

As any presidential candidate can attest, abortion, possibly only behind torture, is the most politically divisive social issue. A president's view on abortion is important to many voters because the president's view influences what he/she looks for in nominating federal judges as well as what cases the Justice Department decides to pursue. According to the CDC, 861,789 legal abortions were performed in the United States in 1999.¹ This is a ratio of 256 abortions per 1000 live births.² Although there is evidence that abortion has likely been performed for thousands of years, abortion jurisprudence in the United States did not begin until the early twentieth century. Since abortion became an issue of national importance, the appropriate federal and state governments' roles in regulating this medical procedure has remained controversial and often contested. There is no explicit direction in the Constitution about whether the Founders intended to protect a right like that of abortion, how such a right should be regulated, or who should regulate it. Because the Constitution charges the Supreme Court with its interpretation, the Court's view on abortion is significant to the issue.

When the Founders of the United States ratified the Constitution, they intentionally included the Ninth Amendment, which says the people retain rights not explicitly stated in the Constitution or its amendments. The Fourteenth Amendment incorporated the rights guaranteed by the Constitution into the states. The vagueness of the Ninth Amendment and its application to states has allowed Courts and legislatures much leeway in determining what rights the Founders did and did not intend for individuals to "retain." The Court has interpreted the Ninth Amendment, through the text and intent of other amendments, to include a constitutionally protected right to privacy.

The notion of a constitutionally guaranteed right to privacy was stated explicitly and explained by then lawyers Samuel Warren and Louis Brandeis in an influential Harvard Law Review article. Warren and Brandeis cited the “right to be let alone,” explained by Judge Thomas M. Cooley in *Torts* two years earlier, as well as the emerging libel, slander, and intrusion torts. The two lawyers said “the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection [to intangible properties], without the interposition of the legislature” and, when a relevant case came before the courts, would allow judges to afford the same protection to privacy³. Warren and Brandeis cited numerous cases from English and French common law supporting their assertion of an implicitly recognized, though not codified, right to privacy. Although their intention was to protect the privacy of persons from intrusion into “the private life, habits, acts, and relations of an individual”⁴ and thus establish it as a tort, the idea of extending this protection to individuals themselves became accepted in the legal community. As a Supreme Court Justice, Brandeis incorporated the right to be let alone into legal doctrine with his dissent in *Olmstead v. United States*⁵ (1928).

Later Courts also played a significant role in defining and applying the right to privacy. In 1965, the Court heard *Griswold v. Connecticut*⁶, which challenged the constitutionality of a Connecticut law, based on the 1873 federal Comstock Act, banning the distribution of information about and use of contraceptives or abortive techniques. The Connecticut law punished those who used contraception and those who proscribed or recommended contraception equally.⁷ The newly formed Planned Parenthood Federation of America unsuccessfully challenged the law twice previously (*Tileston v. Ullman*⁸ and

*Poe v. Ullman*⁹ (1961)), failing first because the Court deemed the doctor who brought the case to lack standing and then because the Court concluded those who violated the law had no “realistic fear”¹⁰ of prosecution. The dissent by Justice John Harlan in *Poe*, however, legitimized Planned Parenthood’s claim that interfering with the intimate relationship of a married couple violated a right to privacy based on Brandeis’ reasoning and the Due Process Clause of the Fourteenth Amendment.

Ultimately, it was Justice Brennan’s concurring opinion in *Poe* that proved most helpful to Planned Parenthood. Planned Parenthood developed a new litigation strategy based on the opinion, in which he said the real target of the Connecticut law was “the opening of birth control clinics on a large scale,”¹¹ not the private use of contraception. When Planned Parenthood opened a clinic in New Haven in November 1961, it intentionally violated the Connecticut law in the hope of challenging its constitutionality in Court. When the police came to arrest Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, she gave the arresting officers copies of Planned Parenthood literature about contraceptives. The case reached the Court and, in a 7-2 decision authored by Justice Douglas, the Court said a constitutionally guaranteed right to privacy was derived from the penumbras of certain guarantees found in the First, Third, Fourth, Fifth, and Ninth Amendments.¹² This right to privacy, Douglas said, extended to the “sacred” intimacy of marriage and thus the right of married couples to use and receive information about contraceptives. Justice Goldberg took an alternate approach, justifying the decision based on the framers’ caveat in the Ninth Amendment that their failure to enumerate a given right did not mean that the Constitution should not be interpreted as protecting that right.

In *Eisenstadt v. Baird*¹³ the Court extended to unmarried couples the right to use contraception. As the ACLU said in its *amicus curiae*, *Griswold* was not about protecting marital intimacy so much as creating a right to sexual privacy.¹⁴ Justice Brennan, who authored the *Eisenstadt* decision, agreed with the ACLU, saying “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁵ With this decision, Brennan said that the reason protecting the right to distribute contraception was not the intimacy of marriage but the decision of men and women of when and whether to bear a child.

A case before the Court during the same term as *Eisenstadt* is seen as the most important and controversial privacy case and is the one around which this paper revolves. Because the justices could not agree on how to approach and word the opinion in *Roe v. Wade*¹⁶, the case was held over until the next term. *Roe* confronted the constitutionality of state restrictions on abortion— a procedure that had been fairly common for over a century and one with which more than half of the country was comfortable with in 1972, when the case was heard. When “Jane Roe’s” (Norma McCorvey) attorneys reached the Supreme Court, they argued that Texas’ law prohibiting abortions except when necessary to save the life of the mother burdened and infringed on Roe’s right to privacy as established in *Griswold*.

Persuaded by Roe’s case, the Court ruled 7-2 in favor of upholding a constitutionally protected right to a pre-viability abortion. In doing so, Justice Blackmun, who authored the opinion, acknowledged that the way people feel about abortion is largely shaped by their personal experiences and views on morality, religion, and family.

Therefore, Blackmun said, abortion is a topic best addressed by the Court using a constitutionally based, rather than an emotionally based, approach.¹⁷ Blackmun looked at the state's interest in abortion and the competition between the health and safety of the mother and of the unborn fetus. In deciding when the state had the right to interfere in a woman's decision to have an abortion, Blackmun examined the right of privacy.

Blackmun said:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or... in the Ninth Amendment's reservation of rights to the people, it is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.¹⁸

Prohibiting women from obtaining a medical procedure without which psychological or physical harm would likely follow is not a legitimate state interest. Blackmun did, however, acknowledge there are times at which the state has an interest in regulating how and when an abortion could take place.

The ability of a state to regulate abortion depends on when the Court considers a fertilized egg to become a constitutionally protected person. Blackmun notes that the Court has never defined a fetus to be a "person" as recognized in the constitution.¹⁹ Blackmun looked at scientific and religious conceptions of when life begins to determine when the state should consider a fetus to be a constitutionally protected life.²⁰ The Court, seemingly arbitrarily based on subsequent decisions, designated the point at which the state's interest in "protecting the potentiality of human life" becomes "compelling" at the end of the first trimester.²¹ During the first trimester, the decision of whether to terminate a pregnancy should be solely between a woman and her doctor. During the second trimester, the state may impose reasonable restrictions related to protecting the health of the mother. During the third trimester, treated as the period post-viability, the state may

regulate abortion as it sees necessary to preserve the viable fetus so long as there is an exception allowing an abortion at any point to preserve the health of the mother.²²

Since *Roe* was decided in 1973, several cases have interpreted the state's role and ability to regulate abortion. *Planned Parenthood of Central Missouri v. Danforth*²³ ruled that requiring the consent of a parent for minors and the consent of a spouse for married women during the first 12 weeks of pregnancy, even if an exception for the life of the mother was included, imposed an undue burden on the right to abortion. *Harris v. McRae*²⁴ challenged the constitutionality of the Hyde Amendment, which did not allow Medicaid money to go toward abortions. The Court held that being in poverty was not a suspect class and thus that states choosing not to providing a woman covered by Medicaid the financial means necessary to obtain an abortion, even if medically necessary, was not unconstitutional. One of the biggest objections to the Hyde Amendment and the *Harris* case was the role that religion and religious interest groups played in the passage of the act and the litigation challenging its constitutionality.

As president, Ronald Reagan made it very clear to the public and the Department of Justice that he wanted to see *Roe* overturned. Two Supreme Court cases, one during his presidency and one soon thereafter, came close, in number of votes, to achieving that goal but ultimately the Court voted contrary to Reagan's wishes. In *Thornburgh v. American College of Obstetricians & Gynecologists*,²⁵ the Court decided by a narrow margin that three challenged restrictions on abortion unduly burdened (to use the phrase from Rehnquist's dissent)²⁶ a woman's right to choose an abortion of her pregnancy. The Court interpreted the challenged restrictions, including requiring informed consent, disseminating information about the risk of abortion, and requiring the presence of a

second doctor for post viability abortions, as ways of intimidating women into not seeking or obtaining an abortion under the guise of protecting maternal health.²⁷ The Court in *Webster v. Reproductive Health Services*,²⁸ again by a 5-4 margin, struck down the preamble of a piece of legislation in Missouri indicating that life began at conception as well as the content of the legislation, which did not allow public employees or funds to aid in performing elective abortions.

With the appointments of Justices Antonin Scalia and Clarence Thomas in 1986 and 1991, pro-life advocates thought they might have the opportunity to overturn *Roe* and restore to the states the right to regulate abortion. However, through its eleven-year tenure, the Rehnquist Court consistently upheld a woman's right to an abortion. This Court determined what restrictions states could reasonably make on abortions. Possibly the most notable abortion case to come out of the Rehnquist Court was *Planned Parenthood v. Casey*.²⁹ The case challenged reforms made to Pennsylvania's abortion regulations by Governor Robert Casey in 1989. Among the new regulations were mandatory 24 hour waiting periods, spousal notification, and parental notification for minors. When the case reached the Court, many doctors would not perform abortions because of the stigma attached.³⁰ Through a coalition of moderate Justices O'Connor, Kennedy, and Souter, the Court ruled in a 5-4 decision, with which the non-authoring justices all concurred in part and dissented in part, that *Roe* remained the precedent on a woman's right to an abortion whether elective or medically necessary. However, with *Casey*, the Court acknowledged that the states might have an interest in making reasonable restrictions on abortion so long as such regulations did not impose an "undue burden" on a woman's right and ability to obtain an abortion.³¹ O'Connor, Kennedy, and

Souter defined an undue burden as “a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”³² As indicated, the Court held that the viability of the fetus, not the chronological point in the pregnancy, was the most important consideration in determining the state’s interest in regulating abortion. The opinion explicitly reaffirmed *Roe* and served as an interpretation of its application rather than any sort of reversal. The Court upheld all the challenged regulations except the spousal notification requirement, explaining, “The husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.”³³ However, in upholding the restrictions, the Court noted that there must still be an exception made to all regulations for the “preservation of the life or health of the mother.”³⁴

After *Casey*, litigation stopped challenging the constitutionality of a right to abortion but rather focused on access to abortion and the constitutionality of restrictions on the right to abortion. The most notable cases have looked at the constitutionality of what is commonly referred to as “partial-birth abortion,” frequently used in late term abortions. The first case, *Stenberg v. Carhart*,³⁵ which was heard by nearly the same Court that heard *Casey*, LeRoy Carhart, a doctor in Nebraska, challenged a state law that made it illegal to perform a partial birth abortion. The target of the law was the dilatation and extraction (D&X) procedure, most often performed post-viability. Dr. Carhart said that though the law targeted D&X, it effectively banned a similar procedure called dilation and evacuation (D&E) used on most second term, pre-viability abortions, thus posing an “undue burden” on him and his patients. The Court ruled 5-4 in Carhart’s favor, holding that the law did not result in saving the life of a fetus but only regulated

the method used for its destruction.³⁶ The Court also found that the use of the D&X procedure posed no threat to the health and safety of the mother. These facts together led the Court to rule that Nebraska's law did not further an important state interest based on the precedent established in *Roe* and *Casey*.

Six years later, the composition of the Court had shifted in a significant way to its current state following the death of Chief Justice Rehnquist and the retirement of Justice O'Connor. Justice O'Connor, a moderate who consistently protected and affirmed a woman's right to abortion, was replaced by the more conservative Samuel Alito, who appears to favor at least restrictions on this right. This was when Carhart again challenged a ban on partial-birth abortions, this time imposed by Congress through the Partial-Birth Abortion Ban Act of 2003, arguing that the ban would in effect apply to the D&E procedure, thus making it an undue burden on a woman's right to obtain an abortion. Carhart also raised issue at the ban's lack of an exception for the health of the mother, to which the state responded that the D&X procedure is never necessary for the health of the mother. The Court ruled in *Gonzales v. Carhart*,³⁷ in a departure from earlier decisions, that the law was not overbroad and could not reasonably be perceived as banning to the constitutional D&E procedure. Justice Kennedy, writing for the majority, did not require Congress to amend the law to include an exception for the health of the mother allowing doctors to perform the procedure if deemed medically necessary. Conflicting evidence was presented on whether the procedure is ever medically necessary but the Court relied most heavily on the evidence presented by Gonzales. Notable was Kennedy's word choice in his majority opinion. In the opinion, Kennedy consistently

referred to the fetuses terminated through D&X as “infants,”³⁸ a dramatic change from his opinion in *Casey*.

In light of the most recent change in the composition and ideology of the Court and as evinced by *Gonzales v. Carhart*, it appears the Court may be moving toward having the opportunity and ability to overturn *Roe v. Wade*. Scalia and Thomas have made it clear through their voting record and concurring and dissenting opinions they have written that they are eager to overturn *Planned Parenthood v. Casey* and *Roe v. Wade*.³⁹⁴⁰ As Thomas says in his dissent to *Casey*, “The standard [established by the majority opinion in *Casey*] is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard [*Roe*] it purported to replace.”⁴¹ Roberts and Alito have not yet written extensively on the subject so there is no way to know with complete certainty their view on abortion but based on their voting in *Gonzales* and speculation, it is likely that they do not agree with *Roe*’s establishment of a constitutionally protected right to privacy broad enough to guarantee a right to abortion. Kennedy has made it clear through his majority opinion in *Casey* that he sees the right to abortion as protected by the constitution but his opinions in *Stenberg* and *Gonzales* imply that he believes that right to be limited in scope or he now believes that states should determine the extent of that right. The four consistent votes in favor of abortion, Justices Ginsburg, Stevens, Souter, and Breyer, are nearly absolutely in favor of protecting a woman’s right to abortion, favoring *Casey*’s undue burden standard, which they can and do apply to overturn most restrictions. The current composition of the Court

means the votes in a case questioning the constitutionality of *Roe v. Wade* would likely split 5-4 in favor of upholding *Roe*.

The composition of the Court, however, will be changing in the not too distant future. Justices Stevens, Ginsburg, and Breyer are all 70 of age or older, meaning they will retire or pass away most likely within the next ten years or sooner. Stevens definitely and Ginsburg likely will retire within the next president's term, allowing whoever wins in November to appoint the replacements of two justices who are current advocates for and supporter of the right to abortion. Therefore, who wins in November and whom they subsequently nominate to the bench could have a significant impact on the Court's opinion on abortion. Should McCain win the presidential election, he has made it clear through interviews and even the main page of his campaign website that, given the opportunity, he will appoint "people in the cast of John Roberts, Samuel Alito, and...William Rehnquist."⁴² This can be interpreted to mean a justice who would favor overturning *Roe* based on McCain's advocating for a "reversal of *Roe v. Wade*, returning the abortion question to the individual states."⁴³ Should Barack Obama or Hillary Clinton, whichever secures the Democratic nomination, win the presidency, both have indicated their support of a woman's right to choose whether to abort a pregnancy and believe the Constitution to protect that right, although Clinton's view of abortion is more restrictive.⁴⁴⁴⁵ Most likely, the Democratic nominee will appoint someone who will, or whom the president believes will, support *Roe*.

Assuming the former is the case and two new justices who want to overturn *Roe* join the Court, this would tip the balance in favor of those who reject the constitutional protection of abortion through a derived, but not explicit right to privacy. Soon after the

nomination of these justices, a case will come before the Court that will allow it to remove the constitutional protection from abortion. In the opinion of this case, the majority will not go so far as to say the Constitution proscribes abortion because they would then be guilty of using their personal philosophies of morality as the basis for constitutional interpretation, something Scalia and Thomas criticized O'Connor, Kennedy, and Souter of doing.⁴⁶ As fans of originalism, Thomas and Scalia, the likely authors of an opinion overturning *Roe*, would look to the Founders' original intentions in drafting the Constitution, which did not include a consideration of privacy or abortion. The Court would say "there is no such thing as a personal, free-standing, fundamental right embedded in the Constitution of the United States to kill gestating life."⁴⁷ The opinion would reject the idea that a right to privacy exists within the "penumbras" of the Constitution and thus it is not a constitutionally protected right, meaning the Court has no jurisdiction over its regulation or proscription. It is not for the Court, the justices would say, "to attempt to substitute *its* view respecting the significance of life for a nonarbitrary view that more democratically representative branches of government than itself might hold."⁴⁸ The opinion would use the Commerce Clause of the Constitution as evidence that the federal government does not have the authority to regulate abortion, leaving individual states responsible for deciding whether to allow or proscribe abortion and under what conditions. This would also overturn *Gonzales v. Carhart*, even though that decision restricts abortion.

Some states that currently impose only minimal restrictions and regulations on abortion will continue to protect abortion. Some may even expand their protection to include the D&X procedure, the use of which the Court presently says is unconstitutional.

Unsurprisingly, those states continuing to allow broad access to abortion will be largely concentrated in the Northeastern and Western regions of the country. The legislatures of these states will amend the laws to protect explicitly abortion as a medical procedure. The decision of when an abortion is an appropriate medical option would remain one made between a woman and her doctor, with the state's interest only serving to protect maternal health and, in some cases, the life interests of a post-viability fetus.

The most notable changes in state law, however, will occur in the Southern and Mid-Western regions of the country. These states are more socially conservative and the religious right, which vehemently opposes the legality of abortion, often plays a significant role in shaping the morality and policy of the region. Given the ability to do so, the state legislatures will seize the opportunity to proscribe abortion, possibly including exceptions for cases of rape and incest or imminent danger to maternal health. The rationale will be that the Court has determined that the Constitution does not necessitate protecting the right to abortion and, given the moral landscape of the state's residents, the state legislature has decided that legalizing abortion would offend the sensibilities of the populous. Some states will not go so far as completely proscribing abortion and will fall somewhere between completely proscribing abortion and leaving it completely unregulated. Such restrictions may include mandatory waiting periods, only allowing certain people to perform abortions, age requirements, spousal notification, informed consent, gestational restrictions, outlawing certain procedures, and limitations on the number or frequency of abortions.

With the change in laws governing the performance of abortion in each state, so must follow a change in the penal code. Using the laws challenged in *Planned*

Parenthood v. Casey, *Stenberg v. Carhart*, and *Gonzales v. Carhart* as examples, current regulations on abortion carry with them penalties for doctors that perform prohibited procedures. The amendment to Nebraska's constitution challenged in *Stenberg* characterized violating the amendment as "a 'Class III felony' carrying a prison term of up to 20 years, and a fine of up to \$25,000"⁴⁹ for doctors. A conviction for violating the law also carried with it an automatic revocation of the doctor's medical license. The Partial-Birth Abortion Ban Act of 2003, passed by Congress and challenged in *Gonzales*, said a physician knowingly violating the ban could be imprisoned for up to two years and/or fined. The woman and her husband or guardians, if under age 18, may sue the physician for actual and special damages. The Act also includes a provision that a person who is not a physician but who knowingly performs an abortion that is inconsistent with the Act will be subject to the same punishment as if he/she were a physician.⁵⁰ As do the previous two laws, so does Pennsylvania's Abortion Control Act penalize the physician for violating the regulations imposed. However, the Act also included a provision that differentiates between punishing physicians and other persons saying:

Any person who intentionally, knowingly or recklessly violates the provisions of this section commits a felony of the third degree, and any physician who violates the provisions of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation.⁵¹

Although it stated in a different section that a woman seeking an abortion may in no way be punished for doing so, this wording leaves open the possibility for punishing individuals other than the person actually performing the abortion, physician or not.

Assuming that a state, under the new post-*Roe* system, had the ability to punish anyone who knowingly plays a role in the abortion process, how would the state allocate

such punishment? There are multiple individuals involved in the process including the doctor, nurse, mother, father, and, possibly, friends and parents. How culpable are each of these individuals for the resulting abortion when such abortion is proscribed by state law? Would the answer change if the abortion takes place in a state other than the one in which the mother resides? Clearly, physicians in states where abortion is proscribed would continue to receive punishment similar to how they do under the current system with possibly more severe punishments given if the state considers a fetus to be a constitutionally protected person. The state would consider the nurse, as an assistant to the abortive process, a principal actor and punish him/her in a similar manner to the doctor.

If abortion in a given situation is proscribed and the mother actively seeks and procures a physician to administer such an abortion, she would face some repercussions under the post-*Roe* system. The mother, in seeking an abortion, would be knowingly enabling another individual to break the law. A similar situation would be the mother enabling a homicidal person (the doctor) by providing the doctor with a gun, which is punishable if providing the gun results in the doctor killing someone (for convenience, let's name him Bob). 18 U.S.C. § 2 treats as a principal offender anyone who "aids, abets, counsels, commands, induces or procures" the commission of a crime and anyone who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States."⁵² . Following this logic, the mother would receive punishment as severely as the physician would because she is aiding and abetting in the commission of a crime. However, more likely, the mother would receive a lesser punishment.

The father, logically, should also have some level of culpability seeing as, in fathering the fetus, he contributed to the woman's ability to seek an abortion. However, the father did not necessarily help conceive a fetus with the knowledge that the mother would try to abort it. Continuing the same fact pattern from above, assuming the sex was consensual, this would mean that the father bought the gun as a gift, one the mother accepted, not knowing that the mother would give the gun to the doctor, who would ultimately kill Bob. This would mean that the role of father could be construed as aiding in the commission of a criminal abortion but the logical train is tenuous at best so any punishment the state could justify giving a father would be minimal.

Any friends that encourage the mother to seek out and/or obtain an abortion also play a role in the abortion and have some culpability. The father can be among this group of individuals. Going back again to our original scenario, the mother would tell the friends about the gun the father gave her as a present and ask for their help and advice in deciding whether to give the gun to the doctor, knowing the doctor would kill Bob. If the friends encourage the mother to abort the pregnancy, it is as if they are pushing the mother's hand to give the gun to the doctor. If the friends actually take the mother to obtain an abortion, they are actually enabling her to enable the doctor to commit a crime. This qualifies as "willfully caus[ing] an act to be done which if directly performed by him or another would be an offense against the United States."⁵³ Therefore, the culpability of the friends, and the father if he participates in bringing the mother to the abortion doctor, would be great as that of the mother. The friends may be treated by the state as more culpable and therefore subject to a harsher punishment than the mother herself may.

States could adopt this system of punishing all parties involved in abortion to prosecute those who decide to violate laws proscribing abortion. However, it is unlikely that the state will want to seek out and pay for the litigation necessary to punish all of these involved parties. But, should they choose to do so, the logic of the law would support a state's effort to punish individuals based on their peripheral involvement in abortion where it is proscribed.

It is possible that mothers in states where abortion is illegal will go across state lines to a place where abortion is still a right protected by that state. In that case, states proscribing abortion would not be able to prevent its residents from obtaining an abortion in another state because the Commerce Clause of the Constitution gives Congress the sole power to regulate interstate commerce.⁵⁴ Therefore, unless Congress passed a law prohibiting citizens from doing so, any woman could go to a state permitting abortion and legally obtain one regardless of the state in which she resides.

Based on the evidence presented above, overturning *Roe* would not outlaw abortion, as pro-life groups advocate, but rather create a system of states with varying levels of restrictions on abortion. The Court and thus the country would no longer interpret the right to abortion as constitutionally protected but the Court also would not produce an opinion that proscribed abortion. The resulting ambiguity among states means that the Court's conservative coalition would succeed only in putting more obstacles between some women and the abortions they hope to obtain. While overturning *Roe* would certainly deteriorate the rights deserved by and afforded to women, it would not result in the absolute proscription of abortion. Individuals would have, as they

always have had, the right and ability to move to a jurisdiction in which the views of the legislators and the laws they pass most closely align with the views of the individual.

While the Court overturning *Roe* would not result in the complete loss of the right to abortion, abortion should remain within the purview of the courts with final appeals heard by and ultimate decisions made by the Supreme Court. *Roe v. Wade* and the subsequent decisions supporting its intent are rational exercises of the Court's power. The sheer number of abortion laws challenged in federal courts shows the propensity of legislatures, which a decision overturning *Roe* would charge with regulating abortion, shows their tendency to infringe on the rights of individuals. The Founders, concerned with the tyrannical powers of the legislature and executive in England, charged the Court with protecting the rights of individuals.⁵⁵ The powers of the legislature to regulate a right such as abortion must be checked by the Court's interpretation and application of the Constitution to those laws to ensure the laws are not overbroad or vague and serve a legitimate state interest.

As a procedure that is often medically necessary and that has a long history of being performed, abortion deserves special protection by the Court, the justification of which can be found in the Court's interpretation of the intent of the Constitution and its subsequent application. Legislatures should not have the exclusive right to regulate a right the exercise of which is such a personal decision. The judiciary is the branch of government least likely to and capable of encroaching on the rights of individuals; the executive is the most likely and the legislative is the most capable. Excluding the Court from the abortion equation, as would happen with a decision overturning *Roe*, would be devastating to the rights of all women, both those who choose abortion and those who

choose to carry a pregnancy to term. The Ninth Amendment was intentionally included in the Bill of Rights to prevent the government from trying to suppress rights not specifically stated in the Constitution. One of the rights the Court must prevent the government from suppressing is that of a woman's choice with her doctor of what is medically appropriate for her unique situation. The right to be secure in one's own person is a right so fundamental that only a judicial branch, unhindered by the threat of job loss, has the ability to define its scope.

¹Footnotes

Abortion Surveillance---United States. Centers for Disease Control.
<<http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5109a1.htm>>.

² *Id.*

³ Warren, Samuel D. and Louis D. Brandeis. "Right to Privacy." 4 HARVARD L. REV. 193 (1890) at 194.

⁴ *Ibid*, 12.

⁵ 277 U.S. 438 (1928).

⁶ 381 U.S. 479 (1965).

⁷ *Id.* at 480.

⁸ 318 U.S. 44 (1943).

⁹ 367 U.S. 497 (1961).

¹⁰ *Id.* at 508.

¹¹ *Id.* at 509.

¹² 381 U.S. 479 at 484.

¹³ 405 U.S. 438 (1972).

¹⁴ *Ivers* 490.

¹⁵ 405 U.S. 438 at 453.

¹⁶ 410 U.S. 113 (1973).

¹⁷ *Id.* at 116.

¹⁸ *Id.* at 153.

¹⁹ *Id.* at 157.

²⁰ *Id.* at 160-161.

²¹ *Id.* at 162-163.

²² *Id.* at 164-165.

²³ 428 U.S. 52 (1976).

²⁴ 448 U.S. 297 (1980).

²⁵ 476 U.S. 747 (1986).

²⁶ *Id.* at 828.

²⁷ *Id.* at 759.

²⁸ 492 U.S. 490 (1989).

²⁹ 505 U.S. 833 (1992).

³⁰ *Ivers* 507.

³¹ 505 U.S. 833 (1992) at 874.

³² *Id.* at 877.

³³ *Id.* at 898.

³⁴ *Id.* at 337.

³⁵ 530 U.S. 914 (2000).

³⁶ *Id.* at 930.

³⁷ 550 U.S. ____ (2007).

³⁸ *Id.* at 29.

³⁹ Thomas Concurrence, *Gonzales v. Carhart*.

⁴⁰ 530 U.S. 914 (2000) at 955-956 and 980-1020.

⁴¹ 505 U.S. 833 (1992) at 982.

⁴² John McCain for President. <<http://www.johnmccain.com>>.

⁴³ Human Dignity & the Sanctity of Life. John McCain for President.

<<http://www.johnmccain.com/Informing/Issues/95b18512-d5b6-456e-90a2-12028d71df58.htm>>.

⁴⁴ Barack Obama on Abortion. On the Issues.

<http://www.ontheissues.org/Social/Barack_Obama_Abortion.htm>.

⁴⁵ Hilary Clinton on Abortion. On the Issues.

<http://www.ontheissues.org/Social/Hillary_Clinton_Abortion.htm>.

⁴⁶ 505 U.S. 833 (1992) at 982.

⁴⁷ William Van Alstyne, *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: an Outline of a Decision Merely Overruling Roe*, 1989 DUKE L. REV. 1677 (1989) at 1688.

⁴⁸ *Id.* at 1680.

⁴⁹ 530 U.S. 914 (2000) at 922.

⁵⁰ Partial Birth Abortion Ban Act of 2003. FindLaw.

<<http://news.findlaw.com/cnn/docs/abortion/2003s3.html>>.

⁵¹ Pennsylvania's Abortion Control Act. People for Life. <http://www.peopleforlife.org/ctrl_act.html>.

⁵² 2471 18 U.S.C. § 2. United States Department of Justice.

<http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02471.htm>.

⁵³ *Id.*

⁵⁴ U.S. Const. art. I, § 8, cl. 3.

⁵⁵ Alexander Hamilton, *Federalist* #78, (1788).