International Journal of
Public Policy and Administration
(IJPPA)

CARI Journals

International Journal of Public Policy and Administration

Vol.4, Issue No.1, pp 27 – 53, 2021

www.carijournals.org

VIGILANTISM, TEXAS, PRIVACY, AND LIBERTY: WAITING ONCE AGAIN FOR THE SUPREME COURT TO SPEAK

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Vigilante: a member of a self-appointed group of citizens who undertake law enforcement in their community without legal authority, typically because the legal agencies are thought to be inadequate.

Abstract

Is there a constitutionally protected right to privacy? This is *not* an article in support of or in opposition to abortion rights. In fact, it is *not* an article about abortion at all. Rather, in light of two actions of the United States Supreme Court that took place in 2021, the authors have undertaken in Part I of this study a review of Supreme Court precedents, statutory materials, and other state and federal legislative actions relating to the issues of privacy and liberty. The article is written in the context of the debate over reproductive rights and examines the rationale used by courts to make critical distinctions in cases where not only reproductive rights were at issue, but also where questions were raised relating to the existence of a broader constitutionally protected right to privacy which we will consider in other discreet areas in Part II of the study.

Keywords: *Right to privacy; precedents; fetal viability; vigilantism; liberty; 14th Amendment*

1.0 INTRODUCTION

Durham (2021) writes: “Current abortion jurisprudence in the United States can best be described as fragmented and evolving. Abortion has been protected under the label of the constitutional right to privacy since Roe v. Wade in 1973, but the details of what that right entails have been in flux ever since.” In fact, issues related to reproductive rights had been joined much earlier in the 1960s in the United States.

Sherri Chessen was born 1932 and is probably more well-known as Sherri Finkbine. [For the purposes of this discussion, we will refer to her as Chessen/Finkbine.] Chessen/Finkbine was a former children's television host, known also as *Miss Sherri*, for her role on the Phoenix version of the popular children's show *Romper Room*. In 1962, she sought to end a pregnancy by seeking an abortion after discovering that the over-the-counter sedatives purchased by her husband had contained thalidomide which potentially could result in serious fetal deformities when taken in early stages of pregnancy. Chessen/Finkbine had taken 36 of the pills in the early stages of her fifth pregnancy.

Thalidomide was first marketed in 1957 by the West German pharmaceutical company Chemie Grünenthal under the trade name Contergan, where it was available as an over-the- counter medication (Annas & Elias, 2011). The drug was promoted for anxiety, trouble sleeping, "tension", and morning sickness. While it was initially thought to be safe if taken during pregnancy, concerns regarding birth defects continued to surface, and in 1961, thalidomide was removed from the European market. The total number of embryos affected by its use during pregnancy is estimated at 10,000, of which about 40% did not survive birth. Those who did survive developed limb, eye, urinary tract, and heart problems. The numerous reports of malformations in babies brought about the awareness of the side effects of the drug on pregnant women. Birth defects caused by the drug ranged from moderate malformation to more severe deformities. Webb (1963) reviewed the history of the drug and the different forms of birth defects it had caused and noted: "The most common form of birth defects from thalidomide is shortened limbs, with the arms being more frequently affected. This syndrome is the presence of deformities of the long bones of the limbs resulting in shortening and other abnormalities."

Chessen/Finkbine's physician recommended that she obtain an intentional or *therapeutic abortion*, which was the only type of abortion permitted in Arizona at the time. To publicize the danger of thalidomide, Chessen/Finkbine contacted the *Arizona Republic*. Although she was assured anonymity, her identity was not kept secret. The media identified her as "Mrs. Robert L. Finkbine" and "Sherri Finkbine," even though she personally had not used that name.

Following the paper's publication of Chessen/Finkbine's story, the hospital in Arizona where she had planned to have the abortion performed, sought assurance that it would not be prosecuted for performing the abortion. At that time, however, the abortion laws of Arizona limited her decision. In Arizona, an abortion could only occur if the *mother's life* was in danger. When the hospital was unable to receive such assurance, the scheduled abortion was canceled. The physician then sought a court order permitting him to proceed with the abortion. Meanwhile, a barrage of negative publicity resulted in the couple receiving numerous threatening letters and phone calls. A few of the letters included death threats, and the FBI was brought in to protect her. She also lost her job hosting *Romper Room.* The petition filed by her physician was dismissed by Judge Yale McFate, who determined that he lacked the authority to render a decision on the matter. [As a quirk of history, McFate was the Maricopa County Superior Court judge who presided over the 1963 rape case that led to the U.S. Supreme Court's landmark *Miranda* decision and the ubiquitous police incantation that starts "You have the right to remain silent" (Ulrich, 2013; Baird, 2018).]

Chessen/Finkbine attempted to travel to Japan to obtain an abortion but was denied a visa by the Japanese Consul. She and her husband then flew to Sweden (Lennerhed, 2019). The abortion panel of the Royal Swedish Medical Board granted Chessen/Finkbine's request for an abortion on August 17, 1962, on the grounds of safeguarding her mental health. A legal abortion was performed on August 18, 1972. The Swedish obstetrician who performed the abortion told Chessen/Finkbine that the fetus had no legs and only one arm and that it would not have survived. The doctor stated that the fetus was too badly deformed to even identify the fetus' gender.

2.0 ON THE ROAD TO *ROE V. WADE*

In 1964, a Connecticut resident, Gerri Santoro, died trying to obtain an illegal abortion (see Candelario, 2012). In 1963, her husband's domestic abuse prompted Santoro to flee the marriage, and she and her daughters returned to her childhood home in California. Santoro took a job at Mansfield State Training School, where she met another employee, Clyde Dixon. The two began an extramarital affair and Santoro became pregnant. When Santoro's husband announced he was coming from California to visit his daughters, Santoro feared for her life. On June 8, 1964, twenty-eight weeks into her pregnancy, she and Dixon checked into the Norwich Motel in Norwich, Connecticut, under aliases. They intended to perform a self-induced abortion, using surgical instruments and information from a textbook which Dixon had obtained from a teacher at the Mansfield school. In a state of panic, Dixon fled the motel after Santoro began to bleed. She died, and her body was found the following morning by a maid.

Dixon and Morgan were arrested three days later. Dixon was charged with manslaughter and Morgan, the teacher, was charged with conspiracy to commit an illegal abortion. Dixon was convicted and sentenced to serve a year and day in prison.

The shocking photo of Gerri Santoro became a rallying point for women who were faced with similar circumstances (see Sandlos, 2000) and spurred attempts to legalize abortion.

2.1. *Griswold v. Connecticut*

Griswold v. Connecticut (1965) is now regarded as one of the most consequential decisions of United States Supreme Court. The Supreme Court ruled that the Constitution of the United States protects the *liberty* of married couples to buy and use contraceptives without government restriction on the basis of a *right to marital privacy*.

Although the Bill of Rights does not explicitly mention "privacy," Justice William O. Douglas, who wrote for the 7-2 majority on the Court noted: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Justice Arthur Goldberg penned a concurring opinion in which he found the Ninth Amendment in support of the Supreme Court's decision. Justice Byron White and Justice John Marshall Harlan II wrote

concurring opinions in which they argued that privacy is protected by the due process clause of the Fourteenth Amendment.

The case originated as a prosecution of Dr. Estelle Griswold under the Connecticut Comstock Act of 1873 (Bailey, 2010). The law made it illegal to use "any drug, medicinal article, or instrument for the purpose of preventing conception...." Violators of the Connecticut law could be "... fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." [By the 1950s, in fact, Massachusetts and Connecticut were the only two states that still had such statutes on their books, although they were almost never enforced.]

During the 1940s, several prosecutions had arisen from the provision of contraception by the Waterbury Planned Parenthood clinic, leading to legal challenges to the constitutionality of the Comstock law, but these challenges failed on technical grounds. In *Tileston v. Ullman* (1943), a doctor and mother challenged the law on the grounds that a ban on contraception could, in certain situations, threaten the lives and well-being of patients. The U.S. Supreme Court dismissed the appeal on the grounds that the plaintiff *lacked standing* to sue on behalf of his patients. Yale School of Medicine gynecologist C. Lee Buxton and his patients brought a second challenge to the law in *Poe v. Ullman* (1961). The Supreme Court again dismissed the appeal, on the grounds that the case was not *ripe*: the plaintiffs had not been charged or threatened with prosecution, so there was no actual controversy for the Court to resolve.

The dissenting opinion of Justice John Marshall Harlan in *Poe* would serve as the foundation argument four years later in *Griswold v. Connecticut* (Schroeder, 2000). Justice Harlan wrote in *Poe*:

> "(T)he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms in the United States; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which,

> broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."

Justice Harlan argued that the Supreme Court should have heard the case rather than dismissing it on grounds of ripeness. Perhaps most importantly, Justice Harlan indicated his support for a broad interpretation of the due process clause of the Fifth and Fourteenth Amendments (see Williams, 2010). On the basis of this interpretation, Harlan concluded that the Connecticut statute violated the Constitution.

After *Poe* was decided in June of 1961, the Planned Parenthood League of Connecticut (PPLC) decided to challenge the law again. Estelle T. Griswold served on the PPLC as Executive Director from 1954 to 1965. Dr. Griswold and Dr. Buxton, a PPLC medical volunteer, opened a birth control clinic in New Haven, Connecticut, "thus directly challeng[ing] the state law." The clinic opened on November 1, 1961. Griswold and Buxton were arrested, tried, and found guilty of violating the Connecticut Comstock Law, and fined $100 each. The conviction was upheld by the Appellate Division of the Connecticut Circuit Court, and subsequently by the Connecticut Supreme Court. On June 7, 1965, the Supreme Court of the United States issued a decision in favor of Dr. Griswold, striking down Connecticut's Comstock Law.

Seven Justices formed the majority and joined an opinion written by Justice William O. Douglas. The theory of the majority's opinion is both interesting and controversial.

The Court began by finding that the U.S. Constitution protects "marital privacy" as a *fundamental constitutional right*, but struggled to identify a particular source for such a right in the text of the Constitution itself. Interestingly, the Court rejected Justice Harlan's analysis under Fifth and Fourteenth Amendments to the U.S. Constitution as the source of the marital privacy right.

Instead, the Court held the right of marital privacy right was *implied under various provisions of the Bill of Rights*, such as the First, Third, Fourth, and Fifth Amendments. In so doing, the Court made reference to cases where the Court had found personal liberties that were constitutionally protected despite not being specifically enumerated in the Constitution, such as the constitutional right to parental control over childrearing found in *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925). The Court viewed the implicit nature marital privacy rights in a similar

light. In a now well-known (and sometimes ridiculed) line Justice Douglas used the metaphor of shined light and its shadows to describe it:

> "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."
>
> "We have had many controversies over these penumbral rights of 'privacy and repose.' These cases bear witness that the right of privacy which presses for recognition here is a legitimate one." (Griswold v. Connecticut, 1965).

The Court concluded that Connecticut's Comstock Law violated this fundamental right to privacy, and therefore was unconstitutional. Douglas went even further and stated that the right to marital privacy was "older than the Bill of Rights," and ended the opinion with an impassioned appeal to the sanctity of marriage in the Anglo-American culture and common law tradition found in American law:

> "We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

DeMoss and Coblenz (2008, p. 271) note: "In Griswold, Justice Douglas set out a number of unenumerated rights that the Supreme Court had found or defined through recognition over the years. They included the right of parents to control what was taught to a child, the right to send a child to private school, the right to procreate, the right to be free from certain bodily intrusions, and the right to travel abroad."

Although the *Griswold* decision has been criticized as essentially "legislating from the bench," McCarthy (2018, pp. 369-370) writes in strong support of the Douglas view:

> "Justice Douglas's Griswold opinion is, among other things, a top-notch originalist analysis of the Constitution. Douglas does not play charades with the

> Constitution, but instead explicates with precision and accuracy the original public meaning of the Bill of Rights in general and the Ninth Amendment more specifically. The drafters intended the Ninth Amendment to function as a fail-safe mechanism to protect against an imperfect enumeration of fundamental natural law rights. Justice Douglas identifies this function and correctly determines that the right to privacy was among the natural law rights that eighteenth-century and early nineteenth-century Americans held to be sacred, inalienable, and self-evident truths. Douglas recognized that the drafters wrote on the principle of the iceberg - they engaged in a mode of authorship identical to Ernest Hemingway's theory of implied omission. Like Hemingway, they submerged content beneath the surface of the text that both the authors and the readers understood to be implied and fundamentally important to the overall sense and meaning of the document."

The concurring and dissenting opinions in *Griswold* add much to the understanding of the Court's majority reasoning as well as to the views of the Justices who disagreed with the decision. Justice Arthur Goldberg concurred with the Court's majority, but wrote a separate opinion to emphasize his view that the Ninth Amendment—which states that if the Constitution enumerates certain rights but does not enumerate others it does not mean that the other rights do not exist—was sufficient authority on its own to support the Court's finding of a fundamental constitutional right to marital privacy. Justice John Marshall Harlan II also concurred with the result, but reiterated that the right to privacy should be protected under the Due Process Clause of the Fourteenth Amendment. Justice Byron White concurred only in the judgment, and wrote a separate concurrence describing how he thought Connecticut's law failed rational basis scrutiny, saying: "I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships."

2.2. The Dissenting Opinions: Could They Form the Basis for a Later Attack on a Constitutional Right to Privacy?

Justices Hugo Black and Potter Stewart dissented from the Court's decision. The dissenters argued that because the U.S. Constitution does not *expressly mention* a right of privacy in any of

its provisions, the Court had no constitutional basis to strike down Connecticut's Comstock Law. Black's dissent was most pointed in its conclusion:

> "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."

Later decisions by the U.S. Supreme Court would extend *Griswold* beyond its particular facts to a more generalized recognition of a constitutionally protected right of privacy in other circumstances—often through the vehicle of the 14th Amendment (see Pavlinich, 2020).

2.3. *Griswold* and its Progeny: Leading to *Roe v. Wade*

Lopez, Mitchell, Sekaran, and Williams (2017, pp. 439-440) wrote:

> "Through *Griswold*'s progeny, the Court explained that all individuals, regardless of their marital status, have a fundamental right to privacy that encompasses access to contraception. However, although the legal and societal landscape has greatly changed since 1965, many individuals still face myriad barriers in accessing contraception. The modern debates surrounding access entail a delicate balancing act between the conflicting rights of those who are pro-life and those who are pro-choice, of health care providers and their patients, and of employers and their employees."

In *Eisenstadt v. Baird* (1972), the Court would extend its privacy framework in *Griswold* to unmarried couples (see Pietroforte, 2010). The argument in *Eisenstadt* was that it was a violation of the Equal Protection Clause of the Fourteenth Amendment to deny unmarried couples the right to use contraception when married couples now enjoyed that right under *Griswold*. Writing for the majority, Justice William Brennan wrote that Massachusetts could not enforce its law against unmarried couples because such an action amounted to "irrational discrimination." Following *Griswold*, a major medical breakthrough occurred when, the American College of Obstetricians and Gynecologists (ACOG) issued a controversial medical bulletin accepting a recommendation made six years earlier that clarified that "conception is the implantation of a fertilized ovum" (Brown, 2007). Consequently birth control methods that prevented implantation

became classified as contraceptives, not abortifacients—or more popularly, a drug or a device that would cause a miscarriage or an end to pregnancy.

The legal situation relating to abortion, however, prior to *Roe v. Wade* was more complicated. Thirty states prohibited abortion without exception; 16 states banned abortion except in certain special circumstances (e.g., rape, incest, health threat to mother); 3 states allowed residents to obtain abortions; and New York allowed abortions generally. A brief survey of the progression of the law is in order.

- In 1967, Colorado became the first state to decriminalize abortion in cases of rape, incest, or in which pregnancy would lead to permanent physical disability of the woman. Similar laws were enacted in California, Oregon, and North Carolina.
- In 1970, Hawaii became the first state to legalize abortions upon the request of the woman, and New York repealed its 1830 law and allowed abortions up to the 24th week of pregnancy. Similar laws were soon passed in Alaska and Washington.
- In 1970, Washington held a referendum on legalizing early pregnancy abortions, becoming the first state to legalize abortion through a vote of the people.
- A law enacted Washington, D.C., which allowed abortion to protect the life or health of the woman, was challenged in the Supreme Court in *United States v. Vuitch* (1971). The Supreme Court upheld the law, deeming that "health" meant "psychological and physical well-being," essentially legalizing abortion in Washington, D.C.
- By the end of 1972, 13 states had a law similar to that of Colorado, while Mississippi allowed abortion in cases of rape or incest only.
- Alabama and Massachusetts allowed abortions only in cases where the woman's physical health was endangered.

Both sides in the abortion debate became energized. In the late 1960s, a number of organizations were formed to mobilize public opinion both against and for the legalization of abortion. In 1966, the National Conference of Catholic Bishops assigned Monsignor James T. McHugh, described as “one of the greatest pro-life champions of our time” (Ohlhoff, 2000), to document efforts to reform abortion laws, and in response, anti-abortion groups began forming in various states in 1967. In 1968, McHugh led an advisory group which became the National Right to Life

Committee. On the other side of the debate, the forerunner of the NARAL, Pro-Choice America, was formed in 1969 to oppose restrictions on abortion and expand access to abortion services (Maltbie, 2021). The debate had surely been engaged.

3.0 *ROE V. WADE*

On January 22, 1973, the Supreme Court directly waded into the thicket of the abortion debate and decided *Roe v. Wade,* invalidating all of these laws that had banned abortions or had made them illegal. A brief review of the facts is in order:

> "A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford."

In deciding *Roe*, the Supreme Court ruled that the Texas statute forbidding abortion except when necessary to save the life of the mother was unconstitutional. The Court arrived at its decision by concluding that the right to an abortion under a woman's right to privacy. In its opinion, the Court cited several landmark cases where the court had previously found a right to privacy implied by the Constitution.

Roe also and set “guidelines” for the availability of abortion. In harkening back to its decisions in both *Griswold* and *Eisenstadt*, *Roe* established that the right of privacy of a woman to obtain an abortion "must be considered against important state interests in regulation."

The Court stated that “Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a 'compelling' point at various stages of the woman's approach to term.” The “guidelines” established by the Court included:

> (a) “For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”

Thus, states were prohibited from banning abortion early in pregnancy (generally the first trimester), but *Roe* allowed states to impose increasing restrictions or outright bans later in pregnancy.

On a philosophical level, a central question in *Roe* and in the broader abortion debate in general in the United States, has centered around the question whether human life or personhood begins at conception, birth, or at some point in between. (2017) states: “The abortion issue is very complex, possessing many dimensions: personal, legislative, judicial, religious and scientific. There is, however, one central debate around which every other point resolve—the status of the unborn child. Is it human? Is it alive? And, most importantly, is it a person?”

The Supreme Court recognized the complexity (and controversial nature) of this existential question and declined to wade into the issue (see Condic, 2014). Justice Blackmun wrote: "We

need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

Instead, the majority chose to point out that historically, under both English and American common law and statutes, "the unborn have never been recognized ... as persons in the whole sense, and thus, in a strict legal sense, a fetus is not legally entitled to the protection afforded by the right to life specifically enumerated in the Fourteenth Amendment." Interestingly, rather than asserting that human life begins at any specific point, the Court declared that the State has a "compelling interest" in protecting "*potential life*" at the point of viability.

3.1. *Doe v. Bolton*

Under *Roe v. Wade*, states were prohibited from banning abortions where such a procedure was "necessary to preserve the life or health of the mother," even if it would cause the death of a viable fetus. *Roe* was clarified in *Doe v. Bolton* (1973), a companion case to *Roe*, which specifies "that the medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient." The Court restated that the "right to privacy" applied to matters involving marriage, procreation, contraception, family relationships, child rearing, and education." Justice Blackmun concluded that as a *constitutional matter*, the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

3.2. The Rehnquist Dissent: Does it Form the Basis for the Later Texas Statute?

It is important to note the dissenting opinion of Justice William Rehnquist in *Roe*. Justice Rehnquist directly addressed the question of privacy that was at the core of the Court's ruling in *Griswold*. Rehnquist rejoined the issue and wrote:

> "I have difficulty in concluding, as the Court does, that the right of 'privacy' is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word. Nor is the 'privacy' that the Court finds here even a distant

> relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy."

However, Justice Rehnquist also concedes that:

> "'Liberty,' against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in Williamson, supra. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one."

Justice Rehnquist then offers a comment that was quite prescient. "Unless I misapprehend the consequences of this transplanting of the 'compelling state interest test,' the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it."

4.0 LATER JUDICIAL DECISIONS: CLARIFICATION OR CONFUSION?

In the 1992 case of *Planned Parenthood v. Casey*, the Supreme Court abandoned *Roe's* trimester framework, but at the same time reaffirmed its central holding that women have a right to choose to have an abortion before the viability of the fetus (see Wharton, Freitsche, & Kolbert, 2006). *Roe* held that statutes regulating abortion would be analyzed under a "strict scrutiny" standard (Fallon, 2007), under which a statute will be upheld against constitutional challenge only if "necessary" or "narrowly tailored" to promote a "compelling" governmental interest —the traditional test applied governmental impositions upon fundamental constitutional rights (see

Calabresi & Agudo, 2008). *Casey* rejected this "strict scrutiny" analysis and adopted the lower, "undue burden" standard for evaluating state abortion restrictions (see Freeman, 2013). As noted by Giles (2017, p. 704): "Under *Casey's* version of that standard, an abortion regulation is unconstitutional if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.""

While *Roe* had characterized the right to an abortion as a part of a "'right to privacy,'" which the Court described as one of those 'personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty" (Durham, 2021), *Casey*, however, reaffirmed that the right to abortion was grounded in the *liberty* protections of the constitution: "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.' The controlling word in the cases before us is 'liberty'."

Post-*Casey*, the United States Supreme Court would be called upon on numerous occasions to refine and redefine its prior jurisprudence—perhaps based on the composition of the Court. The Supreme Court has continued to grapple with cases on the subject of abortion rights, on occasion handing down decisions that seemed inconsistent and contradictory (see Whitman, 2002).

In *Stenberg* v. *Carhart* (2000), the Supreme Court had invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed "partial-birth abortion." Following the *Roe-Casey* line of precedents, the Court held the Nebraska statute unconstitutional in part because it lacked the requisite "protection for the preservation of a woman's health. The state may promote but not endanger a woman's health when it regulates the methods of abortion."

Then, on April 18, 2007, the Court issued a decision in *Gonzales v. Carhart* (2007), involving a federal law titled the *Partial-Birth Abortion Ban Act of 2003* which President George W. Bush had signed into law. The law banned a specific method of abortion, *intact dilation and extraction,* which opponents of abortion rights again referred to as "partial-birth abortion." The statute provided for a criminal sanction of up to 2 years for the violation of the statute by a physician. The United States Supreme Court upheld the 2003 ban by the narrow majority of 5–4. *Gonzales v. Carhart* was the first time the Court had allowed a ban on a specific method of

abortion since 1973. The opinion, authored by Justice Anthony Kennedy, was joined by Justices Antonin Scalia, Clarence Thomas, and the two most recent appointees of President George Bush, Samuel Alito and Chief Justice John Roberts.

Justia (2007) summarized the case as follows:

> "The Court held that, under the most reasonable interpretation, the Act applies only to the intact D&E method (also known as "partial-birth abortion") and not to the more common D&E procedure. The Act's application was limited by provisions that restrict enforcement to cases where the physician intends to perform an intact D&E and delivers the still-living fetus past specific "anatomical landmarks." Because the majority found that the Act applies only to a specific method of abortion, it held that the ban was not unconstitutionally vague, overbroad, or an undue burden on the decision to obtain an abortion. The Court also held that Congress, after finding intact D&E never to be medically necessary, could validly omit a health exception from the ban, even when "some part of the medical community" considers the procedure necessary. To require the exception whenever "medical uncertainty" exists would be "too exacting a standard to impose on the legislative power [...] to regulate the medical profession." The Court left open the possibility that an as-applied challenge could be brought against the Act if it were ever applied in a situation in which an intact D&E was necessary to preserve a woman's health."

Justice Ginsburg sharply dissented from the majority noting that "the Court's hostility to the right *Roe* and *Casey* secured is not concealed." Justice Ginsburg stated: "The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion." Furthermore, she argued that the Act would "chip away" at a right that was declared by the Supreme Court as central to women's lives and was "inconsistent with the very principles of *stare decisis*." Instead of following precedents, the Court would show deference to this "legislative override of our Constitution-based rulings."

Opponents and opponents of abortion rights asked the same question: Would *Gonzales* signal the beginning of the end to abortion rights in the United States? In 2016 and 2020, the Supreme Court would again weigh in on issues related to abortion.

In 2016, in *Whole Woman's Health v. Hellerstedt* (2016), the Supreme Court in a 5–3 decision swept away several state restrictions on the manner abortion clinics can function. In 2013, the Texas legislature enacted restrictions on the delivery of abortion services that required doctors who performed abortions to acquire difficult-to-obtain "admitting privileges" at a local hospital and by requiring clinics to have costly hospital-grade facilities. The Court struck down these two provisions "facially"—that is, the very words of the provisions were found to be invalid, no matter how they might be applied in any given situation. Interestingly, the Supreme Court stated that the task of judging whether a specific law puts an unconstitutional burden on a woman's right to abortion belongs with the courts, and *not the legislatures of individual states*—some of which had evidenced strong negative views on the issue of whether a woman should have the right to an abortion in the first instance—or potentially, whether the right to privacy, upon which both *Roe* and *Casey* were based exist.

In 2020, in *June Medical Services, LLC v. Russo* (2020), the Supreme Court in a 5-4 decision held that a Louisiana state law, modeled after the Texas law at the center of *Whole Woman's Health*, was unconstitutional. Similar to the Texas' law, the Louisiana statute mandated certain requirements for abortion clinics that, if having gone into effect, would have resulted in the closure of five of the six clinics in the state. The case in Louisiana had been put on hold pending decision in *Whole Woman's Health* and was retried based on the Supreme Court's decision in that case. While the District Court had ruled the law unconstitutional, the Fifth Circuit Court of Appeals found that unlike the Texas law, the Louisiana law did not place an unconstitutional burden on women and thus, the law was constitutional. The Supreme Court issued an order to stay enforcement of the law pending further review, and agreed to hear the case in full in October 2019. In reversing the Fifth Circuit, the Supreme Court found the Louisiana law unconstitutional on the same basis of its reasoning in *Whole Woman's Health*. The judgment was supported by Chief Justice John Roberts, who had dissented in *Whole Woman's Health*, but who now joined in the judgment, ostensibly out of respect for the precedent established in that case. It was the first

abortion-related case to be heard by both Justices Neil Gorsuch and Brett Kavanaugh, whose views on abortion were seen as potentially threatening *Roe v. Wade.*

With the elevation of Justices Gorsuch and Kavanaugh to the highest court, was a change on the horizon? Two cases merit special attention—one from Mississippi and one from Texas.

5.0 MISSISSIPPI AND TEXAS LEGISLATURES TAKE THE LEAD

In May 2021, the Supreme Court granted *certiorari* in *Dobbs v. Jackson Women's Health Organization*, a case that directly challenged *Roe v. Wade* relating to enforcement of Mississippi's 2018 law that had banned any abortions after the first 15 weeks of pregnancy (Totenberg, 2021; Durham, 2021). The Mississippi statute was similar to laws enacted in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Montana, Missouri, Ohio, Oklahoma, South Carolina, Utah, and Tennessee (see generally Bakst, 2019).

The Center for Reproductive Rights (2021), admittedly a partisan in the debate, made the following points relating to the undue burdens placed on a woman seeking an abortion in Mississippi under the legislation:

- **Burdensome Licensing Scheme:** a restrictive clinic licensing system that singles out abortion clinics for a series of unnecessary and unwarranted regulations that far exceed regulations applied to other clinics providing similar and even higher-risk medical care.
- **24-hour mandatory delay:** a requirement that women delay their abortion 24 hours after receiving state-mandated information; Mississippi does not subject any other medical care to this requirement.
- **Two-trip requirement:** a requirement that a woman make two separate trips to and from the clinic before she can obtain an abortion; no other medical care is subject to this requirement in Mississippi.
- **Physician only law:** a requirement that only physicians provide abortion care, when evidence and experience demonstrate that other medical practitioners can safely provide this care, as they do in several other states.
- **Telemedicine ban:** a ban that applies only to physicians providing abortions that prohibits physicians from the use of telemedicine to provide consultations and treatment recommendations, including dispensing prescription medications, to patients; no other

type of telemedicine consultations or treatments are subject to this prohibition in Mississippi.

- **15 Week Ban:** a prohibition on abortions after 15 weeks that threatens physicians with civil penalties for providing that care.
- **6 Week Ban:** a law that would make it a crime for doctors to provide an abortion once a heartbeat has been detected—which can happen as early as six weeks of pregnancy

The Supreme Court will hear arguments December 1, 2021 to consider whether the Mississippi statute and other state laws that ban pre-viability abortions are unconstitutional. The Supreme Court could also decide to limit further or perhaps even overrule *Roe v. Wade*.

5.1. Meanwhile…. The Texas "Solution"?... Or a Constitutional End-Run?

The Texas *Heartbeat Act* was introduced in the Texas Legislature on March 11, 2021, and was signed into law by Governor Greg Abbott on May 19, 2021 (Najmabadi, 2021). The law came into effect on September 1, 2021 (Roy, 2021). The human fetus or embryo is referred to as the "unborn child," irrespective of the stage of gestation in the Act. The Act is the first "six-week abortion ban" enacted in the United States, and the first law to rely on enforcement by private individuals through civil lawsuits, rather than by the government through criminal or civil enforcement.

The private civil enforcement feature of the legislation was engineered by Jonathan F. Mitchell, a former visiting Stanford law professor, former clerk for Justice Antonin Scalia, Texas solicitor general under then-Governor Rick Perry, and member of the Federalist Society. Mitchell (2018) had first proposed the idea in a 2018 Virginia Law Review article, *The Writ-of-Erasure Fallacy.* At the same time, the *Human Life Protection Act* (2001) was passed which would prospectively ban all abortions in Texas, without any exceptions, should the United State Supreme Court overrule *Roe v. Wade* and return the abortion question to the states.

The Texas Act was challenged by the United States Justice Department eight days after it went into effect on the ground that it is preempted by federal law under the supremacy clause of the U.S. constitution. The Act is also being challenged in state court in multiple suits brought by abortion providers and funders, with a temporary injunction hearing scheduled for October 4, 2021

5.2. Provisions of the Act

Although an abortion patient may not be named as a defendant, the Texas *Heartbeat Act* (2021) allows “any person” to sue someone who performs or induces an abortion, or aids and abets one, once "cardiac activity" in an embryo can be detected via transvaginal ultrasound, which is usually possible beginning at around six weeks of pregnancy. In addition to the physician performing the procedure, potential defendants may include staff members at clinics, counselors, lawyers, financiers, and those who provide transportation to an abortion clinic, including drivers of taxi or ride-hailing companies. The key feature of the Act is that it incentivizes *private enforcement*—some have termed it as *vigilantism*—by authorizing "statutory damages" of at least $10,000 in addition to court costs and attorney's fees if a defendant is found liable. Plaintiffs are not required to have a personal connection to the patient or abortion provider—or even live in the same state—in order to bring a lawsuit under the Act.

The Act contains exceptions in the case of a medical emergency, but not for rape or incest. Governor Abbott, however, asserted that the Act does not force a woman who has been raped to carry a pregnancy to term because it gives them "at least six weeks" to seek a legal abortion. Curiously, the Governor added that the state would "work tirelessly to make sure that we eliminate all rapists from the streets of Texas by aggressively going out and arresting them and prosecuting them and getting them off the streets”—although the connection to abortion seems tenuous at best.

5.3. Significance What the Texas Act Matters

The Texas Act is one of the first attempts in the United States to outlaw abortion as early as six weeks into a pregnancy. In Texas, and perhaps elsewhere, an estimated *85%* of abortions have been performed *after* the six-week mark, which often occurs shortly after a pregnant woman misses her menstrual period, and before many women have confirmed or are aware of a pregnancy. A study produced by researchers at the University of Texas at Austin claimed that the Act would prohibit *80%* of abortions in Texas and would disproportionately affect black women, lower-income women, and women who live far away from facilities that provide abortion care (see generally Pincus, 2013).

From a legal perspective, the Act is unique in that it replaces governmental (state) enforcement with a civil enforcement system. The clear purpose of adopting this strategy was to deny abortion providers the opportunity to seek an injunction in a federal court against the enforcement of an unconstitutional statute by state officials. Since the law carries no enforcement provisions by state officials which would involve "state action" potentially in violation of the Fourteenth Amendment to the Constitution, but only sanctions enforcement by private individuals, a law suit challenging the constitutionality of the Act prior to enforcement would be problematic. On September 9, 2021, however, the U.S. Justice Department sued the State of Texas directly in the U.S. District Court for the Western District of Texas, seeking a declaration that the law is unconstitutional, and injunctive relief.

5.4. The United States Supreme Court Weighs In: Is this a Portent to Overruling *Roe v. Wade*?

On August 30, 2021, the Center for Reproductive Rights filed an emergency application with the Supreme Court of the United States, seeking to block the Act from going into effect. In *Whole Woman's Health v. Reeve Jackson* (2021), a 5–4 decision, the Supreme Court denied the motion (see Lewis, 2021; Liptak, Goodman, & Tavernise, 2021). The majority, however, stressed that the denial of immediate relief did not preclude other legal challenges to the Act in lower federal or Texas state courts. In her dissenting opinion, Justice Sotomayor was very pointed in her criticism of the Court's majority and wrote that "presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of justices have opted to bury their heads in the sand."

On September 6, 2021, United States Attorney General Merrick Garland joined in the debate. Garland, who had been denied a seat on the Supreme Court when the then Republican-majority refused even to consider his nomination to the Court by President Obama, announced that the Justice Department would protect women seeking abortions in Texas under the *Freedom of Access to Clinic Entrances Act* (1994).

Nunez-Eddy (2017) noted:

> "On 26 May 1994, US President Bill Clinton signed the Freedom of Access to Clinic Entrances Act in to law, which federally criminalized acts of obstruction

> and violence towards reproductive health clinics. The law was a reaction to the increasing violence toward abortion clinics, providers, and patients during the 1990s. That violence included clinic blockades and protests, assaults on physicians and patients, and murders. The Freedom of Access to Clinic Entrances Act established criminal and civil penalties against people who obstructed or committed violence towards reproductive health clinics, and has supported women's access to safe reproductive healthcare."

On September 9, 2021, the Attorney General and the Department of Justice (DOJ) sued the State of Texas on the basis that the Texas law "is invalid under the Supremacy Clause and the Fourteenth Amendment, is preempted by federal law, and violates the doctrine of intergovernmental immunity." Garland further noted that the United States government has "an obligation to ensure that no state can deprive individuals of their constitutional rights (see generally Bakst, 2019)." The complaint argued that Texas enacted the law "in open defiance of the Constitution." The relief sought from the U.S. District Court in Austin, Texas, includes a declaratory judgment that the Texas Act is unconstitutional, and an injunction against state actors as well as any and all private individuals who may bring an action under the Act.

On September 15, 2021, six days after their initial filing, DOJ lawyers filed an "emergency" motion for temporary restraining order (TRO) or preliminary injunction (PI). District Judge Robert Pitman then issued an order setting an evidentiary hearing for October 1, 2021, noting that the State of Texas opposed an immediate ruling and wanted to be heard. A day later, Judge Pitman also rejected the DOJ's motion for an expedited briefing schedule, observing that "this case presents complex, important questions of law that merit a full opportunity for the parties to present their positions to the Court."

6. CONCLUSION: FINAL COMMENT AND OBSERVATION

The action of legislatures in Texas and Mississippi have once again fueled the debate on privacy and abortion rights in the United States and may, with the additions of Justices Kavanaugh, Gorsuch, and Coney-Barrett to the United States Supreme Court, signal a reappraisal of *Griswold v. Connecticut* and *Roe v. Wade*. Part II of this study will discuss the outcomes of these

challenges and will address the larger implications relating to determining if a right to privacy exists under our Constitution and the extent of that right.

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