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"WHAT'S GRISWOLD GOT TO DO WITH IT?": PERHAPS HOLDING THE KEY TO A DECISION BY THE UNITED STATED SUPREME COURT AND A TEST OF LEADERSHIP FOR THE CHIEF JUSTICE

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Abstract

The current debate regarding whether the United States Supreme Court will overrule the precedent of *Roe v. Wade* (1973) must be viewed in the broader context of a 1965 case decided by the United States Supreme Court in *Griswold v. Connecticut* (1965). This article looks at *Griswold* in order to explore if a repudiation of its core ruling relating to privacy might provide the basis for overruling or at least significantly limiting *Roe* to return the issue of abortion to the individual states or even perhaps to make abortion illegal under all or most circumstances.

Key Words: Abortion; abortion services; privacy; conception; undue burden

1. Introduction

On Wednesday, December 1, 2021, the United States Supreme Court heard oral arguments in a case that most assuredly will have an impact on the fate of *Roe v. Wade*, the Court's 1973 decision that legalized abortion in the United States (Franklin, 2021; Rupp & Stohr, 2021).

As Totenberg (2021) wrote: "At issue in Wednesday's case — *Dobbs v. Jackson Women's Health Organization* — was a Mississippi law that bans abortion after 15 weeks of pregnancy."

To this date, the Supreme Court has upheld *Roe*'s central framework: women have a constitutional right to an abortion in the *first two trimesters* of pregnancy—the period when a fetus is unable to survive outside the womb—roughly 24 weeks.

The debate regarding whether the United States Supreme Court will overrule *Roe v. Wade* (1973) must be viewed in the broader context of a 1965 case decided by the United States Supreme Court in *Griswold v. Connecticut* (1965)—recognized as the foundation upon which *Roe* was built.

2. Some Background

According to the common law tradition exported into the United States from England (Sauer, 1978/2011), abortion before "quickening" (defined as when the fetus's movements could be felt) was not a crime. In 1821, the state of Connecticut, however, adopted a portion of *Lord Ellenborough's Act* (1803) (Handler, 2007) that in effect criminalized abortion.

The website of US Legal (2021) notes:

> "Ellenborough's Act is an English Statute of 1803 which punishes offenses against the person. The Act provides for prevention of malicious shooting and attempts to discharge loaded fire-arms, stabbing, cutting, wounding, poisoning and the malicious using of means to procure the miscarriage of women. The Act provided that it was an offence for any person to

> perform or cause an abortion. The punishment for performing or attempting to perform a post quickening abortion was the death penalty. The Act is named after Lord Chief Justice of England and Wales, Edward Law, 1st Baron Ellenborough who first proposed the law. The Act is also known as Malicious Shooting and Stabbing Act of 1803."

Mirroring the Ellenborough's Act, Connecticut enacted the first law in the United States that banned abortion *after* quickening. Within twenty years, eight states had adopted such laws. By the time of the adoption of the Fourteenth Amendment in 1868, 20 states, out of 37, had passed laws restricting, or in some cases, wholly prohibiting abortion. Generally, an abortion performed *after* quickening would be considered as a felony, while procedures performed *before* quickening would be treated as a misdemeanor (Gavigan, 1984/2007; Spitz, 2021). Gradually, however, legal distinctions between pre- and post-quickening abortions began to disappear (Sekaleshfar, 2009). In commenting on the state of abortion in the United States in the 1950s and 1960s, the Bill of Rights Institute (2021) notes:

> "By the 1950s, almost every state banned all abortions except when necessary to save the woman's life. In the late 1960s, however, some states began to relax their laws restricting abortion. This trend coincided with the feminist movement, and the liberalization of laws governing sexuality and privacy. The trend was also mirrored in legal challenges to laws regulating intimate relations."

3. The Context of the Current Debate

The Guttmacher Institute (2021), "a leading research and policy organization committed to advancing sexual and reproductive health and rights (SRHR) worldwide," reports that "Each year, a broad cross section of people in the United States obtain abortions. In 2017, 862,320 abortions were provided in clinical settings in the United States. However, between January 1, 2011 and July 1, 2019, states enacted 483 new abortion restrictions, and these account for nearly 40% of all abortion restrictions enacted by states in the decades since the Supreme Court's landmark decision in *Roe v. Wade*."

Sanger-Katz, Miller, and Bui (2021) have noted that:

> "The portrait of abortion in the United States has changed with society. Today, teenagers are having far fewer abortions, and abortion patients are most likely to already be mothers. Although there's a lot of debate over gestational cutoffs, nearly half of abortions happen in the first six weeks of pregnancy, and nearly all in the first trimester."
>
> "The typical patient, in addition to having children, is poor; is unmarried and in her late 20s; has some college education; and is very early in pregnancy. But in the reproductive lives of women (and transgender and nonbinary people who can become pregnant) across America, abortion is common. The latest estimate, from the Guttmacher Institute, a reproductive health research group that supports abortion rights, found that 25 HYPERLINK "https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304042"percent of women will have an abortion by the end of their childbearing years" (see also Centers for Disease Control, 2021).

At the same time, several states have moved decisively to limit or restrict a woman's right to an abortion. Some of the most common state-level abortion restrictions which have been enacted include:

- parental notification (Joyce, Kaestner, & Ward, 2020) or consent requirements for minors (e.g., Pori, 2021; Cespedes, 2021);
- limitations on public funding (Ely, Hales, Jackson, Maguin, & Hamilton, 2017; Rutenberg, 2020; McCammon & Beeson-Lynch, 2021);
- mandated counseling designed to dissuade individuals from obtaining an abortion (Rodgers, 2020; Lang, 2021);
- mandated waiting periods before an abortion can be performed (Lindo & Pineda-Torres, 2021; Shatzma, 2021); and
- overly burdensome regulations on abortion facilities (Reingold & Gostin, 2019; Bethay, 2020; Strasser, 2020; Hill, 2021).

Interestingly, the abortion rate of 13.5 abortions per 1,000 women of reproductive age (15–44) represents an 8% *decrease* from the 2014 rate of 14.6. In 2017, there were 1,587 facilities providing abortion in the United States, representing a 5% *decrease* from the 1,671 facilities in 2014. Sixteen percent of facilities in 2017 were abortion clinics (i.e., clinics where more than half of all patient visits were for abortion), 35% were non-specialized clinics, 33% were hospitals and 16% were private physicians' offices. Sixty percent of all abortions were provided at abortion clinics, 35% at non-specialized clinics, 3% at hospitals and 1% at physicians' offices (Guttmacher Institute, 2021).

In 2017, 89% of U.S. counties had no clinics providing abortions. Some 38% of reproductive-age women lived in those counties and would have had to travel elsewhere to obtain an abortion. Of patients who had an abortion in 2014, one-third had to travel more than 25 miles one way to reach a facility (Bearak, Lagasse-Burke, & Jones, 2017; Guttmacher Institute, 2021).

4. The Mississippi Landscape

There were three facilities providing abortion services in Mississippi in 2017. Only one was an abortion clinic. In 2017, 2,550 abortions took place in Mississippi. Abortions in Mississippi represent 0.3% of all abortions in the United States. In 2017, some 99% of Mississippi counties had no clinics that provided abortions, and 91% of Mississippi women lived in those counties.

The following restrictions on abortion were in effect in Mississippi as of January 1, 2021 (see Butterly, 2018):

- Abortion would be banned if *Roe v. Wade* were overturned (see generally Glenza, 2021).
- A patient must receive state-directed counseling that includes information designed to discourage the patient from having an abortion, and then wait 24 hours before the procedure is provided. Counseling must be provided in person and must take place before the waiting period begins, thereby necessitating two trips to the facility.
- Health plans offered in the state's health exchange under the Affordable Care Act can only cover abortion in cases of life endangerment, or in cases of rape or incest.
- Abortion is covered in insurance policies for public employees only in cases of life endangerment, rape, incest or fetal anomaly.
- The use of telemedicine to administer medication abortion is prohibited.
- The parents of a minor must consent before an abortion is provided.
- Public funding is available for abortion only in cases of life endangerment, rape, incest or fetal impairment.
- A patient must undergo an ultrasound before obtaining an abortion; the provider must offer the patient the option to view the image.
- An abortion may be performed at 18 or more weeks post-fertilization (20 weeks after the last menstrual period) only in cases of life endangerment, severely compromised health, or there is a lethal fetal anomaly. This law is based on the assertion, which is not consistent with scientific evidence and has been rejected by the medical community, that a fetus can feel pain at that point in pregnancy.
- The state prohibits abortions performed for the purpose of race or sex selection, or in response to genetic anomaly.
- The state requires abortion clinics to meet unnecessary and burdensome standards related to their physical plant, equipment and staffing.
- The use of a safe, effective and commonly used method of second trimester abortion is prohibited. Abortions using dilation and evacuation are permitted only in cases of life endangerment or severely compromised physical health.

In the most recent controversy, Mississippi has asked the United States Supreme Court to reverse its prior abortion decisions and essentially return the abortion question to the states. Kelly and de Vogue (2021) note that "Mississippi's 15-week abortion ban, which then-Gov. Phil Bryant, a Republican, signed into law in 2018, made exceptions only for medical emergencies or cases in which there is a 'severe fetal abnormality,' but not for instances of rape or incest." A federal judge in Mississippi had struck down the Mississippi statute in November 2018, and the 5th U.S. Circuit Court of Appeals had upheld that ruling in December of 2019 based on the precedent of *Roe v. Wade* (Savage, 2021).

As noted by Heilman (2021): “At the heart of the Mississippi abortion law is ‘fetal viability’ or the point when a fetus can survive out of the womb.”

This limitation on infringing on the rights of a woman to seek an abortion was grounded in what came to be known as the *trimester approach of Roe* (Duncan, 1984). However, in 1992, the trimester approach was replaced by the Supreme Court in the case of *Planned Parenthood v Casey* (1992). The majority in *Planned Parenthood* left in place the woman’s right to abortion, but set the standard for government intrusion based on fetal viability (Kelso, 2015). States could not put in place any “undue burden” to accessing an abortion prior to that point in a pregnancy. Heilman (2021) notes that “This shift was due in part to medical advances in keeping a baby born prematurely alive.” Had “science” changed this calculus once again or was it politics?

Where does it seem the Supreme Court may be going in connection with the Mississippi statute? Are there any strong indications? The Court's three newest justices, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett—all appointees of President Donald Trump — appeared to signal that they would side with Mississippi. However, it was still unclear whether these Justices would vote to overrule *Roe*, or would only modify *Roe*’s holding based on a new set of facts, medical understanding, or scientific evidence—or on the fact that their views on abortion now commanded a majority on the Court?

At the same time, Justices Clarence Thomas and Samuel Alito seemed more than willing to reverse *Roe* and perhaps even other decisions which had been based on the recognition of a right to privacy in cases in which they had been in the minority. Surprisingly, a “wild card”—Chief Justice John Roberts—although rightfully characterized as a conservative, focused on the question of fetal viability—and not on a reversal of *Roe.*

5. The *Dobbs* Oral Argument: Providing an Insight to the Views of the Justices

It is interesting to focus on the specific questions or comments of several of the individual Justices and the responses of the litigators who appeared before the Supreme Court (e.g., Franklin, 2021; Rupp & Stohr, 2021).

Chief Justice Roberts to Julie Rikelman (Leung, 2021) (the attorney who represented Jackson Women’s Health Organization, bringing the case): "Why would 15 weeks be an inappropriate line? Viability, it seems to me, doesn't have anything to do with choice, but if it really is an issue about choice, why is 15 weeks not enough time?"

Rikelman replied: "If the court were to move the line substantially backwards — and 15 weeks is nine weeks before viability, your honor — it may need to reconsider the rules around regulations because if it's cutting the time period to obtain an abortion roughly in half, then those barriers are going to be much more important."

At this point, Justice Alito chimed in that: "The fetus has an interest in having a life, and that doesn't change, does it?" (see Jacobs, 2020).

Justice Barrett asked several questions about adoption and “forced parenting.” Justice Barrett, the mother of seven children, two of whom were adopted, drew a distinction between child-bearing and child-parenting. Justice Barrett referred to the state's argument that in the case of failed contraception, a woman can always give her child up for adoption.

Justice Kavanaugh, who had replaced a more centrist and consensus-builder Justice Anthony Kennedy, the Justice that had authored many of the most controversial decisions of the Supreme Court dealing with an expansion of individual liberties based on privacy, signaled that he too may well be willing to reverse *Roe*.

While acknowledging the Court's precedents as he had indicated during his confirmation hearings (Wang, 2021), Justice Kavanaugh noted that with reference to abortion there are two interests — the woman's right to terminate a pregnancy and the interest of fetal life.

Justice Kavanaugh added: "The problem is you can't accommodate both interests. You have to pick." Kavanaugh suggested that the issue might be better resolved in other forums: "Why should this court be the arbiter rather than Congress, state legislatures, state supreme courts and the people being able to resolve this?" Justice Kavanaugh added: "If we think the prior precedents are seriously wrong… why then doesn't the history of this court's practice with respect to those cases tell us that the right answer is to return to the position of neutrality."

In addition, Justice Kavanaugh noted "a long list of past Supreme Court cases that had ruled against precedent," citing *Brown v. Board of Education* (1954) (outlawing the "separate but equal" doctrine); *Baker v. Carr* (1962) (setting the stage for "one person, one vote"); *West Coast Hotel v. Parrish* (1937) (recognizing the state's authority to regulate business); and *Miranda v. Arizona* (1966) (requiring the police to give certain detainees warnings about the "right to remain silent" and to have an attorney present during police questioning) (Wang, 2021).

Justice Clarence Thomas directly challenged the notion that there is a constitutional right to abortion, saying that it is not clearly laid out the way the second amendment is on "the right to bear arms."

Justice Samuel Alito questioned whether fetal viability is even an appropriate line for the court to have drawn. "If a woman wants to be free of the burdens of pregnancy, that interest does not disappear the moment the viability line is crossed," he said.

The Court's more liberal judges weighed in heavily during the oral arguments as well. Justice Elena Kagan said a major goal of precedent is "to prevent people from thinking that this court is a political institution that will go back and forth depending on what part of the public yells the loudest ... usually, there needs to be a strong justification in a case like this, beyond the fact that you think the case is wrong."

Justice Sonia Sotomayor, nominated by President Barack Obama, as was Justice Elena Kagan, signaled that she believes Mississippi's motive in restricting abortion is religious and is not based on public health considerations. Justice Sotomayor feared a further threat to Supreme Court precedents that protect rights to birth control access and same-sex marriages.

Justice Stephen Breyer quoted from the 1992 ruling in *Planned Parenthood v Casey* which had reaffirmed the essential holding in *Roe*. "To overrule under fire in the absence of the most compelling reason to re-examine a watershed decision would subvert the court's legitimacy beyond any serious question," he said.

"Not much has changed since Roe and Casey," Justice Kagan added. "The reason people agree or not are the same reasons they've always had … aren't we in the exact same place, except that we've had 50 years of women relying on this right?"

Justice Sotomayor added: "Fifteen justices over 30 years have reaffirmed that basic viability line … 15, of varying political background." Justice Sotomayor addressed Scott Stewart, Mississippi's Solicitor General: "The sponsors of this bill ... in Mississippi are saying 'We're doing this because we have new justices on the Supreme Court.' Will this institution survive the stench that this creates in the public perception that the constitution and its reading are just political acts?"

Justice Sotomayor continued: "If people believe it's all political … how will the court survive?" Justice Breyer added that the risk in a "super case" like this is that the American public will regard justices as "just politicians." "That's what kills us," he said.

As Justices from the Court's liberal wing referred to the Court's previous decisions on abortion, and the liberty interest enshrined in those decisions, Justice Sotomayor noted that what has changed was the change in the court's membership.

United States Solicitor General Elizabeth Prelogar, representing the views of the Biden administration, said that the decision to have an abortion "is an incredibly difficult choice," and one that the court "for 50 years has recognized must be left up to [women] based on their beliefs and their conscience and their determination about what is best for the course of their lives." What view would eventually prevail? A look back at *Griswold v. Connecticut* and its progeny, *Eisenstadt v. Baird*, might prove helpful.

6. *Griswold v. Connecticut* (1965): The Decisional Foundation

Griswold v. Connecticut (1965) is now regarded as a foundational decision the United States Supreme Court in which the Court ruled that the Constitution of the United States protects the liberty interest of married couples to buy and use contraceptives without government restriction on the basis of a right to marital privacy.

Recognizing that the Constitution, more specifically 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 wrote a concurring opinion in which he used the Ninth Amendment in support of the Supreme Court's ruling (see Kruschke, 2020).

Justice Goldberg wrote:

> "I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment. I add these words to emphasize the relevance of that Amendment to the Court's holding."

Justice Byron White and Justice John Marshall Harlan II wrote concurring opinions in which they argued that the right of privacy is protected by the due process clause of the Fourteenth Amendment.

Justice White wrote:

> "The Connecticut anti-contraceptive statute deals rather substantially with this [the marital] relationship. For it forbids all married persons the right to use birth-control devices, regardless of whether their use is dictated by considerations of family planning, health, or indeed even of life itself. The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment."

Griswold originated as a prosecution of Dr. Estelle Griswold under the Connecticut Comstock Act of 1873. 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, Massachusetts and Connecticut were the only two states that still carried such statutes on their books, although they were almost never enforced.

During the 1940s, several prosecutions arose from the provision of contraception by the Waterbury Planned Parenthood clinic, leading to legal challenges to the constitutionality of the Connecticut Comstock Act, but these challenges had 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* served as the foundation argument and basis for the later appeal to the United States Supreme Court in *Griswold v. Connecticut.*

> "(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 in *Poe* had 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. On the basis of this interpretation, Harlan concluded that the Connecticut statute violated the Constitution (Powell, 2021).

After *Poe* was decided in June of 1961, the Planned Parenthood League of Connecticut (PPLC) decided to challenge the law once again. Dr. 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. Dr. Griswold and Dr. Buxton were arrested, tried, found guilty, and fined $100 each. The conviction was upheld by the Appellate Division of the Circuit Court, and by the Connecticut Supreme Court. The case reached the United States Supreme Court on a writ of certiorari.

On June 7, 1965, the Supreme Court handed down a 7–2 decision in favor of Dr. Griswold and Dr. Buxton, striking down Connecticut's law against the prescription of contraceptives for married couples. 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 still controversial.

The Court began by finding that the U.S. Constitution protects "marital privacy" as a *fundamental constitutional right*, but admittedly struggled to identify a *particular source* for such a right in the *text* of the Constitution itself (see, e.g., Bellin, 2021). Interestingly, the opinion of Justice Douglas did not embrace the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution (so-called "substantive due process") as the source of the right to marital privacy, because at the time the Court still rejected the application of the doctrine due to its association with the 1905 decision *Lochner v. New York* (1905) which had been used as a barrier to government regulation of business in the pre-New Deal era.

Instead of justifying the right to marital privacy under a substantive due process analysis under the Fifth and Fourteenth Amendments, the Court found that the right of marital privacy right was *implied by reference to specific provisions of the Bill of Rights*, such as those found in the First, Third, Fourth, and Fifth Amendments. In doing so, the Court made reference to earlier cases where the Court had found personal liberties that were constitutionally protected despite not being specifically enumerated in the *text of Constitution*, such as the constitutional right to parental control over childrearing found in the early 20th century cases of *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925). The Court viewed the implicit nature of marital privacy rights to be similar, and in a now often-quoted 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."

The Court concluded that Connecticut's Comstock Law violated this 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."

The concurring and dissenting opinions 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 judgment of the Court 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 constitutional right to marital privacy. Justice John Marshall Harlan II also concurred with the judgment of the Court, and reiterated that the right to privacy should be protected under the Due Process Clause of the Fourteenth Amendment (Powell, 2021). Justice Byron White concurred only in the judgment, and wrote an opinion 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."

7. Extending *Griswold*

Later decisions of the U.S. Supreme Court extended the principles of *Griswold* beyond its particular facts to a more generalized recognition of a constitutionally protected right of privacy. In *Eisenstadt v. Baird* (1972), the Court would extend its holding in *Griswold* to unmarried couples as well (see Lucas, 2003; Appleton, 2016).

After delivering a lecture on overpopulation and contraception at Boston University, the appellee William Baird had invited members of the audience to come to the stage and to help themselves to various contraceptive articles. Baird personally handed a package of contraceptive foam to a young woman. As a result of that act, Dr. Baird was arrested and later convicted in a Massachusetts state court for violating a Massachusetts statute which made it a crime to sell, lend, or give away any contraceptive drug, medicine, instrument, or article, except that physicians were permitted to administer or prescribe contraceptive drugs or articles for *married persons*, and pharmacists were permitted to fill prescriptions for contraceptive drugs or articles for *married persons*. Dr. Baird's conviction was affirmed by the Massachusetts Supreme Judicial Court. The United States District Court for the District of Massachusetts dismissed Dr. Baird's petition for a *writ of habeas corpus*, but the United States Court of Appeals for the First Circuit vacated the District Court's order and remanded the case to the District Court with instructions to grant the writ discharging the appellee.

On appeal to the United States Supreme Court, the Court affirmed the judgment of the Court of Appeals. In an opinion authored by Justice William Brennan, which expressed the views of four members of the Court, the Court held that (1) although the appellee was not a physician or pharmacist and was not an unmarried person who had been denied access to contraceptives, he had standing to *assert the rights of unmarried persons* denied access to contraceptives, and (2) the Massachusetts statute could not be upheld as a deterrent to fornication, or as a public health measure, or as a prohibition on contraception.

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 enjoyed that right under *Griswold*. Writing for the majority, Justice Brennan wrote that since Massachusetts could not enforce the law against married couples under *Griswold*, the law amounted to "irrational discrimination" if the same right was not extended to unmarried couples as well.

7.1. Justice Kennedy Takes Up the Mantle of Protecting Privacy Rights

A second case merits attention. In *Lawrence v. Texas* (2003), the Supreme Court considered three questions:

> "1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law--which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples--violate the Fourteenth Amendment guarantee of equal protection of laws?
>
> "2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?
>
> "3. Whether *Bowers v. Hardwick* (1986) should be overruled?" [In *Bowers*, the Supreme Court had determined in a 5-4 decision that homosexual sodomy was not "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." Thus, the right to privacy did not extend to homosexual sodomy as it was not a fundamental right. In reversing the Court of Appeals, the Supreme Court held in *Bowers* that the statute need only pass the rational basis test of scrutiny.]

In writing for the Court, and in overruling *Bowers*, Justice Kennedy concluded that the case "should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."

Justice Kennedy referenced what he termed as "broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases." In so doing, Justice Kennedy cited *Pierce v. Society of Sisters* (1925), *Meyer v. Nebraska* (1923) and *Griswold v. Connecticut* (1965). Justice Kennedy also cited *Eisenstadt v. Baird* (1972), which "established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship." Justice Kennedy quoted from *Eisenstadt* (p. 453): "It is true that in Griswold the right of privacy in question inhered in the marital relationship.. . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

Still later, on June 26, 2015, the United States Supreme Court would decide *Obergefell v. Hodges*, requiring states to issue marriage licenses to same-sex couples and to recognize the validity of same-sex marriages performed in other jurisdictions. In a majority opinion authored by Justice Anthony Kennedy, the Court examined the nature of fundamental rights guaranteed to all by the Constitution and the harm done to individuals by delaying the implementation of such rights while the democratic process plays out, as suggested by Justice Scalia as suggested in his dissenting opinion (see, e.g., Ropiek, 2015). Seemingly harkening back to the words of Justice Douglas in *Griswold*, Justice Kennedy wrote for the Court in *Obergefell*:

> "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

Now, in considering *Dobbs*, would the Supreme Court continue on its path of expanding or at least protecting constitutional rights, following the lead of Justice Kennedy (Cantarero, 2020), or would the Court draw back and either overrule or effectively eviscerate of its most important—yet controversial—precedents by weakening abortion rights (Jaffe, 2021)?

8. Revisiting the Dissenting Opinions in *Griswold*: Could They Form the Basis for an Attack on a Constitutional Right to Privacy?

Justices Hugo Black and Potter Stewart had dissented from the Court's decision in *Griswold.* 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."

9. Some Concluding Observations: Overruling *Roe* with or Without Overruling *Roe*? Testing the Leadership of Chief Justice John Roberts

There are several possibilities open to the Supreme Court in deciding *Dobbs. Remember that we are dealing with four Supreme Court precedents: Griswold v. Connecticut (and is progeny, Eisenstadt v. Baird), Roe v. Wade and Planned Parenthood v. Casey.*

The first we may call is the "*nothing has really changed*" approach. The Court could acknowledge that a constitutionally protected right to privacy exits as defined in both *Griswold v. Connecticut* and *Eisenstadt v. Baird*; recognize *Roe* as indeed a "super precedent" (Sinclair, 2007), as modified by *Planned Parenthood v. Casey*, and strike down the Mississippi statute as an "undue burden" on the right of a woman to choose to have an abortion. This approach is in line with comments made by Justices Sotomayor, Kagan, and Breyer. However, given the current configuration of the Court, this does not hold itself out as a realistic prospect.

On the other end of the spectrum, but certainly not to the far end of that spectrum, a second approach might be termed as the "*disaffirmance*" approach. The Court could in some combination overrule *Griswold* and *Eisenstadt* on constitutional grounds, holding that there is no "right to privacy" contained in the constitution and certainly no constitutionally protected right to marital privacy. In essence, Justices Black and Stewart had it right all the time! Thus, there is no constitutional basis for *Roe v Wade and Planned Parenthood v. Casey*, and that absent a federal right to abortion, the matter should be now resolved by the individual states. This approach is in line with that taken by Justice Kavanaugh who stated: "Why should this court be the arbiter……"

Or, on the further end of that spectrum, the Court could overrule *Griswold v. Connecticut, Roe v. Wade, and Planned Parenthood,* on the basis that the right to life of the fetus should be constitutionally recognized from the "moment of conception" (Marlin, 2021) That, however, might be a "bridge too far" for a majority of the Justices—or at least for the Chief Justice—but would be in line with the views of Justices Alito and Thomas.

There are other combinations or intermediary approaches or what we term *"threading the needle"* possibilities. This approach would require significant legal or constitutional gymnastics and would require the strong leadership of Chief Justice Roberts. Under this approach, the Court could avoid the constitutional question in *Dobbs, bypassing any need to overrule or even comment on the constitutional analysis in Griswold, Eisenstadt or Roe* altogether, and focus its analysis instead on *Planned Parenthood v. Casey*—deciding that *science* has proven an earlier point of viability for the fetus that would permit the Court to uphold the 15-week Mississippi statute, either as the sole justification for its decision or one in combination with holding that the restrictions found in the Mississippi statute under these circumstances do not impose an "undue burden" on the woman seeking an abortion considering fetal viability.
The Supreme Court is expected to issue its decision in June of 2022.

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