The Constitutionality of Abortion

John M. Nerney

A Senior Thesis submitted in partial fulfillment
of the requirements for graduation
in the Honors Program
Liberty University
Spring 2020

Acceptance of Senior Honors Thesis

This Senior Honors Thesis is accepted in partial
fulfillment of the requirements for graduation from the
Honors Program of Liberty University.

_____
Robert A. Robertson J.D.
Thesis Chair

_____
Stephen Parke J.D., LL.M.
Committee Member

_____
James H. Nutter, D.A.
Honors Director

_____
Date

Abstract

The purpose of this study is to determine whether abortion is constitutional under the Fourth Amendment. Essentially, the Supreme Court used what is known as the "right to privacy" which they created using the First, Fourth, Fifth and Ninth Amendments finding penumbras of the Bill of Rights, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. This study addresses the history of the right to privacy and tries to show that the Supreme Court stretched the meaning of these Amendments beyond what the founders of the Constitution intended. This study analyzed the application of the Fourth Amendment in the cases of *Olmstead v. United States*, *Griswold v. Connecticut* and *Katz v. United States*, in order to show the evolution of the Fourth Amendment. Using dissenting opinions from the cases this study attempts to show that the so called "right to privacy" is unconstitutional and therefore, the Fourth Amendment does not apply to abortion, thereby making the same unconstitutional. The study did discover that although the Supreme Court has declared abortion Constitutional in the case of *Roe v. Wade*, strong arguments could be made against its Constitutionality. In so doing, this study tries to show that if no general right to privacy exists, then abortion is unconstitutional.

The Constitutionality of Abortion

In examining the current topic, it is essential to examine the Supreme Court's rational regarding the matter. It is important to examine the opinions of the Supreme Court as they have been granted what is known as Judicial Review which comes from the Supreme Court case of *Marbury v. Madison*. In this case the Supreme Court stated in applicable parts:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. (*Marbury v. Madison,* 1803)

Essentially, the Supreme Court is stating that it is their duty to interpret the law. The Supreme Court is not only arguing that it may interpret laws made but also the Constitution itself. In interpreting laws, the Supreme Court has ruled in many cases leading up to the famous *Roe v. Wade* decision which attacked Texas statutes in which the court held "improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy" *(Roe v. Wade*, 1973). Leading up to this decision were several other cases which created precedent in which the Supreme Court used in making its decision in *Roe v. Wade*. In determining the constitutionality of abortion, it is essential that these cases are examined.

Olmstead v. United States and the Protection of Places

Over the history of the United States, various amendments have been applied in various ways as the Supreme Court continues to interpret and refine the law. In order to understand the Fourth Amendment as it was applied by the Supreme Court in *Roe v. Wade*, early cases dealing with Fourth Amendment issues must be examined. *Olmstead v. United States* is a 1928 case which the Supreme Court cited in *Roe v. Wade* which deals with this issue. In *Olmstead*, the defendants' telephones were tapped; however, no trespassing on the defendants' property occurred (*Olmstead v. United States*, 1928). The Supreme Court held that because no trespassing occurred, the defendants' Fourth Amendment rights were not violated, and stated "U.S. Const. amend. IV was not violated unless there was an official search and seizure of a person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house or curtilage for the purpose of making a seizure" (*Olmstead v. United States*, 1928). What is important to note here is that the Supreme Court is placing emphasis on the protection of places over people. The Court is arguing that in order for the Fourth Amendment to protect a person, there must be a physical invasion of a person or person's property. Therefore, the emphasis is placed upon the protection of a place and not a person in *Olmstead v. United States*. However, as will be examined the Supreme Court shifted its stance on the Fourth Amendment and created what is known as the "right to privacy" in later cases which paved the way for the Fourth Amendment to be applied to *Roe v. Wade*.

Griswold v. Connecticut and the Origins of the "Right to Privacy"

In the Supreme Court Case of *Griswold v. Connecticut*, the Court stated:

> A Connecticut statute made the use of contraceptives a criminal offense. The executive and medical directors of the Planned Parenthood League of Connecticut were convicted

> in the Circuit Court for the Sixth Circuit in New Haven, Connecticut, on a charge of having violated the statute as accessories by giving information, instruction, and advice to married persons as to the means of preventing conception. The Appellate Division of the Circuit Court affirmed, and its judgment was affirmed by the Supreme Court of Errors of Connecticut. (151 Conn 544, 200 A2d 479.). (*Griswold v. Connecticut*, 1965)

Essentially, the married persons in this case were given advice regarding how to prevent conception by the Planned Parenthood League of Connecticut which was then convicted for doing so. When the case eventually made its way to the Supreme Court, the Court held that:

> The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960). (*Griswold v. Connecticut*, 1965)
>
> In examining these amendments, the Supreme Court references in *Griswold v. Connecticut*, the Fourth Amendment and states:
>
> > The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Fourth Amendment)

The Fourth Amendment is discussing searches and seizures. While it is arguable that this amendment does create a right to privacy of sorts, this right is to protect citizens from having their things being searched without a warrant. This is thereby an amendment addressing criminal law and says nowhere that citizens have a broad "right to privacy". Which would pertain to abortion or any other matter unless it concerns a search or seizure, and of course an abortion is neither of these. The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Fifth Amendment)

The Fifth Amendment pertains to the matter of privacy even less than the Fourth does as the Fifth Amendment prevents a person from testifying against him or herself while the Fourth Amendment deals with unlawful searches and seizures. The Fifth Amendment discusses some more criminal matters, discusses what is known as the due process clause, and does discuss the fact that a person may not be deprived of "life, liberty, or property, without due process of law" (Fifth Amendment). However, testifying against oneself has nothing to do with privacy and therefore does not grant a "right to privacy." As a result, the Supreme Court has had to use an extremely broad interpretation of the Constitution in order to create this notion of a right to privacy in *Griswold v. Connecticut* using the Fifth Amendment. As aforementioned, the Supreme Court held in *Griswold v. Connecticut* that "The Fourth and Fifth Amendments were described in

Boyd v. United States, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life" (*Griswold v. Connecticut*, 1965). These amendments, as just examined, have nothing to do with a general "right to privacy." The Fourth Amendment pertains to unlawful searches and seizures. This does create a type of privacy but the only privacy the amendment mentions is privacy from an unlawful search or seizure. The Fifth Amendment prevents a person from testifying against him or herself and makes no mention of privacy of any sort. Therefore, the Supreme Court took an extremely broad interpretation of the Fourth and Fifth Amendments in *Boyd v. United States* and in *Griswold v. Connecticut* when it quoted *Boyd* in *Griswold*. The portion from *Boyd* quoted in *Griswold* states in applicable parts: "The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life" (*Griswold v. Connecticut*, 1965). This quote uses the Fourth and Fifth Amendments as support for the creation of privacy used to permit the unmarried couple in *Griswold* to use contraceptives. However, as just examined the Fourth Amendment protects against unlawful searches and seizures while the Fifth Amendment protects a person from being forced to testify against him or herself. Yet, the Supreme Court explains in *Boyd* that these two amendments protect "against all governmental invasions" and uses this same quote as support in *Griswold* (*Griswold v. Connecticut*, 1965). The wording of these two amendments was just examined and neither of these amendments say anywhere in them "citizens are protected against all governmental invasions." Instead, they protect against unlawful searches and seizures and prevent a person from being forced to testify against him or herself. Therefore, a right to privacy protecting citizens from all governmental invasions does not exist under the Fourth or Fifth Amendments.

The Right of Privacy in *Griswold v. Connecticut* as Compared to *Boyd v. United States*

As examined previously, in *Olmstead v. United States* emphasis was placed upon the protection of places over people, however in *Griswold*, "The right of privacy to use birth control measures was found to be a legitimate one" (*Griswold v. Connecticut,* 1965). This is a protection of a person as opposed to a place. Additionally, as examined, the Supreme Court in *Griswold* cited *Boyd v. United States* when they quoted "The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life" (*Griswold v. Connecticut,* 1965). However, *Boyd* in describing the right to privacy states in applicable parts:

> They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment (*Boyd v. United States*, 1886).

As can be seen in this citation from *Boyd* the Supreme Court in *Boyd* applied the Fourth Amendment and the right to privacy to searches and seizures and the protection of a person's real property. The citation from *Boyd* mentions the right to the "privacies of life" but makes no explicit mention of a right to privacy which is applicable to the protection of people. Yet, in *Griswold* the majority opinion interprets these "privacies of life" to mean that people themselves have a "right to privacy" in any and all circumstances.

Justice Black's Dissenting Opinion in *Griswold v. Connecticut*

Justice Black addresses the right of privacy in his dissenting opinion and challenges this broad interpretation of a general "right to privacy" when he states:

> The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given…." (*Griswold v. Connecticut*, 1965)

Justice Black does an excellent job of pointing out that there is no general "right to privacy." He explains that the notion that laws cannot be made which violate a person's privacy is unconstitutional. He further explains that the Fourth Amendment was designed to be applied to the protection of a person's belongings, and pertains to searches and seizures as opposed to it creating a blanket right to privacy which prevents any and all government invasion. He also points out that the Court talks about the Fourth Amendment as if it will protect against any invasion of privacy whatsoever, but he explains that this is not the case but that there are specific circumstances where a person's privacy is protected. This is not an arbitrary standard as he points out that unreasonable "searches and seizures" are unconstitutional. Ultimately, Justice Black challenges the majority opinion in *Griswold* on the grounds that this notion of a right to privacy which protections people arbitrarily is unconstitutional.

Katz v. United States and the Application of the Right to Privacy

In analyzing the evolution of the Supreme Court's application of the Fourth Amendment leading up to *Roe v. Wade*, the next case which should be examined is *Katz v. United States*. This case came before the Supreme Court two years after *Griswold v. Connecticut*. In *Katz* the Supreme Court stated in applicable parts as follows:

> Defendant was convicted of transmitting wagering information by telephone in violation of a federal statute. At the trial, the government was permitted, over defendant's objection, to introduce evidence of defendant's end of telephone conversations, which was overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth where he had placed his calls. A court of appeals, in affirming his conviction, rejected the contention that the recordings had been obtained in violation of U.S. Const. amend. IV because there was no physical entrance into the area occupied by defendant. (*Katz v. United States*, 1967)

The primary issue the Supreme Court dealt with in the case was "Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth" (*Katz v. United States*, 1967). The Supreme Court stated in applicable parts as follows:

> the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other

> provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy -- his right to be let alone by other people -- is, like the protection of his property and of his very life, left largely to the law of the individual States. (*Katz v. United States*, 1967)

As noted, numerous times throughout this study, the Supreme Court relied heavily upon the right of privacy in *Roe v. Wade*. However, the Court noted in *Roe v. Wade* that:

> Although the Constitution does not explicitly mention any right of privacy, the United States Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. (*Roe v. Wade*, 1973)

The Supreme Court argues in *Roe v. Wade*, that through the various amendments which have been examined in this study, zones of privacy are created and essentially the Supreme Court has decided that abortion falls under one of these zones. However, the Supreme Court earlier noted in *Katz v. United States*, that there is no such thing as a general constitutional "right to privacy" (*Katz v. United States*, 1967). Furthermore, the Supreme Court held in *Katz v. United States* that the Fourth Amendment protects against certain forms of governmental intrusion not all (*Katz v. United States*, 1967). However, the wording of the Fourth Amendment was examined and the only governmental invasion which is protects against is unlawful searches and seizures. This simply does not have to do with any other form of privacy whatsoever. As a result, the Supreme Court erred in *Katz* when it stated, "Other provisions of the Constitution protect personal privacy from other forms of governmental invasion." (*Katz v. United States*, 1967). The Fourth

Amendment is the only Amendment which discusses privacy from governmental invasion, and since there is no other constitutional support for protection of personal privacy the Supreme Court erred in its analysis in *Katz*. The Supreme Court finally held in *Katz v. United States*, that there is no general right to privacy and that privacy is left largely to the states to decide upon (*Katz v. United States*, 1967). Thus, in comparing the holdings of the Supreme Court in both *Katz v. United States* and *Roe v. Wade*, the Court seems to take a more strict interpretation of the Constitution in *Katz v. United States* and a significantly more loose interpretation of the same in *Roe v. Wade*. Arguably in *Roe v. Wade* the Supreme Court gets so far away from the literal meaning of the Constitution that it would seem there truly is no constitutional right to privacy as the Court said as much in *Katz. v. United States*.

Justice Black's Dissenting Opinion in *Katz v. United States*

The majority opinion in *Katz* held that "One who occupied a telephone booth, shut the door behind him, and paid the toll that permitted him to place a call was entitled to assume that the words he uttered into the mouthpiece would not be broadcast to the world" *(Katz v. United States*, 1967). Essentially, the Supreme Court held that the defendant's Fourth Amendment rights had been violated regardless of the fact that there was no physical entrance in the area occupied by the defendant. Justice Black again dissents in *Katz* just as he did in *Griswold v. Connecticut* with many of the same objections he had with *Griswold*. He begins his dissenting opinion with "If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a "search" or "seizure," I would be happy to join the Court's opinion" (*Katz v. United States*, 1967). Justice Black recognizes that in order for a Fourth Amendment violation to occur there must be an actual "search" or "seizure" which occurs without a warrant. Justice Black then states:

> My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that many people believe to be desirable. *(Katz v. United States*, 1967)

Justice Black then quotes the Fourth Amendment and then analyzes its wording by stating:

> The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. (*Katz v. United States*, 1967)

Therefore, Justice Black again argues just as he did in *Griswold*, that this idea of a general “right to privacy” does not exist. He argues that the Fourth Amendment applies specifically to physical searches and seizures and does not create a general “right to privacy” which can be applied arbitrarily. Justice Black also argues that the Court has interpreted the words of the Fourth Amendment in a way which they were not meant to be interpreted in order to please the majority of people as he states “I do not believe that it is the proper role of this Court to rewrite the Amendment in order “to bring it into harmony with the times”’ (*Katz v. United States*, 1967). As has been seen in both *Griswold* and *Katz*, and as Justice Black has pointed out, the Supreme

Court seems to evolve the meaning of the Fourth Amendment and apply it in a way which it is not intended to be applied. Initially, in the case of *Olmstead* the court did use the Fourth Amendment as it was intended but have shifted it in order to create a general "right to privacy." As will be examined, these cases which have been analyzed were cited in *Roe v. Wade*, and this notion of a general right to privacy is the main instrument used by the court to legalize abortion. As Justice Black quotes the Fourth Amendment, he states that 'The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures…."' (*Katz v. United States*, 1967). As can be noted, the protection of persons, houses, and effects from unreasonable searches and seizures does not equate to unborn children. The Fourth Amendment makes absolutely no mention of unborn children. However, the Supreme Court used the "right to privacy" which was synthesized, as examined, using the Fourth Amendment, to justify the legalization of abortion.

Roe v. Wade and the "Right of Privacy"

Essentially, the Supreme Court held in *Roe v. Wade* that there exists a right of privacy in the Constitution. Furthermore, the Supreme Court held that this so-called "right of privacy" applies to a women having an abortion, and that she is protected under the Constitution through this right of privacy in the area choosing whether or not to terminate her pregnancy. In describing this right of privacy, the Supreme Court held that:

> 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, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. (*Roe v. Wade*, 1973)

The Fourteenth Amendment states in applicable parts:

> Section 1.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (14th Amendment)

As previously stated, the Supreme Court has held in *Roe v. Wade* that the Constitution is broad enough that it allows a woman to terminate her pregnancy if she should so choose under the "right to privacy." However, as also stated, the Fourteenth Amendment explains that the states are not permitted to make laws which would "abridge the privileges or immunities of citizens" (14th Amendment). The Supreme Court is thereby taking an extremely broad view of the Fourteenth Amendment and essentially deciding that these "privileges or immunities of citizens" create the so-called right to privacy (14th Amendment). However, it could equally be argued that these do not create a right to privacy. Just as Justice Black pointed out in Griswold "The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not" (*Griswold v. Connecticut*, 1965). Justice Black makes an excellent point. For example, laws which prevent a person from stealing are deemed by the government to be constitutional, as a result, the government has determined that these do not violate the Fourteenth Amendment as stealing is not deemed to be a "privilege or immunity" under the Fourteenth Amendment. Justice Black points out that there is no absolute law which prevents all

governmental invasion in the lives of citizens. The Supreme Court then has determined in *Roe* that for a woman to choose to seek an abortion constitutes one of these “privileges or immunities.” However, the Supreme Court has arbitrarily made that decision since there is no specific provision in the Constitution that outlines which things citizens should have privileges or immunities from.

In examining the Ninth Amendment as referenced in *Roe v. Wade*, it states in applicable parts: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people” (Ninth Amendment). The Supreme Court again takes a broad view of the Constitution as it argued that in addition to the Fourteenth Amendment, the Ninth Amendment also helped to create the “right to privacy.” The Ninth Amendment simply explains that there will be certain rights which will be given to the people, and the Supreme Court thereby takes an extremely broad interpretation of this amendment when it explains that this allows a right to privacy. Again, this is the same thing which occurred with the Court’s interpretation of the Fourteenth Amendment. The Supreme Court has arbitrarily decided that abortion is one of the things which falls under one of the rights which “shall not be construed to deny or disparage others retained by the people.” (Ninth Amendment). The result of the Supreme Court’s interpretation of the Fourteenth and Ninth Amendment’s is the right of privacy which the Supreme Court held in *Roe v. Wade* applied to abortion. Thus, arguments that the Fourteenth and Ninth Amendments do not apply to abortion can be made as Justice Black has stated that The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals, but there is not (*Griswold v. Connecticut*, 1965). Therefore, it could equally be stated that the right to have an abortion does not fall under this protection as the Supreme Court

has arbitrarily decided that it does. In order to fully understand the right of privacy it is important to look to its origins. These origins lie in the Supreme Court case of *Griswold v. Connecticut*.

Compelling State Interest

The Supreme Court noted in *Roe v. Wade* three reasons for which criminal abortion laws existed prior to the Court's ruling in the same. The first is that:

> It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers. *(Roe v. Wade*, 1973)

Essentially, the Supreme Court is arguing that the idea that abortion is wrong is an outdated idea and that no one really cares about these laws anymore, and thus they argue that abortion should be permitted. However, one could argue that the Supreme Court more was arguing from a place of personal feelings rather than an unbiased interpretation of the Constitution. The Supreme Court then went on to state its second reason which is as follows:

> A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the

> development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy. (*Roe v. Wade*, 1973)

In this second reason, the Supreme Court argues that abortion used to be very unsafe to the women. They are simply giving the history of abortion and then go on to explain that the other reason abortion statutes have been in place so long is that abortions have traditionally been unsafe for the women. The Supreme Court then goes on to say that "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient" (*Roe v. Wade*, 1973). The Supreme Court with this statement is arguing that a state interest exists in that the state must ensure that abortions must be treated as any other medical procedure and must not harm the patient. Finally, the Supreme Court notes that:

> The third reason is the State's interest -- some phrase it in terms of duty -- in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is

> involved, the State may assert interests beyond the protection of the pregnant woman alone. (*Roe v. Wade*, 1973)

This third reason the Supreme Court addresses a second state interest besides the health of the women. It is discussing the state interest of protecting prenatal life. During the time of *Roe v. Wade*, it was a theory that life began at conception. If this is the case then the Court reasons that it is a legitimate state interest that prenatal life is protected should the states, choose to do so. Based upon these three reasons, it can be seen that the Supreme Court is arguing more from a place of societal norms rather than a strict interpretation of the law. The first reason simply notes that views of abortion being wrong are simply outdated, and society does not care about these laws anymore. However, the Supreme Court is to interpret the Constitution not according to modern views, but what the founders of the same intended it to mean. The second reason simply focuses on the mother's health and the Supreme Court essentially is arguing that as long as the woman is protected, abortion is acceptable. Finally, the Court argues that abortion is a state interest as the states may care about prenatal life. However, the Supreme Court did not leave this issue up to the states as it held:

> that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case. (*Roe v. Wade*, 1973)

What this did is essentially invalidate the state abortion statute. The Court also held that the Texas statute was overbroad, and essentiall, that it is not a state issue. It is argued however, that the Supreme Court erred in its holding in *Roe v. Wade*. If there truly is a state interest in protecting prenatal life, even if "at least *potential* life is involved," the states should be able to

decide for themselves if abortion shall be permitted. The Supreme Court said itself in *Roe v. Wade*, “Where certain "fundamental rights" are involved, regulation limiting these rights may be justified only by a "compelling state interest," and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake” (*Roe v. Wade*, 1973). Essentially, the Court held that abortion was not a legitimate state interest for Texas; however, one could argue that the Supreme Court erred in its holding as the Court as previously stated, that the interest in prenatal life, even if it is only potentially life, is a state interest and the state should be allowed to decide upon abortion statutes for itself.

Justice Rehnquist’s Dissenting Opinion in *Roe v. Wade*

As previously examined in addressing the “right to privacy”, the Supreme Court stated in *Roe v. Wade* in applicable parts as follows:

> 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, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. (*Roe v. Wade*, 1973)

Justice Rehnquist again wrote a dissenting opinion in *Roe v. Wade* stating:

> Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. 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 *Katz v. United States*, 389 U.S. 347 (1967). *(Roe v. Wade*, 1973)

Here Justice Rehnquist argues that the Fourth Amendment applies only to searches and seizures, and not to abortion as this is not a search nor a seizure. Furthermore, he argues that the *Katz* case, as cited in *Roe,* does not apply as that case deal with searches and seizures. He argues that *Roe* does not have anything to do with this matter. In conclusion, then Justice Rehnquist argues in his dissenting opinion that this right to privacy does not apply in *Roe*.

Conclusion

The case of *Marbury v. Madison* was examined in which the Supreme Court granted itself the power of Judicial Review which allowed it to review laws and decide upon their constitutionality. As a result only the Supreme Court may determine whether laws are indeed constitutional. The right to privacy was addressed next as it is the main pillar used by the Supreme Court in the landmark case of *Roe v. Wade* when the court held that abortion was constitutional. The wording of the Fourth, Fifth, Ninth, and Fourteenth Amendments was examined as the Supreme Court held that "zones of privacy" exist under these amendments and that abortion falls under one of these zones as well as does a woman's choice whether to terminate her pregnancy.

The Supreme Court of course determines the meaning of the Constitution as *Marbury v. Madison,* has explained, and thus what the Supreme Court decides is final. However, the constitutionality of the right to privacy can be challenged. This study analyzed the wording of the various amendments discussed in *Roe v. Wade* and *Griswold v. Connecticut* and these

amendments do not seem to pertain to the matter of privacy whatsoever. In fact, the Fourth Amendment was the only one which discussed a form of privacy, but this only applied to searches and seizures being unlawful without a warrant. The Supreme Court in *Roe v. Wade* and *Griswold v. Connecticut* took such a broad interpretation of these amendments that they arguable erred in their notion that a "right to privacy" exists under the Constitution.

As has been shown, in *Olmstead v. United States,* the Supreme Court originally applied the Fourth Amendment to circumstances concerning searches and seizures. The Supreme Court arguably interpreted the amendment the way it was intended to be used in *Olmstead* as the Court held that the defendants' Fourth Amendment rights were not violated due to the fact that no "actual physical invasion of his house or curtilage for the purpose of making a seizure" (*Olmstead v. United States,* 1928). *Olmstead* shows the way the Supreme Court used to interpret the Fourth Amendment in that it used to apply it only to cases concerning searches and seizures. *Griswold v. Connecticut* was then examined next as the Court begins to expand upon the application of the Fourth Amendment.

Griswold is one of the first cases where the Supreme Court began to apply the Fourth Amendment to not only cases involving searches and seizures but to other areas where the Court held that a "right of privacy" applied. In the case Justice Black wrote a dissenting opinion, challenging the majority opinion as unconstitutional. Justice Black argued that "The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals" (*Griswold v. Connecticut*, 1965). However, he stated that there was no such right. He then went on to argue that the Fourth Amendment may only be applied to cases dealing with searches and seizures, and that the Court may not simply declare there is a general "right to

privacy" whenever a citizen does not want the government to be involved in his or her business. Many of these same issues arose in *Katz v. United States* and again Justice Black wrote a dissenting opinion.

The majority in *Katz* held that the defendant's Fourth Amendment rights had been violated regardless of the fact that there was no physical entrance in the area occupied by the defendant. However, Justice Black argued in his dissenting opinion that eavesdropping via an electronic device does not constitute a search or seizure, and thus he argued that the defendant's Fourth Amendment rights were not violated. He even went so far as to say that the Court was rewriting the Fourth Amendment in order to update it, and he declared this to be unconstitutional. Finally, in his dissenting opinion, Justice Black quoted the Fourth Amendment and explained how it is only applicable to searches and seizures and that the Court may not make this so called "right to privacy" and apply it to any issue it likes. Essentially, Justice Black argued in his dissenting opinion that the only area where privacy is permitted under the Fourth Amendment is in the area of searches and seizures.

Also addressed was the case of *Katz v. Unites States*. The Supreme Court ruled in this case a few years prior to its ruling in *Roe v. Wade* and seemed to have a different conclusion in the former than it did in the latter. In *Katz v. United States*, the Supreme Court held that the Fourth Amendment cannot be translated as a general "right to privacy." The Court was also careful to ensure it explained that the Fourth Amendment is only to grant privacy in the area of searches and seizures without a warrant. The Supreme Court also noted in *Katz. v. United States* that privacy is an issue largely left to the state to legislate. The Supreme Court did note in *Roe v. Wade* that the Constitution makes no explicit mention of a right to privacy but, the Court held that zones of privacy exist under the Fourteenth and Ninth Amendments to the Constitution.

However, as noted, Justice Black explained that a citizen's right to privacy under these amendments is not absolute, and that the Supreme Court cannot arbitrarily decide which things are protected and which things are not protected from government invasion.

The Supreme Court thus, seems to change its stance on the issue of the right to privacy as it first explains in *Katz v. United States* that the right to privacy cannot pertain to issues other than searches and seizures; however, in *Roe v. Wade* seems to take a significantly broad interpretation of the Constitution which seems so far from the actual wording of the Constitution that it is argued that the Constitution really does not create this so called "right to privacy."

The final issue this study analyzed was that of a "compelling state interest." The Supreme Court had three issues which it addressed in *Roe v. Wade* with the issue of the Texas abortion statute. The first was that the Court argued that abortion laws were outdated as they were simply used to "illicit sexual conduct." Secondly, the Court held that the other reason abortion statutes still existed is that abortion used to be unsafe for the woman. As long as the women was unharmed, the Court argued that abortion would be acceptable. Finally, the Supreme Court explained its third reason abortion statutes still existed. This was the "compelling state interest." Essentially, the Court argued that in addition to the health of the woman seeking the abortion, the states may be concerned with the prenatal life. The Court noted that even if it could not be confirmed that the fetus was alive, the possibility that it may be alive is enough to create a state interest.

Therefore, if a compelling state interest exists, the state may bar that action. In this case that would mean barring abortion in Texas, as the Supreme Court held in *Roe v. Wade* that the Texas abortion statute was unconstitutional. In summation the Supreme Court ultimately has invented the notion that a "right to privacy" exists under the Fourth, Fifth, Ninth, and Fourteenth

Amendments to the Constitution. As examined, Justice Black has noted in various cases that the Constitution does not create a general "right to privacy" which may be applied to any issue the Court chooses. The only area which may receive privacy under the Constitution is that pertaining to searches and seizures. The Ninth and Fourteenth Amendment protects citizens from certain governmental invasions, but as Justice Black noted this is not an absolute right. Furthermore, he also noted that the Supreme Court may not arbitrarily decide which areas may or may not be invaded by the government.

However, it can clearly bee seen that the Supreme Court has taken an extremely broad interpretation of the Constitution, and it has arguably given it a meaning which the founders did not intend. If this is the case, that the Constitution does not create a general "right to privacy" then based upon the Supreme Court's rational in *Roe v. Wade*, abortion would be unconstitutional as the only reason the Court was able to say it was constitutional is due to the fact that they argued there is a right to privacy and this right prevents government interference in regard to what a women does with her body.

The majority in *Roe v. Wade* in discussing abortion held that:

> 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, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. (*Roe v. Wade*, 1973)

However, Justice Rehnquist wrote a dissenting opinion and argued that the "right of privacy" does not apply to the case nor does the Fourth Amendment. Justice Rehnquist made the same

arguments in *Roe v. Wade* as did Justice Black in *Griswold v. Connecticut* and *Katz v. United States*. It is indisputable that the Supreme Court has changed the meaning and application of the Fourth Amendment over time. In early cases such as *Olmstead v. United States,* the Court applied the Fourth Amendment only to cases dealing with searches and seizures. However, in later cases such as *Griswold v. Connecticut* and *Katz v. United States* the Supreme Court began applying the Fourth Amendment to issues not pertaining to issues of searches and seizures and essentially interpreted the amendment to mean nothing more than a "right to privacy" from government invasion. Justice Black wrote dissenting opinions in such cases and argued that this interpretation was not only a stretch but a complete rewrite of the Fourth Amendment which did not reflect the meaning of the amendment. Due to the Supreme Court's interpretation of the Fourteenth and Ninth Amendments the Court was able to hold in *Roe* that:

> 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, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. (*Roe v. Wade*, 1973)

Justice Black argued in similar cases in his dissenting opinions that this type of interpretation of these amendments is unconstitutional and Justice Rehnquist made this argument in his dissenting opinion in *Roe*. If these dissenting judges are correct in that the wording of the Fourth Amendment only applies to issues concerning searches and seizures, and that the protections from governmental invasion found in the Fourteenth and Ninth Amendments do not guarantee absolute freedom from governmental invasion into a person's privacy then an argument that

abortion should not fall under one of these areas of protection from governmental invasion is a legitimate one.

References

14th Amendment. (n.d.). Retrieved January 3, 2020, from Cornell Law School: https://www.law.cornell.edu/constitution/amendmentxiv

Boyd v. United States (Supreme Court of the United States February 1, 1886). Retrieved February 24, 2020, from https://advance.lexis.com/document/?pdmfid=1516831&crid=9a33b97f-7732-4693-a5b5-f3a388da2314&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-HFK0-003B-H2DW-00000-00&pdcontentcomponentid=6443&pdshepid=urn%3AcontentItem%3A7XW4-F4R1-2NS

Fifth Amendment. (n.d.). Retrieved January 3, 2020, from Cornell Law School: https://www.law.cornell.edu/constitution/fifth_amendment

Fourth Amendment. (n.d.). Retrieved January 3, 2020, from Cornell Law School: https://www.law.cornell.edu/constitution/fourth_amendment

Griswold v. Connecticut, 496 (Supreme Court of the United States June 7, 1965). Retrieved January 3, 2020, from https://advance.lexis.com/document/?pdmfid=1516831&crid=0129ca3f-6404-49be-9d2d-6d12d9579967&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-GMB0-003B-S0YC-00000-00&pddocid=urn%3AcontentItem%3A3S4X-GMB0-003B-S0YC-00000-00&pdcontentco

Katz v. United States, 35 (Supreme Court of the United States December 18, 1967). Retrieved January 3, 2020, from https://advance.lexis.com/document/?pdmfid=1516831&crid=7d77d6a5-f3aa-46c6-b790-b548d13cc190&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-FS40-003B-S29Y-00000-00&pddocid=urn%3AcontentItem%3A3S4X-FS40-003B-S29Y-00000-00&pdcontentco

Marbury v. Madison (Supreme Court of the United States February 24, 1803). Retrieved January 3, 2020, from https://advance.lexis.com/document/?pdmfid=1516831&crid=119ea518-894a-41c1-aaca-b36336910bfe&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-KWW0-003B-H16C-00000-00&pddocid=urn%3AcontentItem%3A3S4X-KWW0-003B-H16C-00000-00&pdcontentco

Ninth Amendment. (n.d.). Retrieved January 3, 2020, from Cornell Law School: https://www.law.cornell.edu/constitution/ninth_amendment

Olmstead v. United States, 493, 532 and 533. (Supreme Court of the United States June 4, 1928). Retrieved February 24, 2020, from https://advance.lexis.com/document/?pdmfid=1516831&crid=cc3f6627-54a6-446f-ab8d-26868f3e2a81&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-FDB0-003B-72SH-00000-00&pdcontentcomponentid=6443&pdshepid=urn%3AcontentItem%3A7XW4-F4R1-2NS

Roe v. Wade, 70-18 (Supreme Court of the United States January 22, 1973). Retrieved January 3, 2020, from https://advance.lexis.com/document/?pdmfid=1516831&crid=e29d7888-6d32-4a5e-8e3e-4eca4bcc6ef2&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-CYB0-003B-S4J4-00000-00&pddocid=urn%3AcontentItem%3A3S4X-CYB0-003B-S4J4-00000-00&pdcontentco