Tribe who observes that the question of when human life truly begins is not at the point which the fetus possess an agreed-upon set of characteristics which make it human, but rather for a decision as to what characteristics should be regarded as defining a human being, which is a decision that people invariable differ widely.⁷⁹ Law argues, “religious belief cannot, by itself, justify a law imposing oppressive sex discriminatory burdens and demanding that others sacrifice their own deeply held conscientious beliefs”.⁸⁰ Law responds to the second claim about the right to life movement by stating, “forcing her (the pregnant woman) to support the dependent fetus denies her capacity to decide whether that is a relationship that she can sustain and imposes enormous costs on her life, health, and autonomy. Respect for the fetus is purchased at the cost of denying the value of women”.⁸¹ Finally, she responds to the third claim by explaining that application of constitutional equality prohibits the state from enforcing patriarchal relations through coercive power and that today, reproductive freedom is the core issue of women’s equality and liberty.⁸²

⁷⁸ Law, 1025-1028.

⁷⁹ Law, 1026.

⁸⁰ Law, 1027.

⁸¹ Law, 1027

⁸² Law, 1028.

In addition to criticisms of the subordination of women's rights to fetal rights, *Roe* has been criticized for the kind of legal precedent that it set. 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."⁸³

Judge Ginsburg states *Roe* would be more acceptable if it had not gone beyond a ruling on the particular statute involved in the case, and had not invoked the privacy doctrine to justify a broader but ultimately problematic basis for a qualified right to abortion. She agrees with commentary maintaining that the Court should have based its decision on sex equality considerations. She poses that such an approach might have muted the criticism of the *Roe* decision. "The breadth and detail of the *Roe* opinion ironically may have stimulated, rather than discouraged, antiabortion measures, particularly with respect to public funding of abortion".⁸⁴ Justice Ginsburg further explains that she believes *Roe* turned toward a medical approach that physicians were pleased with, but it halted the direction toward reproductive freedom was headed in the early 1970s.⁸⁵ *Roe* had a trimester approach that was described as, "reading like a set of hospital rules and

⁸³ "Body Politic." Oyez. Accessed July 20, 2016. <http://projects.oyez.org/body-politic/ch1#ch1-quicktake>.

⁸⁴ Ginsburg, 375.

⁸⁵ Ginsburg, 382.

regulations”.⁸⁶ Justice O’Connor, described that trimester approach as a collision course with itself, claiming that, “advances in the medical technology would continue to move forward the point at which regulation could be justified as protective of women’s health, and to move backward the point of viability, when the state could proscribe abortions unnecessary to preserve the patients life or health”.⁸⁷ Justice O’Connor thought this approach impelled legislatures to remain *au courant* with changing medical practices and called upon courts to examine legislative judgments, not as jurists applying “neutral principles” but as “science review boards”.⁸⁸ In agreement, Constitutional Law Professor Paul Freund believed that the *Roe* distinctions turning on trimesters and viability of the fetus illustrated a troublesome tendency of the modern Supreme Court under Chief Justices Burger and Warren “to specify by a kind of legislative code the one alternative pattern that would satisfy the constitution”. He also stated, “some of the bitter debate on the issue (of abortion) might have been averted, the animus against the Court might at least have been diverted to the legislative halls”.⁸⁹

It has been speculated by observers that *Roe* was motivated by pragmatic considerations for population control, coat hanger abortions, and concern for unwanted children born to impoverished women.⁹⁰ Justice Ginsburg stated for the

⁸⁶ Ginsburg, 380.

⁸⁷ Ginsburg, 380.

⁸⁸ Ginsburg, 380.

⁸⁹ Ginsburg, 382.

⁹⁰ Ginsburg, 383.

argument, “As long as the government paid for childbirth, public funding could not be denied for abortion, which was often a safer and far less expensive course, short and long run”.⁹¹ However, this didn’t guarantee government neutrality. Action deemed to be in the public interest, in this case, protecting the potential life of fetus, could be promoted by encouraging childbirth in preference to abortion.”⁹²

Justice Ginsburg asserts that, “Overall, the Court’s position –in *Roe*- is weakened by the concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective”.⁹³

“The resilience of *Roe* in the ensuing decades has been sufficient to retain the constitutional right to choose an abortion. However, the due process basis used by the Court in *Roe* has been completely inadequate for establishing a constitutional right to state assistance for obtaining one” says scholar Eileen McDonagh.⁹⁴ *Roe* did not end in protection for women, “In the aftermath of *Roe*, the Court ruled that a state need not provide public funding, public personnel, or public facilities for performing an abortion, even in the case of an indigent woman suffering from a medically abnormal pregnancy that could cripple her for life”.⁹⁵ In this regard, the purpose of *Roe* is left uncertain, as women are still not granted access and opportunity to abortion. “The Court has also ruled that it is constitutional for the

⁹¹ Ginsburg, 383.

⁹² Ginsburg, 384.

⁹³ Ginsburg, 385.

⁹⁴ McDonagh, 1058.

⁹⁵ McDonagh, 1058.

state to require restrictive abortion regulations, such as twenty-four hour waiting periods and informed consent decrees. Policy inadequacies stemming from the *Roe* foundation for abortion rights can be corrected by reconstructing the constitutional right to an abortion on an equal protection foundation evoking a woman's right to consent-to-pregnancy rather than merely her right to choose an abortion".⁹⁶

X: Feminist Jurisprudence

In addition to criticisms of the shortcomings of the privacy doctrine, feminist scholars argue that Justice Blackmun's opinion in *Roe* fundamentally affects women's roles as citizens. Feminist scholars argue that it is not enough to make advances in the public sphere, but question how feminist empowerment is possible without progress in the private sphere.. MacKinnon further claims, "The feminist posture toward the state has therefore been schizoid on issues central to women's survival".⁹⁷ Scholar Sylvia Law claims as a result of history, "we have been virtually blinded to the relevance of equality notions when evaluating state limitations on a woman's access to abortion".⁹⁸ In response to privacy, "privacy is defined as a right to an inviolable personality which is guaranteed by ensuring autonomy or control over the intimacies of personal identity", which is not demonstrated in *Roe*.⁹⁹

⁹⁶ McDonagh, 1059.

⁹⁷ Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs*, Vol. 8, no. 4 (1983): 643.

⁹⁸ Law, 962.

⁹⁹ MacKinnon, 656.

Privacy is what men have had, and everything that women have never been allowed to have.¹⁰⁰

One of the major issues with the fourteenth amendment's guarantee of liberty and equality is that it discriminated against poor and non-white women.¹⁰¹ Justice Ginsburg in agreement states, "Women who are not poor have achieved access to abortion with relative ease; for poor women, however, a group in which minorities are disproportionately represented, access to abortion is not markedly different than what it was in pre-*Roe* days".¹⁰² It is clear that the pre and post *Roe* world still has a "sex-specific impact", as coined by Sylvia Law.¹⁰³

However, the poor woman is not the only disenfranchised because of *Roe*. While the access to safe and affordable abortions is inherently more accessible to wealthy white women, all women, regardless of race or finance suffer inequality in the hands of the privacy doctrine. Primarily, pregnancy and abortion are experiences only women have. "When the state denies women access to abortion, both nature and the state impose upon women burdens of unwanted pregnancy that men do not bear".¹⁰⁴ Law explains, "An equality doctrine that ignores the unique quality of these experiences implicitly says that women can claim equality only insofar as they are like men. Such a doctrine is, to say the least, reified. The reality

¹⁰⁰ MacKinnon, 657.

¹⁰¹ Law, 973.

¹⁰² Ginsburg, 377.

¹⁰³ Law, 981.

¹⁰⁴ Law, 1007

remains that only women experience pregnancy”.¹⁰⁵ Law is explaining that in this sense, since only women face these experiences, the state interfering with abortion and pregnancy, only affects women, and therefore denies equality. “If we are persuaded that the fourteenth amendment's equality guarantee constrains legislative authority to regulate reproductive biology and that such laws raise issues different from those raised by laws that classify explicitly on the basis of sex, we must then consider what standard is appropriate for evaluating such laws”.¹⁰⁶

The burdens of this sex discrimination are both attached to one's personhood and identity but also place physical restrictions and burdens that are sex-specific. “If a woman does not consent to pregnancy, the fetus's effects on her body constitute serious harm impinging upon her bodily integrity and liberty”.¹⁰⁷ Law elaborates, “First, such laws enforce the invasion of women's bodies. The physical burdens of pregnancy always include minor discomfort and physical intrusion and always pose risks of permanent damage to health and life itself that are vastly greater than the risks of abortion”.¹⁰⁸ MacKinnon states, “The male perspective is systemic and hegemonic. Although feminism emerges from women's particular experience, it is

¹⁰⁵ Law, 1007.

¹⁰⁶ Law, 1008.

¹⁰⁷ McDonagh, 1060.

¹⁰⁸ Law, 1008.

not subjective or partial, for no interior ground and few if any aspects of life are free of male power”.¹⁰⁹

Law explains the psychological damage is also done to women fearing loss of control of their bodies, “restricting access to abortion dramatically impairs the woman's capacity for individual self-determination. When the state prohibits abortion, all women of childbearing age know that pregnancy may violently alter their lives at any time”.¹¹⁰ This infringes on every aspect of a woman's life, her ability to plan for the future and sustain relationships with others.¹¹¹

Third, Law holds that “the decision of whether or not to bear a child is inescapably a complex moral and practical one, requiring consideration of relations with existing people and one's capacity to care for the child or to find others who will do so. Bearing a child creates a profoundly intimate relationship between the woman and the child, even when that relational ends shortly after birth”.¹¹² Therefore, the state is taking away that decision-making capability from women. Choice of method is a choice of determinants-, which has been unavailable due to subordination of women.¹¹³ Law claims this imposes a crushing restraint on the heterosexual women's capacity for sexual expression.¹¹⁴

¹⁰⁹ MacKinnon, 638.

¹¹⁰ Law, 1017.

¹¹¹ Law, 1017.

¹¹² Law, 1018.

¹¹³ MacKinnon, 638.

¹¹⁴ Law, 1018.

Feminist scholars also disprove the common disposition, that abortion is murder. Law counters, "Neither equality nor privacy can support an asserted right to murder. The view that abortion is morally suspect is inconsistent with significant currents of moral thought. A stronger defense of abortion rights must not simply assume that the fetus is a person but must rather directly challenge the claim that the legislature may declare fetal life to be personhood or, in the face of uncertainty, may require that the fetus be treated as a person".¹¹⁵ Ellen Willis argues that we can assume that the fetus is a person and yet support a woman's right to choose abortion as a form of self-defense.¹¹⁶ Law further states, "This distinguishing characteristic of fetal life supports the line that *Roe v. Wade* draws between the woman's right to decide whether to abort and the state's power to protect fetal life. It is only after birth that anyone other than the mother can assume responsibility for the nurture that is indispensable to life. At the point of viability, when the fetus "has the capability of meaningful life outside the mother's womb," the state may restrict abortions, except where the life or health of the mother would be endangered if the fetus were carried to term".¹¹⁷ Overall, scholars like Law hold, "the drive to criminalize abortion is animated by an affirmation of the value of a patriarchal society".¹¹⁸

¹¹⁵ Law, 1023.

¹¹⁶ Law, 1023.

¹¹⁷ Law, 1024.

¹¹⁸ Law, 1028.

“The key issue in the abortion debate, therefore, is not merely a woman's right to exercise her right of choice as an isolated individual, but rather her right to consent to what a separate entity, the fetus, does to her when pregnancy results from its presence and implantation in her uterus”.¹¹⁹This issue is often unseen by those opposed to abortion.

This ultimately calls into question once again, the role of the state in the female body. However, feminist scholar Catharine MacKinnon asks, “What is this state, from women’s point of view? The state is male in the feminist sense. The law sees and treats women the way men see and treat women”.¹²⁰ The state institutionalizes male power. MacKinnon states, “Justice will require chance, not reflection – a new jurisprudence, a new relation between life and law”.¹²¹ This justice has not been seen in the years since *Roe*. The lack of equal protection is a clear constitutional violation on behalf of the state.

XI: Restricting a Woman’s Right to Choose

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 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

¹¹⁹ McDonagh, 1063.

¹²⁰ MacKinnon, 644.

¹²¹ MacKinnon, 658.

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

This progressing interest of the abortion cases demonstrate that even the Court was torn between the two interests in abortion cases. In *Bellotti v. Baird* (1979), the Court 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.¹²² The Court's decision upheld a woman's right to choose to have an abortion and extended this to unmarried women under the age of 18. At the same time, however, the Supreme Court accepted a state's right to require consent so long as an alternative procedure was available through the courts. This was interestingly an 8-1 decision and even Justice Rehnquist insisted on defending privacy rights. This is an example of women's interest being disregarded.

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 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

¹²² 443 U.S. 622 (1979)

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."¹²³ From the perspective of the legal theory advanced by these justices, the right to privacy as defined by the Court in *Harris* fails to provide an adequate guarantee of women's autonomy to decide what happens to their own bodies because it denies women who cannot pay an equal right to reproductive autonomy. Feminist legal scholars go even further, criticizing the problematic assumption that nonintervention in the private sphere promotes a woman's freedom of choice; as MacKinnon writes, "the *Harris* result sustains the ultimate meaning of privacy in *Roe*: Women are guaranteed by the public no more than what we can get in private" and what they can get in private is often imbalanced due to men's control over sexuality.¹²⁴

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

¹²³ 448 U.S. 297 (1980).

¹²⁴ Quoted in Ford, 400.

waiting period, and the disposal of fetal remains in a "humane and sanitary manner."¹²⁵ This case affirmed the Court's commitment to protecting a woman's reproductive rights by ruling against these regulations. This case held that the City of Akron's ordinance violated the Constitution because it was intended to persuade women away from having abortions and was not motivated by medical considerations.¹²⁶ This goes to create fewer locations where abortion services are available which limits women's ability to have reproductive care.

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 the statute's stated concerns with material health were aimed at discouraging abortions instead. The majority rejected provisions requiring "informed consent," concluding that reporting and viability determination procedures were in fact violations of the privacy rights of patients and physicians. The Court 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.¹²⁷ ¹²⁸ In so doing, the Court reacted against a growing number of state regulations that attempted to limit abortions by making them more difficult to obtain. While the Court reaffirmed *Roe*,

¹²⁵ 462. U.S. 416 (1983)

¹²⁶ 462. U.S. 416 (1983)

¹²⁷ 476 U.S. 747 (1986)

¹²⁸ 476 U.S. 747 (1986)

the proliferation of state attempts to restrict abortion underlined how vulnerable the privacy doctrine was to competing interpretations.

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. This directly contradicts what *Roe* was supposed to protect.

Whereas a narrow majority had ruled against similar 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 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”.¹²⁹

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.¹³⁰ 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.¹³¹

Planned Parenthood of Southeastern Pennsylvania v. Casey in 1991 reaffirmed *Roe v. Wade* and imposed a new standard to determine validity of abortion laws.

¹²⁹ 492 U.S. 490 (1989)

¹³⁰ 497 U.S. 417 (1990)

¹³¹ 500 U.S. 173 (1991)

This standard asked if the regulation has the purpose or effect of imposing an “undue burden”, which is defined as a “substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”¹³² The 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.¹³³ Overall, *Casey* affirmed the constitutional right to an abortion and reiterated *Roe’s* finding that abortions may not be banned before the point of viability. At the same time, however, *Casey* broadened the state’s authority to regulate abortion, including regulations during the first trimester aimed at protecting the health of the mother; the majority also noted that the point of viability could come earlier during a pregnancy thanks to medical advances. Finally, by adding a new “undue burden” test, the Court created an ambiguous standard that, much like the privacy doctrine, is subject to different interpretations.

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

¹³² 505 U.S. 833 (1992)

¹³³ 505 U.S. 833 (1992)

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.

Feminist legal theorists criticize the Court's decision in *Casey*, arguing that it set a dangerous precedent by ruling that the state had an interest in protecting potential life at the moment of conception even though the mother's interest outweighed this. For feminists, this formulation threatened to allow even more restrictions.¹³⁴ Indeed, the Court's decision in *Casey* opened the door to such restrictions by ruling that the state "may take measures to ensure that the woman's choice is informed [including] measures designed... to persuade the woman to choose childbirth over abortion," as long as such measures do not pose an "undue burden" on the woman's right to choose an abortion. Feminists would point out that this reflects paternalistic, gendered assumptions that women are emotional and prone toward making irrational decisions. As a result, most of the methods used by the state to protect the fetus do not directly hinder a woman's right to choose an abortion but rather interfere with her access to abortion".¹³⁵

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

¹³⁴ Francis and Smith.

¹³⁵ McDonagh, 1065.

one physician in the state of Montana was licensed 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.¹³⁶ The pattern of these cases following *Roe v. Wade* demonstrates over and over again that the Court will find loopholes and restrictions to prevent abortions. This variation can be attributed to the contrasting interests in abortion between the individual and the state. Justice Blackmun defined a limited right to an abortion based on a right of privacy and based on medical evidence that the fetus is not viable in the first trimester. However, subsequent Supreme Court decisions on abortion focused less on was divided over which interests should take priority, it is clear that the privacy doctrine created a problematic basis for defending abortion rights. Blackmun's decision in opened the door to subsequent decisions denying that the government has a constitutional obligation to ensure that all women have access to safe and legal abortions.

In 2007, the Supreme Court upheld the constitutionality of the Partial Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*.¹³⁷ This bans partial birth abortion where the Court weighed that there were substantial state interests in protecting and preserving fetal life. Opponents of the Act claimed it concealed the extent of its restriction on pre-viability abortion choices. Many states have passed statutes requiring communications to women about the putative nature and health

¹³⁶ 520 U.S. 968 (1997).

¹³⁷ 550 U.S. 124 (2007).

consequences of abortion, stipulating management of supposed fetal pain, or imposing regulatory requirements on clinics with the asserted aim of protecting maternal health.¹³⁸ These statutes invite the Court to restrict *Roe* further. This places barriers make it effectively unavailable. Feminists point out that analyses of whether such statutes place undue burdens on women's rights in terms of formal legal barriers manifest legal formalism that conceals the reality of ongoing oppression or inequality of opportunity.

Overall, it is demonstrated through these cases that the dialogue about women's autonomy in making their 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 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.

XII: Legislation Introduced in the 114th Congress

The effect of a decision made by the Supreme Court extends to every aspect of our lives. When it comes to *Roe*, the vague ruling opens the door to not only the subsequent Supreme Court cases mentioned above, but also to Congressional bills that work to undermine women's autonomy as well. I examined legislation introduced in the 114th Congress (2015-2016) that sought to limit women's reproductive freedom through abortion bans, non-accessible health care, and cuts in federal spending towards Planned Parenthood. The language in many of these

¹³⁸ 550 U.S. 124 (2007).

legislative proposals is laced with patriarchal connotations that suggest that women are not capable of making mature, independent decisions and are not entitled to the full citizenship men have. While these bills were not necessarily passed, their introduction to Congress demonstrates that while rights for women have begun to advance throughout the years, the law still leaves room for government control.

Congressional bills are important to evaluate when determining the future of reproductive freedom because they have the power to enact change on the citizens and pressure the Court, if they are passed. Of course, Congress cannot “overrule” the Supreme Court, however they can enact legislation to determine the original intent.

H.R. 492: Ultrasound Informed Consent Act amends the Public Health Service Act to require abortion providers, before a woman gives informed consent to any part of an abortion, to perform an obstetric ultrasound on the pregnant woman, and to provide a simultaneous explanation of what the ultrasound is depicting, display the ultrasound images so the woman may view them, and provide a complete medical description of the images, including the dimensions of the embryo or fetus, cardiac activity if present and visible, and the presence of external members and internal organs if present and viewable.¹³⁹ I argue this poses an undue burden on women as they are forced to experience of the traumatic and emotional response to viewing and hearing a fetus they do not wish to carry to term.

H.R. 453: Healthy Relationships Act of 2015 / S. 923: Healthy Relationships Act of 2015 amends the Public Health Service Act to authorize the Health Resources and

¹³⁹ H.R. 492, 114 Cong. (2015).

Services Administration to award grants for qualified sexual risk avoidance education for youth and their parents. The unambiguous message that postponing sexual activity is the optimal sexual health behavior for youth must be the primary emphasis and context for each topic covered by the education.¹⁴⁰ This does not teach young people about responsible sexual behavior to prevent unwanted pregnancy, by instead only teaching abstinence.

H.R. 217: Title X Abortion Provider Prohibition Act / S. 51: Title X Abortion Provider Prohibition Act amends the Public Health Service Act to prohibit the Department of Health and Human Service (HHS) from providing federal family planning assistance to an entity unless the entity certifies that, during the period of assistance, the entity will not perform, and will not provide funds to any other entity that performs, an abortion. Excludes an abortion where: (1) the pregnancy is the result of rape or incest; or (2) a physician certifies that the woman suffered from a physical disorder, injury, or illness that would place the woman in danger of death unless an abortion is performed, including a condition caused by or arising from the pregnancy. Excludes hospitals that do not provide funds to non-hospital entities that perform abortions. Requires HHS to provide Congress annually: (1) information on grantees who performed abortions under the exceptions, and (2) a list of entities to which grant funds are made available.¹⁴¹¹⁴² This forces facilities to lose federal

¹⁴⁰ H.R.453, 114 Cong. (2015).

¹⁴¹ H.R.217, 114 Cong. (2015).

¹⁴² S.51, 114 Cong. (2015).

funding if they provide abortion services, which ultimately results in fewer and fewer facilities available to women.

H.R. 610 amends title XIX of the Social Security Act to audit States to determine if such States used Medicaid funds in violation of the Hyde Amendment and other Federal prohibitions on funding for abortions, and for other purposes. This bill amends title XIX (Medicaid) of the Social Security Act to include as an activity under the Medicare Integrity Program an annual audit of payment claims under a state Medicaid plan to determine if any payments for family planning services and supplies violated federal law that restricts the use of funds under Medicaid for abortions.¹⁴³

H.R. 36: Pain-Capable Unborn Child Protection Act amends the federal criminal code to prohibit any person from performing or attempting to perform an abortion except in conformity with this Act's requirements. It also requires the physician to first determine the probable post-fertilization age of the unborn child. Prohibits an abortion from being performed if the probable post-fertilization age of the unborn child is 20 weeks or greater. Permits a physician to terminate a pregnancy under such an exception only in the manner that provides the best opportunity for the unborn child to survive. Requires a physician performing an abortion under an exception provided by this Act, if (in reasonable medical judgment) the pain-capable unborn child has the potential to survive outside the womb, to ensure that a second physician trained in neonatal resuscitation is present and prepared to provide care

¹⁴³ H.R.610, 114 Cong. (2015).

to the child. Requires, when a physician performs or attempts an abortion in accordance with this Act and the child is born alive. Requires the physician who intends to perform an abortion under one of this Act's exceptions to first obtain a signed informed consent authorization form, which shall be presented in person by the physician.¹⁴⁴

S. 78: Pregnant Women Health and Safety Act requires a person who performs an abortion to have admitting privileges at a local hospital and notify the patient of the location of the hospital where the patient can receive follow-up care by the person if complications arise.¹⁴⁵ However, admitting privileges are not easy to come by and once again limit the availability of physicians for the woman seeking an abortion.

These legislative restrictions on women demonstrate a lack of strong progression towards reproductive freedom. Many of these bills provide a turnabout way for pro-life legislators to prevent women from having abortions or contraceptives by creating rules, regulations, and limitations on the availability of family planning services. The “enemy” of self-determination and choice is usually seen as imposing from the top down. In the north, it is the government – through the courts, the legislature, and the bureaucratic rule making- that threatens to “take away” women’s reproductive autonomy.¹⁴⁶ These regulations provide a means to

¹⁴⁴ H.R. 36,114 Cong. (2015).

¹⁴⁵ S.78, 114 Cong. (2015).

prevent women from achieving full constitutional authority over their own bodies without overturning *Roe V. Wade*.

Additionally, *Roe* relies on viability in terms of its privacy doctrine. However, the medical view of viability argued and heard by the court in 1973 is not the same as today. The interest that Justice Blackmun laid out suggests that when the fetus in fact gains viability is when the interest shifts to the state. When the court heard *Roe* this viability point is around the second trimester. However, the advancement of medical technology currently shows examples of viability being as early as 6 weeks, before many women even know they are pregnant. This would in turn immediately take women's rights away and place them into the hands of the state before she even could have an abortion preformed.

XIX: Conclusion

The law continues to restrict women's reproductive freedom. The courts, state legislatures, and bureaucratic agencies have increasingly chipped away at women's reproductive autonomy.¹⁴⁷ Although the Supreme Court has upheld a woman's right to choose an abortion as guaranteed in *Roe v. Wade*, the Court has also supported the infringement of women's rights by restricting their access to safe and affordable abortions as well as their access to contraceptives. The Court has therefore worked to both grant and restrict women's rights, as demonstrated in the

¹⁴⁶ Lori L. Heise, "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.

¹⁴⁷ Heise, 206.

various Supreme Court cases referenced earlier in the paper. These regulations are all based upon an interpretation of the Constitution that bases women's reproductive freedom on a limited right to privacy.¹⁴⁸ Women have a right to privacy and therefore abortions are legal but only in the first trimester, and even then, with increasing restrictions and obstacles on effectively exercising this right. As time and medical technology have advanced, the initial point of viability has been pushed earlier and earlier in pregnancy, limiting the applicability of privacy and expanding the state's interest more and more. When Justice Blackmun determined the constitutionality of the right to abortion as a matter of balancing these contrasting interests, he opened the door to a steadily increasing privileging of the state's interest over women's freedom.

The *Roe* opinion falls short in recognizing the necessity to promote equality for women: "Women's bodily freedom (the absence of physical, legal, or social constraints on one's decision about one's body) 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".¹⁴⁹ Control over one's body is an essential part of being an individual with needs and rights, a concept, which is the most powerful legacy of the liberal political tradition.¹⁵⁰

¹⁴⁸ Heise, 206.

¹⁴⁹ Christine Overall, *Why Have Children? The Ethical Debate* (Cambridge MA: MIT Press, 2013), 21.

¹⁵⁰ Petchesky, 665.

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.¹⁵¹ Despite women's gains in the economy and in politics, reproductive rights have barely advanced over the years since *Roe* numerous hurdles and barriers make safe and healthy reproductive health options difficult to access or afford for many women. Women's control over their bodies is not like preindustrial workers' control over their tools; it cannot be wrested away simply through 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."

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.¹⁵² 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 as a part of health care, in addition to based on viability.¹⁵³

¹⁵¹ Petchesky, 666.

¹⁵² Overall, 21.

¹⁵³ Overall, 22.

The rights of women as to make their own choices as citizens have not been respected and have contrasted differently with the rights of other social groups. This is not just about fundamental religious or cultural belief 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 involved, and because they still have primary responsibility for the care and development of the children born.¹⁵⁴

This paper has defended the position that these regulations against women's reproductive freedom infringe on their ability to participate equally in society, limiting their rights as citizens. I argue that the feminist legal theory outlined earlier in the paper stands as a positive companion to existing legal theory that criticizes the vagueness of the privacy doctrine as applied to *Roe*. The model I have proposed suggests that the law should consider gender when making decisions that fundamentally affect women. It is not enough to grant women the right to an

¹⁵⁴ Petchesky, 669.

abortion through *Roe*, and then put burdens on women attempting to utilize their right. Reproduction affects women as women in a way that transcends class divisions and penetrates everything – work, political and community involvements, sexuality, creativity, dreams.¹⁵⁵ 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. As Justice Brennan famously said, 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.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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

¹⁵⁵ Petchesky, 665.

¹⁵⁶ 405 U.S. 438 (1972).

¹⁵⁷ Petchesky, 665.

¹⁵⁸ Petchesky, 666.

bodies is not like preindustrial workers' control over their tools; it cannot be wrested away simply through 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.”

I do not believe that abortion should be completely unregulated and I acknowledge that the state has a legitimate interest in protecting and promoting a healthy population. Nonetheless, I disagree with the growing tendency to expand the state's interest at the expense of women's autonomy. I caution against a narrow focus on viability because viability can be argued and determined at varying dates depending on the scientist or physician. As discussed in this paper, arguments about the state's interest in protecting the potential life of the fetus as well as paternalistic claims to be protecting women from their own potentially harmful choices, demonstrate hostility against women's right to choose, especially when it comes to women of color and low-income women. I suggest that the state has a responsibility to ensure that all women can exercise their reproductive freedom, and not be discriminated against based on income, gender, or ethnicity. In fact, abortions have become increasingly concentrated among low-income women for whom an unintended pregnancy may limit their economic and educational opportunities. And economics reverberates throughout women's lives when they can't get the abortions they need. In a longitudinal study of almost one thousand women who sought an abortion, researchers at the University of California in San Francisco discovered that those who were unable to have an abortion were more likely to become unemployed and were three times as likely to fall into poverty compared to

women who began in comparable financial situations. Moreover, women who were able to get the abortions they sought were more likely to follow through on their employment or educational plans.¹⁵⁹

Therefore, I hold the current standing allows for too much government control in the rights of women in regards to their reproductive freedom. Therefore I adopt a more liberal feminist perspective in the freedom to make individual choices without excessive state control. The state has a right to preserve potential life but the excessive state control comes into play with undue burdens such as waiting periods, restrictions on physicians to perform abortions, and unfair regulations that result in limited abortion providers.

The role of the Supreme Court is to uphold the Constitution and protect the rights of all citizens, male and female. 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. While I argue that Justice Blackmun should have pursued an alternative route in *Roe*, his decision does in fact claim a right to privacy which increasingly, Supreme Court decisions enacted post *Roe*, have moved toward unconstitutionally invalidating. 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

¹⁵⁹ Bryce Covert, "Why Abortion is a Progressive Issue," *The New York Times* (25 April 2017).

Justice Blackmun, the Supreme Court made strides toward increasing women's autonomy and reproductive freedom but continued to accept some limitations on this right. This set the stage for subsequent rulings that accepted more and more limitations. This paper has demonstrated that such a defense of abortion rights is vulnerable to change.

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