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Perpetual Conflict or Compromise? The Cost of Domestic Legitimacy in the Realm of
Women's Human Rights: A Case Study on the Right to an Abortion

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I. Introduction

With its turbulent and volatile legal evolution, the right to an abortion in the United States still remains a highly contested issue and has developed into one of the most divisive topics within modern legal discourse. This right, which was established in 1973 by the groundbreaking case of *Roe v. Wade*, legally allows a woman to surgically or medicinally choose to terminate her pregnancy. (Solinger, 1998, 95) In recent years, this right has again been thrust into the political arena with the advancement of pre-natal and stem cell technology where an already embroiled debate has been renewed. (Page, 2006, 25-26) In particular, both the political and legal contention now centers around when a human being attains legal and physical personhood. Additionally, this controversy also surrounds when precisely that entity is endowed with all the rights and liberties enjoyed by citizens of the United States. (Tribe, 1990, 115-116) Ultimately, these and other elements of this perpetual debate have created a stagnating problematic situation for rights claims. In both a legal and human rights context, the mother's and unborn child's rights are constructed to conflict and eventually compete in this realm of bodily jurisdiction.

Over the past several decades since the formal inception of the right to an abortion in modern law, a definitive and increasingly constraining shift has been identified within both the political and legal realm. (Solinger, 1998, 103-104) As other legal scholars have pointed out, this restrictive and transformative process has predominately manifested in abortion jurisprudence. As Luker notes, these increasing restraints on the right to abortion appear to be largely launched by pro-life activists and conservative legislative pundits

fervently committed to eventually rendering this right void and ineffective. (Luker, 1985, 216) Many legal experts have thus characterized this constraining movement as a political and social backlash to claims of judicial legislation on such a complex issue at the core of the human experience. (Solum, 2006, 26) With an increasing politicization of this women's right of reproductive choice in both the legal and political realms of society, this perpetual "clash of absolutes" appears to have no end in sight. (Tribe, 1990, 237-238)

After much review of the legal literature on this perennial debate, I believe this increasingly prohibitory shift can be explained through an examination of the gradual development of abortion jurisprudence. I argue that this historical evolution of abortion case law can be deconstructed into four phases: extension, articulation, transition and restriction. The first phase of extension encompasses approximately the decade before and up to the formal enunciation of a right to an abortion in *Roe v. Wade* (1973). This period began in 1965 with the textual establishment and extension of reproductive privacy to married persons in *Griswold v. CT*. (Richards, 1986, 14-15) Here, the Court found that the precincts of the bedroom and subsequent marital activities lie within a zone of privacy. Thus, the prohibition on the use of contraceptives was found unconstitutional under this logic. (Conkle, 1987, 3) In *Roe*, the Court again utilized the zone of privacy framework to include the right of a woman to choose to terminate her pregnancy. (Butler and Walbert, 1992, 101-102) Thus, this initial phase of extension significantly characterizes the Supreme Court's construction of the conceptual boundaries that embody and further expand privacy rights to pregnant women.

The second phase of articulation spans from the time of *Roe* to around the mid-1980s. This phase in abortion jurisprudence is largely depicted by a rise in legislative and statutory attempts in regulating the public funding aspects of the right to an abortion. (Solinger, 1998, 112-113) During this time, the Court made strident attempts at both clarifying and re-affirming their decision in *Roe* by invalidating legislation and regulations aimed at narrowing the parameters of abortion rights. Both the *Thornburgh* and *Akron* cases demonstrate the Court's commitment to adhering to the legal precedent set by *Roe* and maintaining the legal force of the right to an abortion.

The third phase, transition, occurred predominantly in the late 1980s and early 1990s. This changing phase portrayed another attempt by the Court to bring clarity to their decisive stance on the abortion issue. During these years, the Court drastically shifted their use of both the logical framework and testing standards constructed in *Roe*. The plurality's decision in *Webster* endorsed a substantial "restatement" of *Roe*'s trimester scheme. (Sullivan and Gunther, 2004, 573) In *Casey*, the Court appeared to follow through by transitioning to a new standard of review that is still in effect today. (Howard, 1993, 7-8)

The final, current restriction phase is demonstrated by several cases decided during the early part of the 21st century. This constraining phase has opened the door for anti-abortion legal professionals, political pundits and state legislators alike to begin dismantling the foundational elements central to the legitimacy of the right to an abortion. (Richards, 1986, 21) As this new phase kicks into gear with various legal challenges to *Roe* bubbling up through the American judicial system everyday, one of the main

purposes of this thesis is to examine the most salient factors impacting the stability and legitimacy of emergent women's rights within the United States.

By deconstructing the political underpinnings and legal rationale of the right to an abortion through a systematic case law analysis, I will demonstrate that this right has been incrementally destabilized. This instability embedded in abortion jurisprudence has been primarily produced by a combination of textual ambiguity in the case law and judicial ambivalence regarding this complex area of law. In addition, I argue that the use of the largely discredited substantive due process doctrine to ground this contentious right has also contributed to the lack of legal stability. (Wimberly, 2007, 8-9) I assert that when these elements culminate in the realm of reproductive privacy the right to terminate a pregnancy becomes increasingly unstable and contested.

With mounting legal instability due to a consistent lack of textual clarification by the Supreme Court, the right to an abortion is essentially fixated on a foundation of constitutional quicksand. (Howard, 1993, 12) Through an in-depth chronological synthesis of reproductive privacy case law and abortion jurisprudence in the main text of this thesis, I argue that this significant degree of systematic instability ultimately results in an inability to establish a firm legitimate foundation for abortion in constitutional law. The absence of a solidified legal foundation creates a porous illegitimate quality to the right to an abortion and imbues a level of vulnerability to the overturning power of the judiciary. Coupled with a largely fragmented Court on the issue, the legal future for the right to an abortion is a highly volatile and unpredictable one. With the recent additions of conservative Justices John Roberts and Samuel Alito, the legality of the right to an abortion may in fact drastically change with the coming years. (Summers, 2006, 10)

Thus, a demonstrated failure on the part of the Court to devise a legitimate, stable framework for the legal grounding of this right has virtually compromised any future attainment of legitimacy through an entrenchment approach to constitutional law. With this in mind, I emphasize the necessity to depart from grounding this contentious right in a domestic rigid body of law, which has proved to be both ineffective and unsuccessful. Instead, I argue there first needs to be a re-conceptualization of the right to an abortion to incorporate a human rights element. The use of human rights oriented language would speak to the highly complex and multi-faceted nature of this right. Additionally, an integration of human rights language in codifying this right would acknowledge the inherent dignity, equality and self-determination of women as independent human beings with a freedom from the traditional constraints of society. (Thomas, 1997, 5-6)

With a new, revitalized conception of the right to an abortion drawing from human rights discourse, it is then essential to construct both an enforcement and interpretive mechanism that will recognize and adhere to this re-conceptualization. Thus, I argue that in order to eventually implement this new contextual framework to legitimize this women's right domestically, some international human rights legal values must be assimilated with constitutional norms. (Thomas, 1997, 7) In other words, this conceptual transition requires the right to an abortion to be first identified as a women's human right and thus stabilized by adopting an automatic self-executing mechanism in the domestic rule of law. (Hovell and Williams, 2005, 12)

This contextual integration of international and domestic bodies of law would not only imbue universally accepted legal values and norms in domestic jurisprudence, but also serve to eliminate the instability evident in abortion case law. By directing allocating

human rights to individuals through the implementation of a self-executing provision in law, this would largely bypass the subjectivity and illegitimacy of an overly active, legislating judiciary. (Richardson, 1990, 4) In essence, I assert this transformative shift in concept and legal framework from a domestic juridical structure to an international, human rights platform will prove more efficacious. This approach re-inscribes international legal legitimacy and eliminates the Court's convoluted lexicon of terms upholding the right to an abortion.

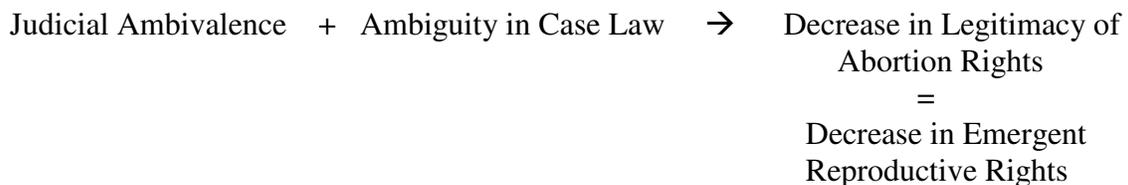
II. Research Design and Methodology

In order to effectively and efficiently engage in an academic discussion of the numerous facets impacting abortion jurisprudence in the legal realm, an in-depth comprehensive definition of terms utilized in this thesis is essential. By both textually clarifying and substantially grounding these terms, this will bring a level of precision necessary to academically depict this convoluted issue. Additionally, an extensive review of the legal literature regarding this debate imbues a level of validity in my construction of variables. Through this discussion and review, I am able to adequately define the variables used to formulate my hypothesis and clearly sketch out the subsequent format of this thesis.

The hypothesis espoused in this section is characterized by a cumulative, bi-variable effect that directly impacts the dependent variable. To be more precise, the focus of this thesis asserts that an increase in judicial ambivalence, coupled with an increase in

textual ambiguity has directly led to this complex area of law remaining unsettled. With reproductive privacy and abortion jurisprudence residing in this uncertain legal state, the legitimacy of the right to an abortion is thus unstable and challenged. (Howard, 1993, 12)

As demonstrated in recent judicial decisions on the issue, I argue that this pervasive instability and legal inconsistency has essentially left the door open for pro-life advocates and legislatures to begin dismantling this right. (Page, 2006, 16-17) In a larger sense, with highly a fragmented and convoluted abortion jurisprudence, I believe this has consequently created a problematic precedent in modern law that significantly compromises the future emergence of women’s reproductive rights. (Smearman, 2006, 12)



The pictorial representation above demonstrates the central argument in this thesis. This clear diagram shows that both judicial ambivalence and textual ambiguity are the independent variables and that the degree of legitimacy of women’s abortion rights is the dependent variable. It is my assertion that culmination of judicial ambivalence and textual ambiguity in abortion case law directly undermines the legitimacy of the domestic right to an abortion. In other words, the combination of both factors has produced a lower degree of legitimacy of this right, which has contributed to its slow disintegration as a legal right. (Butler and Walbert, 1992, 91-92)

As other scholars suggest, the recent increase in aggressive legislative attacks on this right have created, what I term, a restrictive phase in reproductive rights

jurisprudence as mentioned previously. (Page, 2006, 145-147) Thus, I also argue that the prominence of both elements in the decrease of legitimacy of abortion rights transmits to the larger umbrella term of reproductive rights. By negatively affecting the right to an abortion, this constraining shift prompted by the foundational instability of reproductive privacy has also led to a decrease in the legitimacy of emergent reproductive rights. Thus, the continuation of a significant lack of textual clarity and judicial consensus on the issue of abortion may produce dire, legal consequences for other reproductive rights. As Page suggests, “the groundwork is already being laid for the day that the federally protected right to contraception fades away” and other reproductive rights such as the use of in-vitro fertility technology (IVF) and amniocentesis options. (2006, 165-166) I assert that the continued deteriorating legitimacy of the right to an abortion will have a negative over-arching impact and subsequently open the door for increased federal limitations on reproductive rights. (Jansen, 2007, 8-9)

There are several important and salient concepts that have been introduced by this hypothesis, centering on ambivalence, ambiguity and legitimacy. Scholars within the field of both political science and legal studies have long debated the true definitional meaning of these rhetorical and contextual constructions. Yet, it is meaningful and essential to engage in a descriptive, definitional discourse to provide clarity and precision to the use of these concepts. This literature analysis and definitional discussion will greatly aid in clearly structuring my argument and synthesizing the abortion jurisprudence in the main section of this thesis.

The term ambivalence, by its own definitional nature, suggests and conjures analogous words such as confusion, hesitancy or uncertainty. (Mishkin, 1983, 2-3)

Although these are all pertinent connotations of the word, they present difficulty in the term's particular utilization given the variance of interpretations of this word. To be more precise, I will employ this concept of ambivalence to refer to a dilemma of indecision and hesitancy among the justices of the Supreme Court. Other scholars, such as Mishkin, utilize this term in a similar fashion in describing a judicial apprehension to provide definitive parameters and set standards, as well as imparting a solidified precedent in case law. (1983, 5-6) The ambivalence depicted here is specifically characterized as judicial ambivalence within the thesis and occurs along a continuous spectrum of varying degrees. (Romero, 2006, 2)

The difficulty here is that this basic conceptualization of judicial abstinence in sufficiently clarifying precedents and establishing solid standards can be attributed to a variety of causes. Additionally, this term is not widely accepted, documented and discussed within much of the legal literature, which leaves little leeway in crafting a largely applicable term. Thus, formulating a valid and precise definition for this concept is contextually harder given the lack of peer-reviewed literature in referencing this term. Nevertheless, I have distilled a working definition of judicial ambivalence with the help of prior formulations from both Mishkin and Romero.

Thus, it is important to discuss some of the background elements prompting ambivalence among the justices in order to fully devise and construct a clear definition. One of these key elements is the long debated role of judicial review in defining case law and interpreting the contextual meaning of the Constitution. (Gunther and Sullivan, 2004, 19-20) This side discussion on the legitimacy and differing attitudes toward judicial

review will help to provide insight into the possible underlying reasons for renewed ambivalence among the justices with abortion case law.

Judicial review refers to the power and authority invested in the Supreme Court justices to make the determination if actions of the executive branch and regulations from the legislature are in accordance with the Constitution. (Sullivan and Gunther, 2004, 15) The contention surrounding this concept stems from its non-constitutional basis and literal extension of explicit power over the legal system. (Nowlin, 2007, 4) In response to this controversy, two competing schools of thought (judicial restraint and judicial activism) have evolved that highlight both the dangers and benefits associated with this expansion of judicial power. (Tushnet, 1987, 2) In order to determine the presence of judicial ambivalence in reproductive case law decisions, it is helpful to first describe the ideological constructs of each school. Then it is possible to identify the potential, psychological implications that adopting either one of these ideologies may have on the mindset of a justice scrutinizing abortion jurisprudence. (Gerhardt, 2002, 17-18)

The two schools of thought primarily diverge of the concept of the degree of activity in the interpretation process of reviewing provisions for possible violation of Constitutional amendments. (Tushnet, 1987, 3) Judicial restraint is the restrictive stance, which advocates and only legitimizes the usage of judicial power if the law or legislation in question is in “clear collision” with the principles of the Constitution. (Sullivan and Gunther, 2004, 9). As articulated by Chief Justice Marshall in his opinion for the Court in the *Marbury* case, the duty of the justices is to uphold the integrity and continuity of the Constitution. Additionally, Marshall cautioned that arbitrarily overstepping the bounds of judicial jurisdiction would result in the destabilization and implicit undermining of the

rule of law. (*Marbury v. Madison* 1803) In essence, this position portrayed the Constitution as an immutable, supreme body of law that is resistant to change. With this mindset, modern strict constructionist justices such as Justice Scalia expound and call for a reserved stance in the determination and re-interpretation of constitutional principles. (Gerhardt, 2002, 17)

Central to this stance is an understanding of applied ambivalence, which emphasizes a predisposition of apprehension in deciphering the constitutionality of laws. For example, when it comes to personal liberties and especially abortion case law, we see that the adoption of this conservative, judicial ideology by a justice significantly impacts their decision. (Gerhardt, 2002, 19) In particular, Supreme Court justices that adhere to this school of thought are more likely to refrain from expanding the scope of “personal liberty” even before a specific case reaches the Court. (Lindquist, Smith, and Cross, 2007, 9-10) This suggests that justices who are categorized as strict constructivists are pre-disposed to be less pro-active in extending individual rights not explicitly mentioned in the Constitution. I argue that justices who practice judicial restraint are not only going to strongly abstain from clarifying and grounding the unenumerated right to an abortion, but also stridently protest its survival in law. (Gerhardt, 2002, 19)

On the flipside, judicial activism was popularized by the Warren court during the 1960s and calls for a pro-active re-interpretation of constitutional principles. Judicial utilization of this school of thought has led to both the expansion of numerous rights and the overturning of state statutes and legislation. (Sullivan and Gunther, 2004, 11) In the instance of abortion case law, this stance becomes even more controversial when cases are decided that hinge on the right to privacy. (Lindquist, Smith, and Cross, 2007, 2) This

liberal take on the role of the judicial branch openly opposes ambivalence regarding expanding individual liberties. Additionally, it emphasizes the necessity for actively shaping the rigid nature of law to adapt to the complexities and societal changes of our new age of modernity. (Tushnet, 1987, 2-3) Justices that adhere to this school of thought (such as Justice O'Connor) often support the continued existence of *Roe* and make textual efforts in clarifying its framework in law. (Gerhardt, 2002, 44)

The controversy surrounding both competing schools of thought have led to stark criticism of the proper role of judicial review in reproductive privacy cases. As many legal critics argue, the decision in *Roe* is often viewed as an unparalleled, illegitimate exercise of judicial activism. (Tribe, 1990, 79) Tribe and other legal scholars have identified the vast contention and subsequent conflict particularly produced by the engagement of judicial activism in abortion case law. (Tushnet, 1987, 4) I argue that this staunch disagreement, controversy and non-consensus amongst the justices over judicial review methodology has prompted judicial ambivalence in abortion jurisprudence.

One of the primary elements that reveal this degree of ambivalence is an examination of the decision outcome. In particular, an analysis on the occurrence of split decisions, unanimous decisions, concurrences and dissents in abortion case law implies the existence of some ambivalence in arriving at a consensus on the issue. Examining decision outcomes is an effective tool of measurement since it textually displays the reasons each justice gave for either their disagreement or consensus. (Stearns, 2002, 1-2) By tracking which specific justice agreed, dissented or concurred illuminates the degree and efficacy of the attempt to settle the case law. The element of disagreement inherent within split decision rulings in abortion jurisprudence suggests there is an apprehension

on the part of the justices to confer a solidified, binding precedent in this contentious area of law. (Gerhardt, 2002, 22)

Another way I plan to measure judicial ambivalence is to examine if there was a shift or complete replacement of the framework used to justify a particular ruling. The presence of a shift is indicative of ambivalence in that a transition in logic, as demonstrated in the *Casey* ruling, suggests a judicial non-consensus with the central elements of the legal rationale. (Butler and Walbert, 1992, 18) Furthermore, completely discarding a previously held framework also signals a degree of judicial apprehension in that the Court must have identified a serious flaw in the logic for it to be unworkable. (Conkle, 1987, 3) With an underlying degree of contestation with the core principles established by a precedent, this suggests a hesitancy to reaffirm the original logic and to further abstain from clarifying it. (Garfield, 1986, 12) Here, judicial ambivalence is evidenced by an apprehension on the part of the Court to continue utilizing previously established legal rationale.

A similar method that will be employed to test for ambivalence is the success and occurrence rate of partial/full overturns and reversals in the case law. Here, the holding will be analyzed in comparison to the prior related case and also according to whether there was a successful overturning of the case, as illustrated by *Thornburgh* overturning *Akron*. (Butler and Walbert, 1992, 18) If an abortion or privacy case was overturned, this indicates ambivalence insofar that the logic and parameters established by the case was later viewed as fallacious possibly due to hesitancy in making a premature ruling. (Zampa, 1990, 6-7) There will be some discourse later in the case law analysis on the implications and innate ambivalence implied within the concept of stare decisis, which

literally translates to “stand by things decided.” (Solum, 2006, 26) This legalistic principle advocates adhering to prior legal precedents unless the logic has proven unworkable for future relevant case law. (Butler and Walbert, 1992, 201) This analysis on judicial overturning of previous abortion case law will be the last measure of judicial ambivalence used in this thesis.

The second term widely utilized in this thesis is textual ambiguity. This concept, like ambivalence, also generates a multitude of definitions with a great degree of variance. For purpose of precision and accuracy, this term must also be defined in a systematic way and measured in a valid manner to ensure reliability during my case law synthesis.

The central meaning of ambiguity, as used in this thesis, makes reference to the inconclusive meanings and unclear central holdings of Supreme Court decisions within the reproductive privacy area of law. (Zampa, 1990, 2) The emphasis here is on the confusing and often contradictory language employed by the Court possibly as a means to circumvent providing strict, solidified standards. (Schneider, 1993, 10) In essence, the distinction here is that specific court rulings (especially privacy and abortion case law) directly fail to provide a firm set of parameters and standards for the right to an abortion. Additionally, the Court utilizes convoluted terms and vague language that remains largely undefined and thus unclear. (Howard, 1993, 12) I assert that this textual ambiguity is produced by a severe lack of clarity within the decision, which further adds to the legal instability of this right. (Robertson, 1987, 7-8) In contrast with ambivalence, which is the mental/psychological component, ambiguity is thus the textually based physical element. It is manifested within the lack of precise and comprehensive definitions or standards to

sufficiently clarify the parameters of this newly established right to an abortion. (Howard, 1993, 12)

One of the most salient methods of testing for both subtle and overt forms of ambiguity in case law is through an in-depth, literary analysis of the decision from the Court. In particular, examining the rhetoric/diction usage and if the logic built upon these linguistic constructions withstands through time. As exemplified most prominently by the contentious nature of the right to privacy, rhetoric formulation plays an important role in the acceptance and legitimacy of the holding.

The newly developed, legal construction of the “right to reproductive privacy,” as established by *Griswold v. Connecticut* (1965) still continues to maintain an aura of ambiguity given its purely interpretational and non-textual foundations. (Zampa, 1990, 3) I argue that this inherent lack of clarity in specifying the exact legal and constitutional roots of “privacy” has greatly buttressed the continuation of instability within the right to an abortion in modern law. (Schneider, 1993, 12-13) Coupled with loose, privacy-gearred, Constitutional interpretation, this conception of a right to privacy is implicitly founded from the outlying, shadowy realm of specifically the First, Third, Fourth, Fifth, and Ninth Amendments. (Sullivan and Gunther, 2004, 547) It is evident that the legal implications of the *Griswold* case certainly left the door open for ambiguity in *Roe v. Wade* (1973), which explicitly legalized and politicized a women’s choice in her reproductive capacities.

Another method of measuring ambiguity is to determine if there was a clear attempt to re-affirm or clarify the logic in subsequent rulings of reproductive privacy case law. As exemplified in both the *Webster* and *Casey* decisions, the Court made a definitive

effort to re-affirm the central point in *Roe*, which was that the initial ruling still remains applicable in today's society. (Johnson and Alexander, 2003, 5-6) Here, the implied necessity to re-affirm or re-emphasize the primary argument suggests there was a significant degree of ambiguity in the initial ruling. As demonstrated later in the case law synthesis, the Court appeared compelled to provide more lucidity in order to uphold the ruling, but instead added another layer of complexity to already convoluted abortion jurisprudence. (Howard, 1993, 5)

Another method of testing for ambiguity is conducting an analysis on the reaction to the court decision, with an emphasis on the amount of contestation by legal scholars and legislative pundits. It is undeniable that the divisive *Roe v. Wade* (1973) decision generated mass amounts of controversy and immediate attempts to overturn the ruling. (Tribe, 1990, 17) Yet, the sheer amount of political and legal contestation suggests the existence of ambiguous and over-broad logic/standards. Many legal scholars such as Tribe and Luker argue that highly ambiguous language and inconsistent standards had essentially allowed for pro-life advocates to launch effective attacks in undermining the right to an abortion in law. (Luker, 1984, 156-157) I argue that the porous nature of the right to an abortion is created in part by this textual ambiguity pervasive throughout abortion jurisprudence.

The final term that needs clarification and a precise definition in this thesis is the concept of legitimacy. The term legitimacy can also be defined and characterized by a myriad of varying conceptual ideas and formulations. Yet, a more exact description of this term as utilized in this thesis refers to the belief that judicial decrees are held as lawful, well reasoned and in compliance with national regulation and standards. In other

words, a law that is legitimate is not widely contested over the course of decades and is also enforced as dictated by the Court. (Farrell, 1998, 8) This multi-faceted term incorporates not only a legal and governmental element, but also contains a societal element. (Butler and Walbert, 1992, 102) Specifically, this thesis is attempting to examine the level of legitimacy by analyzing its approval and acceptance level on the legal dimension. I intend to measure legitimacy primarily on two levels: textually and judicially. The first way is to analyze whether the Supreme Court adhered to precedent in reproductive case law. If the previous decision were valid and legitimate, it would still prove workable and not be subject to changing subjective views in the matter. (Zampa, 1990, 3) The second way I aim to measure legitimacy is to examine the degree of contestation in the forms of legal challenges to the Court's decision. This is evidenced by the subsequent cases to *Roe*, in which regulations directly challenged the legitimacy of the right to an abortion. (Tribe, 1990, 109-110)

Similar to gauging ambivalence and ambiguity among the justices, measuring legitimacy would involve textual analysis of each privacy and reproductive Supreme Court case listed below. I speculate that through examining adherence to legal precedent by lower circuit courts, as well as the Supreme Court adherence, this will exemplify the degree of legitimacy. (Farrell, 1998, 9)

Legal scholars also look at the effects of contestation on the legitimacy of the Supreme Court itself. As Tyler and Mitchell both note, the institutional legitimacy of the Court has also been challenged over the years as a result of their decision in *Roe*. (1994, 9-10) Their conceptualization of judicial legitimacy ties back to an analysis of judicial review. They assert that the Court's engagement with judicial activism by creating a right

to an abortion in law has consequently led many legal analysts to question the integrity and legitimacy of the Court. (Tyler and Mitchell, 1994, 10) As other scholars argue, these critical attacks on the Court's illegitimate use of judicial authority through their policy-making for the nation on the issue of abortion has had serious effects on the legal sustainability and legitimacy of the right to an abortion. (Smolin, 1992, 21)

The case law that will be examined and synthesized is primarily drawn from the privacy and reproductive realms of law. The cases to be analyzed include: Foundations of Privacy [*Lochner v. NY* (1905)], Transition to Reproductive Privacy [*Griswold v. CT* (1965)], Establishment of a Right to Abortion [*Roe v. Wade* (1973)], Regulation of Abortion [*Akron v. Akron Center of Reproductive Health* (1983), *Thornburgh v. ACOG* (1986)], Reaffirmation and Modification of Roe [*Webster v. Reproductive Services* (1989)], Departure from Roe [*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)]. (Sullivan and Gunther, 2004) Each case will be systematically analyzed and measured for all three facets of my hypothesis: judicial ambivalence, textual ambiguity and legitimacy.

The framework of the main text in this thesis is constructed in a chronological manner. As displayed above, I will begin with a discussion on the foundations of privacy in constitutional case law that precede *Roe*. The analysis in *Lochner* will provide a broad understanding of the Court's construction of the substantive due process doctrine and its conceptualization of liberty as applied to individuals. (Conkle, 1987, 2) This examination will highlight the problematic nature with the use of substantive due process in justifying and subsequently expanding civil liberties in constitutional jurisprudence. (Johnson and Alexander, 2003, 3)

The next section will focus on the formal articulation of reproductive privacy and its utilization to ground the right to an abortion in *Roe*. A textual analysis of *Griswold* will again emphasize the problem with the Court's heavy reliance on the substantive due process doctrine as a means of justification given its capacity for judicial subjectivity, judicial activism and inconsistent legal logic. (Wimberly, 2007, 7-8) Additionally, it will also mark the Court's use of highly ambiguous language and departure from sufficiently clarifying their logic without textually-derived constitutional principles. (Zampa, 1990, 3) The following synthesis on *Roe* will again depict this problematic trend amongst the members of the Court in utilizing unclear terms and logic to essentially construct a highly controversial, unenumerated right to an abortion. (Farrell, 1993, 10)

The following section will continue to trace these problematic elements with the regulation of the right to an abortion. The synthesis of both *Akron* and *Thornburgh* will demonstrate the intensive divisiveness among the member of the Court and subsequent ambivalence in continuing to apply the *Roe* framework. (Prieto, 1984, 5-6) Judicial contestation regarding the inherent and central logic in *Roe* reaches its pinnacle in these cases, which again highlights the problematic nature of using ambiguous language coupled with judicial activism in this complex area of law. (Smolin, 1992, 2-3)

The last section in the case law synthesis deals with the re-affirmation/modification and subsequent departure from *Roe*. The cases that will be analyzed are both *Webster* and *Casey*, which will further demonstrate the Court's struggle to sufficiently clarify and legitimately ground the right to an abortion using valid constitutional principles. (Chlapowski, 1991, 4) This examination of the case law will also mark the beginning of the Court's departure for *Roe*'s central constructs and the

adoption of a new, equally ambiguous standard of review. (Zampa, 1990, 9) The Court's adamant discarding of Roe's framework and logic implicates an ambivalence to maintain this flawed foundation. By delivering a highly fragmented, contradictory and splintered decision in *Casey*, the Court has essentially paved the road for new aggressive regulations to be largely upheld in the coming years (Schneider, 1993, 2-3)

As many legal scholars speculate, the Court's overt failure to develop and implement a solid, consistent framework has significantly compromised the stability and subsequent legitimacy of this right in modern law. (Howard, 1993, 12) I argue that this transition into a restrictive phase in abortion jurisprudence further exemplifies the highly problematic and fallacious nature of utilizing ambiguous terms, coupled with an ambivalent judiciary to adequately clarify them.

Following the abortion case law synthesis is a brief discussion of the implications resulting from the Court's actions in abortion jurisprudence within the results analysis section. Additionally, I review the accuracy of my hypothesis and initial assertion made in this section. With the results of my analysis laid out, I then transition into the concluding section of this thesis: human right policy implications. Within this section, I make my final assertion that the right to an abortion needs to be re-conceptualized and implemented using international human rights law. (Thomas, 1997, 3) I argue that by transitioning the right to an abortion into a women's human right using a international law schema, this will prove more efficacious in both implementing and enforcing the right domestically. (Jackson, 2003, 12) I believe by adopting a South African approach to women's human rights, coupled with the inclusion of a self-executing provision in

domestic law, the right to an abortion will be more stable and legitimate within the United States. (Hovell and Williams, 2005, 11-12)

III. Reproductive Jurisprudence Synthesis

A. Legal Foundations of Privacy: The Legacy of Lochner

The legal history of abortion jurisprudence has been considered to be both highly contentious and textually inconsistent. Furthermore, the right to an abortion is largely hinged on the problematic right to privacy. I argue this contingency essentially orchestrates an unstable foundation for the subsequent right to an abortion and largely compromises its future legitimacy in constitutional jurisprudence. (Johnson and Alexander, 2003, 2) As identified by numerous legal scholars, the right to an abortion as established in *Roe* has been increasingly dismantled through inconsistent judicial decisions and aggressive abortion regulations since its inception in 1973. (Howard, 1993, 10)

To truly understand the parameters of the current abortion debate, it is important to first lay the historical foundation and legal underpinnings of the concept of the right to an abortion. For this reason, I will begin with a discussion on the judicial formulation and construction process of the right to privacy. This detailed and systematic analysis approach will be helpful in shedding some light on the underlying facets and distinct elements largely contributing to the instability manifested within current abortion jurisprudence.

I assert that through an in-depth synthesis of each case detailing the evolution of the right to privacy, it is evident that textual ambiguity and substantive due process logic culminate to significantly destabilize the right to privacy. (Garfield, 1986, 17) With a highly problematic and unstable right to privacy assembled by the Court, this then creates an insecure foundation for the right to an abortion. (Johnson and Alexander, 2003, 5)

The legal construction of the right to privacy is a multi-faceted, complex and highly unstable concept that was fabricated utilizing the substantive due process clause. (Conkle, 1987, 2) This utilization of substantive due process has prompted a flurry of contestation by legal and non-legal scholars alike. (Chlapowski, 1991, 2) It is evident that the usage of the substantive due process clause from the Fourteenth Amendment has left the door open for criticism of judicial subjectivity and legitimacy. Additionally, the use of this doctrine has also created a risky situation in which judicial ambivalence coupled with foundational ambiguity in case law has precipitated an inconsistent right to privacy. I argue that an unstable right to privacy solely upholding the right to an abortion is problematic and leads to a lessened degree of legitimacy in modern law. (Wimberly, 2007, 15-16)

The *Lochner v. New York* case of 1905 essentially disabled a New York statute, which placed a cap on the amount of hours worked by bakers to sixty hours per week. (Koehlinger, 1990, 5) In a 5-4 decision, the Court held that “the right to make a contract to purchase or sell labor” was inherently embedded within the due process clause of the Fourteenth Amendment. (Garfield, 1986, 2) Justice Peckham, in writing the opinion of the court, specifically rendered the New York statute as having “no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the

hours of labor, in the occupation of a baker.” (*Lochner v. New York* 1905) Here, the Court made a distinctive effort to clarify that the intent and objective of the law was to regulate occupation hours, without a legislative agenda to safeguard the health and welfare of employees. (Conkle, 1987, 2-3)

Although there was a textual recognition by the majority of the Court that categorized this statute as an inherent invasion of the employee’s liberty of contract, the Court did not expressly purport that this connotation of “liberty” was directly applicable or fundamental to the right of the individual. (Garfield, 1986, 2-3) As demonstrated throughout privacy case law, the net result and legal consequence of this landmark case was first the construction of highly ambiguous terminology relating to the fundamental rights of the individual. Secondly, the application of “special due process protection for liberty of contract” has been drastically expanded and manipulated to include privacy rights. (Garfield, 1986, 3)

This problematic element of the usage of due process from the Fourteenth Amendment in relation to fundamental rights and the subsequent reversal of the statute was explicitly noted in the dissent of *Lochner*. Justice Holmes recognized the inherent danger when the utilization of “the word ‘liberty,’ in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion.” (*Lochner v. New York* 1905) Here, his assertion was predicated on the Court’s seemingly arbitrary expansion and definitional construction of the term “liberty” to encompass the implicit rights of the individual in economic matters. In other words, the contention regarding the ruling in this case centers on an unwarranted extension of the applicability of the due process clause. (Garfield, 1986, 4) Additionally, scholars also argue that this is based on

the subjective opinions and views of the Supreme Court justices on suitable economic policy. (Bernstein, 2005, 12)

Justice Holmes' apprehensive message regarding the Court's broad interpretation of liberty touched on the larger issue of judicial subjectivity in the determination of contentious Supreme Court cases. (Grano, 2000, 8) As demonstrated in his dissent, Holmes made the valid assertion that "various decisions of this court that state constitutions and state laws may regulate life in many ways... which, equally with this, interfere with the liberty to contract," such as Sunday laws, school laws and archaic usury laws. (*Lochner v. New York* 1905) In contrast, the ruling in *Lochner* emphasized a new, emergent infringement of the fundamental rights of citizens stemming from judicial subjectivity that has lived on to characterize Supreme court cases during the *Lochner* Era. (Grano, 2000, 9) It was during this span of time that the Court largely invalidated economic regulations and restrictions that inhibited liberty of contract. (Chlapowski, 1991, 2) This initial recognition of judicial subjectivity by Justice Holmes speaks to the legitimacy and future stability of privacy case rulings in that justices' "agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." (*Lochner v. New York* 1905)

Through the latter analysis of privacy and abortion case law in this thesis, I argue that this judicial subjectivity coupled with contradictory case rulings over the years has essentially buttressed a foundation of instability upon which right to an abortion lies. (Garfield, 1990, 3) Furthermore, this implicit subjectivity of the justices and politicization of the Court has played a significant role in the formulation of the concept of judicial ambivalence. (Wimberly, 2007, 8)

Similar cautionary messages were also evident and heavily echoed in the dissent of Justice Harlan. He began by delineating the appropriate/proper arenas for judicial activity and legislative authority: “Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation.” (*Lochner v. New York* 1905) Here, Justice Harlan touched on a major theme prevalent throughout privacy and latter abortion case law. He argued that judicial decisions relating to the right to privacy and the fundamental implications on individual liberty are severely unstable due in part to its striking resemblance to judicial activism. (Grano, 2000, 7-8) Given the overwhelming contestation and disapproval of the Court’s affinity for overstepping judicial boundaries in civil liberties case law, this further serves to destabilize and uproot the validity and legitimacy of the right to privacy. (Tushnet, 1987, 2-3)

In fact, numerous legal scholars have come to coin the *Lochner* Era of Supreme Court cases as an “era of judicial activism.” (Chlapowski, 1991, 3) As Justice Harlan explicitly asserted, the primary function of the Supreme Court is to make a valid, justified determination if the law or statute in question is essentially in “conflict with the 14th Amendment, without enlarging the scope of the amendment far beyond its original purpose.” (*Lochner v. New York* 1905) In other words, by expanding “constitutional protections to the realm of economic affairs” and domestic policy arenas, this is a vivid example of judicial activism. Additionally, scholars argue that this expansion is a risky encroachment into the dominion of political and legislative authorities, which assume a varying amount of accountability to constituents, unlike the lifetime appointed Supreme Court justices. (Chlapowski, 1991, 3-4)

In *Lochner*, Justice Harlan vociferously maintained that the proper battling and decision-making arena for this case, and others like it, is within the legislative realm of the government. (Grano, 2000, 8) He argued that “a decision that the New York statute is void under the 14th Amendment will, in [my] opinion, involve consequences of a far-reaching and mischievous character.” (*Lochner v. New York* 1905) In this rather critical statement, Justice Harlan made a prescient observation about the problematic nature of the utilization of the due process clause of the Fourteenth Amendment. He pointed to its substantial flaws through its manipulation to procure the subsequent right to privacy in American law. (*Lochner v. New York* 1905)

The concept of substantive due process, as formulated in *Lochner*, is textually derived from the due process clause of the Fourteenth Amendment in the United States Constitution: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” (U.S. Const. art. VII, § 4, cl. 1) In combination with the due process clause of the Fifth Amendment, it essentially safeguards and protects “‘liberty’ from unwarranted governmental interference.” (Chlapowski, 1991, 2) This legal concept principally encompasses a combination of basic procedural rights, as well as the defending a set of substantive rights. (Garfield, 1986, 2) Incorporated within the substantive section are those rights dealing with both liberty and autonomy of the individual, especially those deemed to be fundamental. (Koehlinger, 1990, 6) Through the application of this legal theory, the Supreme Court is not only able to allocate special protection to certain liberties of the individual via judicial discretion, but also controversially expand the scope and power of judicial review. (Chlapowski, 1991, 3)

The power of expansion that is inherent within the substantive due process clause rests upon a two-tier foundation. The first tier is the incorporation doctrine, which permits the Supreme Court to implement and adopt detailed provisions that would apply to states under the due process clause. (Wimberly, 2007, 2) In other words, this theory asserts that many of the constitutional amendments (particularly the Bill of Rights) are in essence incorporated into the Due Process Clause of the Fourteenth Amendment. (Sullivan and Gunther, 2004, 469) Although the majority of the Court has never outright accepted this concept, there has been a significant amount of discussion on the distinction between “selective incorporation” and “total incorporation.” (Gunther and Sullivan, 2004, 469)

One of the most prominent articulations on the idea of selective incorporation can be found in *Palko v. Connecticut* (1937). The case revolved around a federal court re-trial rendering a first-degree murder conviction for Palko and the incorporation of the Fifth Amendment to protect against double jeopardy. (Gunther and Sullivan, 2004, 470) Justice Cardoza, in his deliverance of the majority opinion, asserted that “[The Due Process Clause of the Fourteenth Amendment protects those rights which are] of the very essence of a scheme of ordered liberty.” (Vogel, 2007, 2) Here, Cardoza crafted an approach that delineates “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions” from those which do not deserve this higher level of protection. (Gunther and Sullivan, 2004, 470) He concluded that certain rights, including the double jeopardy guarantee contested in the case, do not meet these outlined requirements and adding to the concept of selective incorporation. (Vogel, 2007, 2-3)

In contrast, the idea of total incorporation as articulated by Justice Black refrains from this method of rights categorization as espoused by Justice Cardoza in *Palko*. In *Adamson v. California* (ten years after *Palko*), Cardoza's incorporation approach proved to be more favorable in the eyes of the Court than Justice Black's formulation within the dissent. (Gunther and Sullivan, 2004, 469) Justice Black argued that the full and total incorporation of all of the Bill of Rights was set out as an "original purpose" of specifically the Fourteenth Amendment. (Gunther and Sullivan, 2004, 470)

In addition to his description of the concept of total incorporation, Justice Black transitioned into the second section of his dissent with an inherent warning. He asserted the innate danger and "consequences of the Court's practice of substituting its own concepts of decency and fundamental justice...and enforcing that [as part of the] Bill of Rights," which is a severe departure from the essential function of the Supreme Court. (*Palko v. Connecticut* 1937) Within this passage, Justice Black also conceived of the vast implications that the "literal application of some or all of the provisions of the Bill of Rights to the States would unwisely increase the sum total powers of this Court to invalidate state legislation." (Gunther and Sullivan, 2004, 471) Again, this emphasizes the problematic nature of the use of substantive due process in procedural law given its capacity to not only controversially expand the realm of judicial discretion, but also to equip the Court with a legalistic mechanism to usurp power from the legislature.

The second tier of substantive due process is the fundamental rights theory. This theory states the Supreme Court can safeguard and dispense increased protections for fundamental rights, without a dependence on textual justification explicitly listed within the U.S. Constitution. (Wimberly, 2007, 6) As previously discussed, Justice Cardoza also

played a significant role in molding and formulating this concept inherent within his majority opinion in *Palko*. His rather elusive depiction of fundamental rights and liberties, which deserve increased protection, in practice, enables the Supreme Court to apply strict scrutiny. With a standard of review involving strict scrutiny, numerous governmental actions deemed to burden the exercise of those rights could thus be invalidated. (Vogel, 2007, 4)

These rights, which are deemed fundamental by the Court, are not only ambiguous in nature, but also their textual base of justification has frequently shifted between three textual sources in the Constitution: “the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause” with a recent re-emergence within the due process clause. (Vogel, 2007, 5) I argue that this contentious combination of ambiguous, undefined terms of liberty with a failure on the part of the Court to substantiate a legitimate foundation has demonstrated the fundamental rights theory to be a risky endeavor at best. (Wimberly, 2007, 3) Coupled with a highly debated and largely unsettled incorporation theory, I assert that the implementation of the substantive due process clause of the Fourteenth Amendment as the primary grounding for the right to privacy has proved problematic. As other scholars agree, the Court’s use of this discredited doctrine has been instrumental in the construction of a highly unstable foundation that undermines the legal legitimacy of the right to an abortion. (Tribe, 1990, 92-93)

B. Transitions to Reproductive Privacy: Is Griswold a Revival of Lochner?

Griswold v. Connecticut is considered by many legal scholars to be the fundamental case that textually substantiated the right to privacy as applied to the reproductive sector of law. (Tribe, 1990, 94) The background of the case involved an Executive Director from the Planned Parenthood League and a licensed physician from the Yale Medical School. Both individuals “gave information, instruction, and medical advice to married persons as to the means of preventing conception.” (*Griswold v. Connecticut* 1965) According to two provisions under Connecticut state law, these actions undertaken by both professionals were in found to be in violation and subsequently punishable by a \$100 fine. (*Griswold v. Connecticut* 1965)

Justice Douglas delivered the opinion of the court. He specifically highlighted the existence of “specific guarantees in the Bill of Rights [that] have penumbras, formed by emanations from those guarantees...and create zones of privacy.” (*Griswold v. Connecticut* 1965) The Court determined that the constitutionality of the Connecticut statute, which prohibited the distribution of information regarding means of contraception, was fallacious in criminalizing this action. (Wimberly, 2007, 7) In the eyes of the Court, this case provided the fitting situation in which to textually construct and establish the right to reproductive privacy using the Due Process Clause of the Fourteenth Amendment. (Johnson and Alexander, 2003, 3)

As demonstrated in the case law, the decision by the majority to utilize “Lochner [as the] guide” has incited a firestorm of controversy not only among critical legal scholars, but also more vividly within the precincts of the Supreme Court. (*Griswold v.*

Connecticut 1965) Given the vast contestation regarding the use of substantive due process rationale, the Court instead refrained from relying too heavily on invoking language of *Lochner* to legitimize their decision in *Griswold*. (Chlapowski, 1991, 3) Instead, the majority in *Griswold* appears to supplement and almost attempt to disguise their use of substantive due process by significantly modifying an incorporationist approach to privacy. (Zampa, 1990, 3)

The Court argued that the penumbras and emanations of the Bill of Rights (particularly the First, Third, Fourth, Fifth and Ninth Amendment) fundamentally produce a zone of privacy specifically for married persons. (Garfield, 1986, 5) The Court essentially attempted to theoretically depart from *Lochner*, but at the same time utilized the substantive due process doctrine to ground the concept of reproductive liberty and privacy. (Wimberly, 2007, 8) As other scholars agree, I argue that this attempt proves to be fairly unconvincing and actually destabilizes the grounding of privacy in law. (Zampa, 1990, 3) With the Court's use of this discredited doctrine coupled with an ambiguous depiction of the textual location of this unenumerated right to privacy, I assert that this significantly weakens the stability and subsequent legitimacy of the right to an abortion. (Chlapowski, 1991, 3)

This interpretive approach by Justice Douglas has been identified to be problematic for several reasons. First, the *Lochner* method of employing substantive due process frames the concept of liberty, as derived from the Fourteenth Amendment's Due Process clause. (Koehlinger, 1990, 2) With liberty viewed as fundamental to the individual, these rights then require and oblige an increased degree of judicial scrutiny to governmental actions that would be interpreted to infringe on this type of liberty.

(Chlapowski, 1991, 3) In other words, through the usage of substantive due process in civil liberties cases, justices are enabled to insert subjective, personal opinions regarding their ideas of appropriate laws, which manifests in the increased degree of protection for rights they deem “fundamental.” (Zampa, 1990, 3)

As Kadlec notes, this judicial subjectivity is further entrenched in *Griswold* because the substantive due process doctrine is structured in such a way that it is essentially an all-or-nothing approach in rights protection. The problem here is that because this doctrine lacks solid, established parameters regarding the specific criteria that labels a right fundamental, the justices are allowed free reign in their decision-making process. (Kadlec, 2007, 8) Similarly, Justice Harlan’s dissent in *Poe v. Ullman*, which is incorporated by reference into his *Griswold* concurrence, also highlights this problem. He stated “Due Process has not been reduced to any formula; its content cannot be determined by reference to any code.” (*Poe v. Ullman* 1961) Justice Harlan clearly hinted at the difficulty in sufficiently justifying the invocation of substantive due process in order to establish fundamental rights protection in law. In a similar vein, Wimberly also notes that the problematic, subjective nature of the Court’s use of substantive due process in *Griswold* largely contributes to their ambiguous basis for decision-making. (2007, 9) I argue that this lack of objective, consistent standards further undermines and complicates reproductive privacy law.

Despite clearly stating that they do not assume a “super-legislature” position, the Court in *Griswold* still struck down the Connecticut statute without providing a textually substantiated basis for their decision. (*Griswold v. Connecticut* 1965) Rather, the Court legitimized their claim by acknowledging the existence of “sacred precincts of marital

bedrooms,” which implies an area exempt from governmental intrusion (Wimberly, 2007, 9-10) Because substantive due process safeguards “those liberties that are deeply rooted in this Nation’s history and tradition,” the Court is virtually granted the capacity to define fundamental rights based on personal ideology and preserve traditional values by enshrining them in constitutional law. (Conkle, 1987, 5)

Justice Black, within his dissent, distinguished the danger of judicial subjectivity and argued in the same vein. He stated “that [the *Lochner*] formula, based on subjective considerations of ‘natural justice’ is no less dangerous when used to enforce this Court’s view about personal rights.” (*Griswold v. Connecticut* 1965) As Justice Black noted, the central problem here is that a newly constructed right, such as the subsequent right to an abortion, is founded upon this unstable principle. (Garfield, 1986, 6) This foundational dependency creates a situation, in which this right is subject to fluctuation in legality with shifting social norms. Additionally, it also renders state legislatures incapable of creating laws and regulations that would satisfy the degree of judicial scrutiny to attain constitutionality. (Zampa, 1990, 3-4) I argue that this implicit subjectivity on the part of the Court under the shroud of substantive due process has contributed to the instability and challenged legitimacy of the right to privacy.

Another problematic element associated with the use of substantive due process in *Griswold* is the manner by which the Court essentially supercedes the confines of judicial review. (Kadlec, 2007, 9) Legal scholars subscribing to a strict constructivist school of thought argue that the Supreme Court is held as an objective, legal arm of the government. (Garfield, 1986, 5) Due to the Court’s active role in carving out a right of reproductive privacy with little to substantiate their logic, many legal analysts argue that

the Court in *Griswold* failed to even slightly adhere to the textual confines of the U.S. Constitution. (Basiak, 2005, 5) The Court's actions in *Griswold* are highly reminiscent of the *Lochner* Court's aggressive engagement in judicial activism through their use of substantive due process to invalidate much economic federal and state legislation. (Borgmann, 2006, 5-6) As many scholars agree, the Court's inherent revival of *Lochnerian* analysis has prompted both increased legal scrutiny and has called into question the legitimacy of the Court's decision in *Griswold*. (Krotoszynski, 2002, 3) I argue that this pervasive legal contestation of the Court's decision-making faculties in *Griswold* actually destabilizes and weakens the right to reproductive privacy in law.

It is important to clarify and define the type of judicial activism discussed by the justices in their respective dissents. Judicial activism, in and of itself, is not inherently negative depending on how one views the primary role of the Supreme Court. (Bernstein, 2005, 18-19) Yet, in respect to *Griswold*, both Justice Black and Justice Stewart are wary of the brand of *Lochnerian* judicial activism that expands the power of the Court. Particularly, Justice Black argued that it is not the proper role of the Court "to invalidate any legislative acts which the judges find irrational, unreasonable or offensive." (*Griswold v. Connecticut* 1965) I assert that this largely discredited form of judicial activism, as noted by Justice Black, significantly compromises the institutional integrity of the Court, which trickles down to seriously impact the legitimacy of this right to reproductive privacy.

Borgmann and other scholars assert that claims of inappropriate judicial activism in *Griswold* are essentially two-fold. First, the Court essentially constructs subjective rights that are not explicitly enumerated in the text of the Constitution. Secondly, the

Court largely alters or completely strikes down long-standing federal statutes with little to substantiate their decision. (2006, 12-13) As Justice Black later articulated, the central criticism of utilizing substantive due process is that “the power to make such decisions is of course that of a legislative body” and not within the jurisdiction of the Court.

(*Griswold v. Connecticut* 1965) I argue that *Lochner*’s past of notoriously invalidating legislation still appears to haunt modern day judicial opinions, as well as spark criticism regarding the capacity of substantive due process to open the door for overly assertive judicial activism.

In his dissent, Justice Black also touched on another highly problematic issue within the *Griswold* decision. He highlighted the troublesome nature of the Court’s use of textually ambiguous terms and noted the subsequent definitional struggles in *Griswold*. (Sullivan and Gunther, 2004, 553) As Wimberly and other scholars note, it appears the majority has engaged the Due Process clause, coupled with the penumbras of the Bill of Rights, for a strategic advantage. (2007, 8-9) By using language encompassing freedom and liberty as well as its capacity to “nationalize” this newly established right to privacy to all state governments, this tactic by the Court seems to have created a highly scattered and convoluted decision. (Johnson and Alexander, 2003, 3-4) Justice Black stated that the term “privacy is a broad, abstract and ambiguous concept...[and] can easily be interpreted as a constitutional ban against many things other than searches and seizures.” (*Griswold v. Connecticut* 1965) Here, there is an emphasis on the definitional flexibility and open-textured nature of the concept of privacy, which largely highlights its vulnerability to subsequent changes and alterations of meaning in later case law. (Wimberly, 2007, 9) With an already ambiguous, unremunerated term of privacy, I assert

that this lays the foundation for instability given its impermanent nature and poses further textual problems for the Court given the lack of clarity in grounding this term.

This difficulty of both elaborating and grounding the existence of privacy in *Griswold*, as articulated by Justice Black, increasingly exacerbates an already highly divisive and fragmented Court. (Smolin, 1992, 25-26) This ambiguity is not only prevalent in the terminology used to clarify the right, but also on a methodological level. (Moore, 1989, 9-10) After a careful review of the case law, I argue that the strenuous struggle by the Court to develop a firm, legally grounded foundation for the right to privacy proves to be largely unsuccessful. This is greatly exemplified by the varying and radically differing opinions, concurrences and dissents launched by other members of the Court.

The legal rationale for solidifying this right in modern constitutional law ranges from the highly abstract penumbras and emanations theory described by Justice Douglas to a subtle underlying existence of implied privacy within the Ninth Amendment as depicted by Justice Goldberg. (Sullivan and Gunther, 2004, 547-548) Coupled with the concept of liberty stemming from the Due Process clause of the Fourteenth Amendment, these vastly different interpretations of where the unenumerated right to privacy lies creates as significant amount of confusion in the jurisprudence. (Gottlieb, 1989, 5-6) There are even justices, primarily Justice Black and Justice Stewart in dissenting, that virtually object to all the constitutionally unbased claims of privacy by other members of the Court. (Sullivan and Gunther, 2004, 552-553) I argue that the blatant lack of judicial consensus on the foundation for privacy as a legal right, in addition to textual and

methodological ambiguity, appears to generate a significant degree of ambivalence among the Court justices. (Zampa, 1990, 3)

This judicial ambivalence in *Griswold* is mainly evidenced by several components in the case law. As legal scholars note, these components include: the divisiveness of the opinion of the Court, the disjointed nature of the legal rationale, the inability to come to a consensus on both the existence and application of privacy. In addition, the striking criticisms regarding lack of textual support for the decision of the Court and the apparent apprehension to deliver a legally binding decision based on the discredited, *Lochner* version of substantive due process also exemplifies some form of judicial ambivalence. (Garfield, 1986, 5) With these elements culminating in the *Griswold* decision, I argue that the criticized illegitimacy of the Court as an objective institution filters down to manifest in a largely unstable and challenged right to privacy. This consequently is a highly weakened foundation for the right to an abortion and significantly contributes to its volatility and uncertainty in modern law.

Over the years, many legal scholars have identified the landmark *Griswold v. Connecticut* case of 1965 as the untimely revival of *Lochner*. (Garfield, 1986, 4) The biting stigma associated with *Lochnerian* substantive due process usage is further buttressed by terminological and methodological ambiguity. Consequently, these elements have produced a largely fragmented and divided Supreme Court. (Smolin, 1992, 25-26) It appears the ambivalence of the Court has hindered the provision of clear and sufficient parameters for the scope of the right to reproductive privacy. The Court's failure to bring an adequate level of clarity to their decision in *Griswold* has significantly contributed to the instability and wavering legitimacy of privacy as a constitutional right.

(Sullivan and Gunther, 2004, 556) Furthermore, scholars argue that accusations of judicial subjectivity leading to the illegitimate usurpation of the role of the legislation have added another dimension of the contentiousness of this decision. (Garfield, 1986, 2)

Legal analysts, such as Zampa and Wimberly, have been vocal within the literature asserting that this aggressive brand of judicial review has significantly politicized and jeopardized the Supreme Court's validity and legal legitimacy. (Zampa, 1990, 3-4) I assert a more pertinent implication lies in that fact that the ambiguity and difficulty in substantiating privacy has had over-arching effects on the subsequent right to an abortion. I argue that the textual and legal instability of the right to privacy has been perpetuated by the Court to latter reproductive privacy cases and has consequently weakened the legitimacy of abortion.

C. Formal Articulation of a Right to an Abortion: Roe v. Wade

Roe v. Wade is the groundbreaking Supreme Court decision that essentially struck down a Texas abortion law, which criminalized the procurement of an abortion except "by medical advice for the purpose of saving the life of the mother." (*Roe v. Wade* 1973) As many scholars point out, this was not the first time the Court assumed an active role on a civil liberty issue and engaged in judicial policy-making (i.e. *Griswold*). (Zampa, 1990, 3) Yet, it did signify an expansion and broadening of the scope of liberty and privacy to a woman's right to elect to terminate her pregnancy. (Garfield, 1986, 7) As demonstrated in *Griswold*, the grounding of such a contentious heated issue was far from simplistic. As scholars note, the Court again seemed to struggle with clarifying it's legal

rationale and stabilizing its textual legitimacy for the right to an abortion. (Gottlieb, 1988, 11) As demonstrated in the case law, I assert that the Court's repeated reliance on the problematic substantive due process clause of the Fourteenth Amendment continues to breed instability and subsequent illegitimacy in reproductive privacy jurisprudence. (Borgmann, 2006, 13)

The majority of the Court, with Justice Blackmun delivering the opinion, commenced with an acknowledgement of the historical nature of abortion. Through this analysis dating from the "Persian Empire abortifacients" to modern "American law," the Court established the historical acceptability of abortion as a medical procedure. (Koehlinger, 1990, 11) With this historical perspective in place, Justice Blackmun initiated another textual grappling match with the unenumerated right to privacy.

After citing previous relevant case law in his synthesis of the actual foundation of the right to privacy, Justice Black concluded:

"...whether it be founded in the 14th Amendment's concept of personal liberty [as] we feel it is, or, as the District Court determined, in the [Ninth Amendment], is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (*Roe v. Wade* 1973)

As Garfield points out, this one decisive sentence illustrates that not only did the Court finally concede and recognize that the right to privacy is a substantive due process right, but also that it is applicable to the right to an abortion. (1986, 6-7)

The significance here is that abortion, as it is determined to be implicit to a person's ordered liberty, is deemed fundamental and requires extra protection on the part of the Supreme Court. (Borgmann, 2006, 5) As a fundamental right, the burden is thus placed upon the shoulders of legislature to craft regulations that are "justified only by a

compelling state interest” in order to limit this right. Additionally, Justice Blackmun stated that regulations “must be narrowly drawn” in order to pass the strict judicial scrutiny reserved for fundamental rights. (*Roe v. Wade* 1973) The concern expressed by many legal scholars is that by categorizing the right to an abortion as both a fundamental right and a substantive due process right, the Court obscures the functionality of the American legal system as a whole. (Chalpowski, 1991, 3) In other words, the Court’s use of the problematic substantive due process doctrine to frame the right to an abortion as fundamental enables them to disrupt the structure of the legal system by usurping authority from the legislature. (Wimberly, 2007, 8-9) With the capacity to illegitimately enact over-arching judicial legislation under the mask of substantive due process, I argue that the Court essentially renders the legislature incapacitated with stringent judicial standards. (Zampa, 1990, 4) Thus, I assert that the Court constructs an unstable and ambiguous platform for the right to an abortion, which is furthermore demonstrated by the implementation of the trimester framework.

The trimester framework formulated and enacted in *Roe* has still left many legal scholars scratching their heads over its legal rationale. The majority of the Court in *Roe* began by delineating and articulating the legal distinctions between viable and non-viable fetuses. (Adkins, 2005, 5) Without speculating or delving into the semantic snake pit that characterizes the debate about when life begins, the Court focused on when viability (the ability of a fetus to survive outside the mother’s womb without any artificial aid) is achieved during gestation. (Farrell, 1993, 31) By drawing on medical and biological literature, the Court determined “viability is usually placed at about seven months (28 weeks).” (*Roe v. Wade* 1973) The importance of this time increment centers on when the

state's compelling interests to preserve potential life come into play, which has serious ramifications for establishing a cohesive and legitimate framework. (Zampa, 1990, 3) I argue that the trimester framework is inherently problematic because of the advancement in pre-natal technology and definitional variability in clearly defining "viability."

The actual trimester framework is structured around three identifiable state interests that the Court considers compelling. (Zampa, 1990, 3-4) From conception up until the end of the first trimester, the decision to abort a pregnancy is considered not significantly life threatening to maternal health. Thus, during the first trimester the Court allocated full decisive power to the woman and her "attending physician." (*Roe v. Wade* 1973) In the second trimester, the Court has determined that the State may intervene to regulate the abortion procedure "in promoting its interest in the health of the mother." (*Roe v. Wade* 1973) In the third trimester once viability has been established, the State's compelling interest in protecting potential human life is considered primary. (Adkins, 2005, 5-6) The Court essentially permits the State to erect regulations and provisions restricting abortion except in the case when the mother's life/health is compromised by the burden of the pregnancy. (Garfield, 1986, 7)

As evidenced by the construction of the trimester framework, the Court made it textually clear that the fetus is not a legal person while in utero. (Tribe, 1990, 115-116) The majority of the Court again felt the need to clear up lingering ambiguity regarding the terms "person" and "right to life" centrally embedded within the due process clause of the Fourteenth Amendment. (Garfield, 1986, 7-8) After thorough review of the contextual nature of these terms, the Court concluded that "the use of the word is such that it has application only postnatally." (*Roe v. Wade* 1973) Interestingly, Garfield asserts that the

progression of fetal rights, as manifested through the State as an agent of claim in the latter stages of pregnancy, seems to increase parallel to the fetus' physical maturation. (1986, 7-8) This inherent conceptualization of "fetal rights as growing over time" by the Court makes abortion regulation laws inconsistent with other forms of law. (Garfield, 1986, 8) In essence, the formula developed by the Court in *Roe* conceded that the fundamental right to privacy outweighs the State's interest in protecting fetal rights insofar that the fetus is a dependent entity. (Solinger, 1998, 96-97)

Through the enactment of the trimester framework, I argue that the Court essentially differentiated three, distinct phases during pregnancy without definitive medical certainty. In *Roe*, the Court again failed to sufficiently substantiate their legal rationale and justification for actively extending the right to privacy to encompass a right to an abortion. (Howard, 1993, 4) As Justice White noted, "the Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action...to override most existing state abortion statutes." (*Roe v. Wade* 1973) I argue that this form of unwarranted judicial activism and policy-making by the Court in *Roe* severely undermines and weakens the legitimacy of the right to an abortion. (Gunther and Sullivan, 2004, 565)

As demonstrated in the *Griswold* decision, the majority in *Roe* is again criticized for their heavy reliance on the doctrine of substantive due process due to the legislative freedom it grants the Court. (Adkins, 2005, 26) This stigma is revisited in the *Roe* decision and best articulated by Justice White in stating "in my view [the majority's] judgment an improvident and extravagant exercise of the [raw] power of judicial review."

(*Roe v. Wade* 1973) This statement greatly illustrates one of the main, problematic facets of utilizing the substantive due process analysis as a foundational justification.

Justice White touched on the fact that a substantive due process analysis orchestrates a difficult situation, in which the judicial branch subverts the authority of the legislative branch. (Garfield, 1986, 2-3) The negative implication here is that the Supreme Court is ill-equipped to engage in policy-making given their supposed neutrality from the political realm and the nature of their selection/appointment process essentially renders them immune to substantial constituent liability. (Zampa, 1990, 4) As Justice White clearly warned, the Court is treading on dangerous ground by “constitutionally disempowering” the legislature to perform their appointed duties. (*Roe v. Wade* 1973) I argue that continuation of the Court’s engagement with judicial activism in sensitive reproductive privacy cases fully hinders the democratic process and generates instability for the right to an abortion when established in this manner. (Wimberly, 2007, 8)

Another negative outcome of grounding *Roe* using substantive due process is that judicial legislating severs the legislative branch from fulfilling its duties as set out by our American system of government. Scholars agree, that it significantly undermines the federal legislature as a successful, equally vital arm of the government. Additionally, it also deprives the State legislatures from engaging in experimentation in appropriate policy arenas to develop a more socially acceptable solution to the abortion issue. (Zampa, 1990, 4-5) It is only through large-scale trial and error on the part of the states that seems to be a more suitable realm to deal with inherent social welfare issues of the public citizenry. By sending the issue back to the people of the states as Justice White suggested, this would allow the highly complex issues entrenched within the right to an

abortion to be more effectively reviewed in a proper forum. (Garfield, 1986, 7-8) Legal scholars argue that it would thus create the democratic opportunity for a sufficiently clear formulation to be derived in union with the varying social values of the local constituents in each state. (Zampa, 1990, 5)

By nationally mandating judicial policy inherently legislative in nature under substantive due process, Zampa asserts that the Court severely emasculates the beneficial role that state legislatures would play in developing a better, fine-tuned solution to the abortion issue locally. (1990, 5) As Zampa continues, the Court's usurpation of authority from local, legislative institutions also perpetuates the controversy and contention surrounding abortion given the lack of a nationwide consensus. (1990, 6) Through the Court's actions as a super-legislature in this case, the people are left incapable of playing a role in resolving the issue on a state level given the broad spectrum of differing opinions on the topic. (Garfield, 1986, 12) The absence of a national consensus on the issue of abortion (or even a consensus among the members of the Supreme Court) has been problematic for adequately legitimizing the right to an abortion in society. Additionally, I find the Court's illegitimate use of substantive due process has fanned the fires of dissent among the American people, which has triggered continuous conflict (in the form of legal challenges) between the states and the Court for essentially violating the core principles of federalism. (Zampa, 1990, 4)

Given the lack of sufficient clarity within the majority's rational analysis of the biological structure of pregnancy, this has essentially left the door open for legal criticism by those unwilling to accept substantive due process logic. (Garfield, 1986, 7) According to the logic of the *Roe* decision, the right to an abortion is fully contingent on the

existence of a right to privacy, which I argue poses the greatest risk to the stability of a legal abortion right. With a highly fragmented Court produced by the *Griswold* decision in their construction of a right to privacy, the convoluted judicial rhetoric and unclear textual legal principles substantiated by the Court in *Roe* are equally divisive. (Howard, 1993, 4) I assert that the Court again struggled with textually clarifying principles and terms that provide the primary constructs of the trimester framework, which further destabilizes the legitimacy of reproductive privacy.

Furthermore, scholars also argue that the viability testing standard is somewhat convoluted in its relation to constitutional rooted principles and the Court's justification is again fraught with the same textual ambiguity as seen in *Griswold*. (Farrell, 1993, 14-15) I argue that this divisiveness over both the decision and founding rationale essentially renders the Court in a fractured state, which perpetuates a failure to adequately clarify these concepts. By imparting an over-arching national standard on such a complex, contentious issue, the Court further raises eyebrows by engaging in judicial policymaking without an established consensus (either by the Court or public). (Zampa, 1990, 4) This Lochnerian brand of judicial activism not only weakens the legitimacy of the Court as a legal interpretative body, but also imbues the right to an abortion with instable foundational groundwork. (Moore, 1989, 2) Thus, I assert that with a highly unstable and disputed right to privacy supporting subsequent reproductive rights, the right to an abortion is largely compromised and weakened as a legal right.

As demonstrated in my discussion of the Court's formal articulation of reproductive privacy and a right to an abortion, the judiciary has struggled to provide a cohesive foundation and clear definition/meaning for the right to privacy. Additionally,

this lack of legal clarity has transferred to the right to an abortion in *Roe*. (Zampa, 1990, 4) As legal scholars note, it appears the most ambiguous piece of this puzzle is the elusive right to privacy, given its shadowy existential existence in the penumbras and emanations of the Bill of Rights. (Garfield, 1986, 5-6) With an inability to clearly and legitimately ground these rights within historical, constitutionally sound legal principles, I argue that the Court in both *Griswold* and *Roe* has essentially perpetuated this problematic tradition of judicial ambivalence and textual ambiguity. As legal scholars agree, the pervasiveness of textual ambiguity in the case law appears to be one of the problematic elements that prompt ambivalence from the justices to maintain *Roe*'s convoluted framework. (Zampa, 1990, 4-5)

As I have argued thus far, textual ambiguity has primarily arisen from convoluted logic, lack of Constitutional grounding, equivocal terms and associated meanings espoused by the Court. (Garfield, 1986, 7-8) Similarly, judicial ambivalence emanates from lack of a Court consensus, engagement in unwarranted judicial legislating and activism, lessened perceived legal legitimacy and the sheer contentiousness among members of the Court on the rationale of the decision in *Roe*. (Farrell, 1993, 9) Yet, it appears a third equally significant element further compounds the situation: substantive due process. (Smolin, 1992, 18)

As demonstrated in both *Griswold* and *Roe*, the usage of the substantive due process doctrine as a sufficient means for legally grounding not only the right to privacy, but also the right to abortion drastically destabilizes these rights in the eyes of many legal scholars. As Garfield argues, with the "ghost of *Lochner*" still attached to privacy and abortion jurisprudence, the Court's apparent affinity for enacting judicial legislation

within the reproductive rights realm has severely weakened the legitimacy of both the right to privacy and right to an abortion. (Garfield, 1986, 17) I argue this instability in reproductive privacy law imposes serious ramifications on future attempts at constructing a pragmatic approach to grounding these rights in a domestically legitimate manner.

D. Regulation of Abortion: The Akron and Thornburgh Cases

The next reproductive cases to be analyzed within this section are the legal challenges launched by critics in response to the establishment of the right to an abortion in *Roe*. During the period between *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pa. v. Casey* (1992), a backlash against the right to an abortion occurred in both American society and the political/legislative arena. This strong reaction forced the Court to re-examine not only the parameters, but also the structural integrity of the trimester framework. (Sullivan and Gunther, 2004, 572) During this time period, the state legislatures also waged a staunch and perpetual battle against the Supreme Court's legislation in *Roe* by challenging the extent of state abortion regulations. (Tribe, 1990, 126-127) This multi-faceted backlash has resulted in the following Supreme Court decisions that not only re-evaluate the finite meaning in *Roe*, but also mark the shift in standard that furthers the perennial debate on the legitimacy of the right to an abortion. (Zampa, 1990, 6)

Although other cases had reached the Court prior to *City of Akron v. Akron Center of Reproductive Health* (1983) such as *Planned Parenthood of Central Missouri v. Danforth* (1976) and *Bellotti v. Baird* (1976), the significance of *Akron* is that it indicated

the actual departure from employing the “unduly burdensome” standard and a considerable modification to the trimester framework. (Zampa, 1990, 6) As legal scholars note, this shift suggests that the legal rationale and logic initially espoused by the Court to justify their decision in *Roe* contains serious problematic facets such as ambiguous terms and largely undefined textual connections. (Mangel, 1988, 3-4) I argue that shifting legal logic and wavering case law standards exemplified in reproductive jurisprudence following *Roe* further demonstrates the illegitimacy and convoluted nature of the Court’s decision. I assert that the unclear and largely uncertain parameters erected by the Court following *Roe* exhibits the difficulty in sufficiently clarifying the textual ambiguity inherent within the Court’s previous decisions. (Howard, 1993, 4) The Court’s subsequent inability to overcome the equivocal nature of *Griswold* and *Roe* is demonstrated through a failure to provide a clear/consistent framework and indicates the deep rootedness of the instability as emphasized within my hypothesis.

The “unduly burdensome” standard, as applied in *Danforth*, was primarily utilized as a guide in administering the trimester approach to abortion regulations. (Zampa, 1990, 5) The standard refers to the concept that the State, in its attempts to regulate the procedures of abortion, may not erect regulations that constitute a substantial obstacle to the woman’s ability to choose to abort. (Howard, 1993, 6) In the particular case of *Danforth*, the undue burden standard was applied to a Missouri law that was broadly aimed at regulating abortion by requiring a written consent of the patient, her spouse, and a parent or guardian if the patient was a minor. (Zampa, 1990, 5)

Through the Court’s application of strict scrutiny to the State statutes in their determination of a compelling state interest to regulate abortion, they found that both the

spousal and parental consent provisions did prove to potentially inhibit a women's ability to decide. (*Planned Parenthood of Central Missouri v. Danforth* 1976) On the other hand, the Court upheld regulations that dealt with patient written consent and physician reporting requirements. I argue that this highlights the variability and inconsistency of the Court's standard of review. (Zampa, 1990, 5-6) As scholars note, the definitional problem here is that regulations that are "burdensome" are permissible, but regulations that are "unduly burdensome" are considered unconstitutional. (Annas, 2007, 202) I assert that this unclear, variability in definition further convolutes the jurisprudence with the Court's failure to sufficiently clarify the criteria that bumps regulations into the "unduly burdensome" category.

The lack of clarity is exemplified by the fact that the State can erect regulations (in the name of promoting potential life) requiring physicians to offer "detailed and accurate information on abortion, the status of the fetus, adoption, sources of help for childbirth, a 24 hour waiting period" as long as it does not significantly interfere or prevent women from making a independent judgment. (Annas, 2007, 202) With a distinct degree of ambiguity, coupled with the Court's failure to provide lucid guidelines in what constitutes the term "unduly," the Court began distancing itself from utilizing this standard because of its lack of clarity. (*Planned Parenthood of Central Missouri v. Danforth* 1976) Instead of devising a more clear and coherent testing standard, the Court instead reframes this convoluted test in terms of a more medical standard. (Prieto, 1984, 2-3) I argue that this shift further confuses the abortion jurisprudence and emphasizes the struggle of the Court to develop a clear, consistent framework that would increase the legitimacy of the right to an abortion.

In the *City of Akron v. Akron Center for Reproductive Health* (1976) case, the Court again reviewed and analyzed State regulations in the form of a direct legal challenge to cripple the right of abortion. (Rhoden, 1986, 4) In particular, the state of Ohio constructed an ordinance, which requires abortions after the first trimester to be performed in a hospital and prohibits the physician from performing the abortion on an unmarried minor without the consent of her parents or a court order. Additionally, the provision obliges the physician to deliver a detailed status report on the development and status of the fetus and possible date of viability, necessitates a 24 hour waiting period, and requires that the physician dispose of the fetal remains in a “humane and sanitary manner.” (*City of Akron v. Akron Center for Reproductive Health* 1976) Justice Powell, in delivering the opinion of the Court, begins by acknowledging:

“legislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a State's authority to regulate the performance of abortions.” (*Akron v. Akron Center for Reproductive Health* 1976)

The need for the Court to make this assertion suggests a serious, permeating fallacy in the original logic and textual justification of the Court in *Roe*. By the Court feeling compelled to continuously have to re-iterate and re-clarify its stance, I argue that this speaks to both the ambiguity of their decisions and the waning legitimacy of the right to an abortion. (Bridenhagen, 1984, 8) Nevertheless, the Court distinctly refrains from implementing the stare decisis doctrine, and instead reaffirms their decision in *Roe*.

The majority in *Akron* again assumed a legislative role in further affixing another dimension to the trimester framework, which again marks a shift in the stability of the legal rationale. (Bridenhagen, 1984, 7-8) As I have previously discussed, the Court has

experienced increasing pressure from State legislatures due to the imprecise nature of the requirements and parameters of the ability of legislation to regulate abortion in adherence to the Court's mandated guidelines in *Roe*. (Zampa, 1990, 6) Thus, the majority's search for clarity led them to decree that post first trimester regulations and "state's discretion to regulate on this basis does not, however, permit it to adopt abortion regulations that depart from accepted medical practice." (*Akron v. Akron Center for Reproductive Health* 1976) As Bridenhagen argues, the Court shifted the testing standard from a rational analysis of undue burden to a standard largely substantiated by modern medical knowledge of the biological factors in the stages of pregnancy. (1984, 2-3)

In essence, the Court engaged in another act of judicial legislation, in which the State is "obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered." (*Akron v. Akron Center for Reproductive Health* 1976) As Zampa argues, the issue here is that because abortion techniques and practices fail to parallel the specific trimesters during pregnancy, this requirement handed down by the majority has basically "fragmented the rigid trimester approach." (Zampa, 1990, 6) This problem subsequently obscures the legislation framework laid out in *Roe* for State compliance in regulating abortion. In the same vein, Justice O'Connor noted another problematic issue regarding the inability of the Court to sufficiently address the biological nature of viability and pregnancy in her dissent. She stated that "without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments." (*Akron v. Akron Center for Reproductive Health* 1976)

Additionally, I argue that the increasing ambiguity in reproductive privacy law is further compounded by the continuous changes made by the Court to supposed definitive standards and guidelines in *Roe*. As Zampa notes, the majority again invoked the problematic substantive due process doctrine to strike down regulations enacted by State legislatures the Court deemed “unnecessary.” (1990, 7) The Court asserted that it is essentially “unnecessary” for the “State to insist that only a physician is competent to [462 U.S. 416, 418] provide the information and counseling relevant to informed consent.” (*Akron v. Akron Center for Reproductive Health* 1976) Thus, the Court invalidated Ohio’s informed consent and 24-hour waiting period regulations without demonstrating the existence of a serious impediment within these provisions that negatively impact a women’s ability to decide. (Bridenhagen, 1984, 7) As exemplified in the *Griswold* case, I argue that the use of the substantive due process permits the Court to blatantly engage in not only subjective decision-making, but also judicial policy-making with the application of strict scrutiny to such regulations.

Another troubling element presented in this case deals with the shift from a rationality standard to one that is increasingly medicalized. (Mangel, 1988, 3-4) As many legal scholars point, the problem here is that by grounding the legal definition of “viability” in *Roe* as the point at which State interests in preserving potential life become realized, the Court virtually de-stabilizes the new standard of review. (Prieto, 1984, 6) In other words, as medical technology in the field of reproductive health evolves, these medical advances revolutionize the capacity for a premature fetus to exist independent of the mother. On the flipside, medical improvements in the reproductive sector also severely threaten the right to an abortion even in the first trimester. (Mangel, 1988, 4) As

Rhoden also asserts, the *Roe* trimester framework is crumbling due to the advancement of medical technology, which will eventually render the viability schema obsolete. (1986, 21)

As a result, it becomes possible to push viability back into the early stages of the first trimester. I argue this would virtually subvert the right of women to elect an abortion, given the ability of State's to ascertain legislative power in demonstrating viability under the guise of compelling interests. (Prieto, 1984, 5) As clearly articulated by Justice O'Connor in her dissent in *Akron*, it is "reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future." (*Akron v. Akron Center for Reproductive Health* 1976) Justice O'Connor clearly illustrated the future danger in shifting to a largely undefined medical standard in reproductive privacy cases. I argue that this transition to a medical standard, which scholars argue is already unstable and impermanent with advances in reproductive technology, further creates inconsistency and confusion within abortion jurisprudence. (Mangel, 1988, 12-13) Additionally, I believe that these continuous shifts in framework and logic destabilize the right to an abortion in law through the Court's unsubstantiated vacillation in standards.

As Justice O'Connor explicitly stated, "the *Roe* framework, then, is clearly on a collision course with itself" if the judiciary insists on utilizing substantive due process, constantly changing framework precedent, and clearly failing in providing a textual basis for unenumerated rights. (*Akron v. Akron Center for Reproductive Health* 1976) Within her dissent, she goes on to delineate the specific flaws and problems with continuing to use the trimester framework by the Court as a foundation to justify a right to an abortion.

She asserted that the framework, with all its various problematic facets, is virtually an “unworkable means of balancing fundamental right[s] and compelling state interests.”

(Akron v. Akron Center for Reproductive Health 1976)

Despite its obvious flaws, the Court still insisted on adhering to the underlying rationale of the trimester framework except with new minor revisions in each case.

(Mangel, 1988, 12) Through their unwillingness to forgo precedent and craft new rationality standards, the Court has maintained the façade and appearance of a “continuity of decision in constitutional questions,” as O’Connor noted. *(Akron v. Akron Center for Reproductive Health 1976)* With such little consensus on the core logic and legal basis for the right to an abortion, I believe that this judicial unwillingness appears to be a manifestation of judicial ambivalence. It seems that the Court refrains from drastically altering precedent on the issue in order to not have to acknowledge fallacy within the original logic of the *Roe* Court. This apprehension of the majority may account for judicial abstinence in textually settling this complex area of law, which inversely has propagated more controversy and less legal stability for reproductive rights.

A similar tone of uncertainty about the constitutionality of *Roe* was also expressed in *Thornburgh v. American College of Obstetricians and Gynecologists* (1986) several years later. In this particular case, the Court again applied strict scrutiny to two provisions of Pennsylvania’s Abortion Control Act, which specifically regulated informed consent and printed information in relation to abortion. *(Thornburgh v. American College of Obstetricians and Gynecologists 1986)* Although the Court did refrain from invoking the problematic “unduly burdensome” standard, it did however essentially utilize the stark

anti-abortion sentiment within legislation as a new testing standard. (Sullivan and Gunther, 2004, 569)

Justice Blackmun, in delivering the opinion of the Court, used the increasing amount of legal challenges in the realm of abortion regulation to decree that “States are not free, under the guise of protecting maternal health...to intimidate women into continuing pregnancies.” (*Thornburgh v. American College of Obstetricians and Gynecologists* 1986) As many legal scholar note, with this important statement the Court essentially constructed a straw man argument by asserting that the States intent is not to purely protect the mother’s health and well being. (Zampa, 1990, 7) Instead, the Court argued that States aim to strictly regulate the practices of abortion and enact legislation that mirrors the sentiment of their constituents. (Zampa, 1990, 8) In addressing the legislature of Pennsylvania, the Court claimed that a prohibitory “effort to deter a woman from making a decision that, with her physician, is hers to make” is not acceptable according to abortion precedent. The Court goes on to essentially portray the legislature’s attempts at abortion regulation as illegitimate by “wholly subordinat[ing] constitutional privacy interests” of the woman. (*Thornburgh v. American College of Obstetricians and Gynecologists* 1986)

By again invoking the doctrine of substantive due process, coupled with applied strict scrutiny, the Court struck down both provisions. (Zampa, 1990, 8) The first provision dealt with informed consent, which was subjectively analyzed and interpreted to inhibit the ability of a woman to choose. The second provision required attending physicians to record the basis for determining non-viability and the woman’s age, race, marital status, and previous pregnancies. (Allen, 1992, 2-3) As Allen notes, the Court has

skewed and obscured the issue to actually oblige States to construct regulations that refrain from persuading women to look into other options. Thus, the Court largely invalidated the provisions for not demonstrating a legitimate state purpose in protecting maternal health. As Justice Burger noted, “the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks.” (*Thornburgh v. American College of Obstetricians and Gynecologists* 1986) I argue that the Court stringent and unclear standard of evaluating anti-abortion intent suggests judicial subjectivity in the invalidation of these State regulations, given the lack of a concise, constitutionally derived standard.

Other dissenting justices in *Thornburgh* joined in, further fragmenting and dividing the Court on the issue. Justice White, joined by Justice Rehnquist, asserted that “this venture has been fundamentally misguided since its inception” and furthermore the legal rationale has been increasingly “depart[ing] from a proper understanding of the Constitution.” (*Thornburgh v. American College of Obstetricians and Gynecologists* 1986) The dissenting justices also highlighted the problematic nature of the utilization of substantive due process given its open-textured character. They argued that the “Court engages not in constitutional interpretation, but in the unrestrained imposition of its own extraconstitutional value preferences.” (*Thornburgh v. American College of Obstetricians and Gynecologists* 1986) As directly noted by Justice White and Rehnquist, the Court’s largely unprincipled invalidation of numerous State regulations since *Roe* has further undermined the stability of the right to an abortion. Additionally, I argue that the Court’s

overt, illegitimate use of judicial power and inconsistent establishment of imprecise standards further fragment the right to abortion in constitutional jurisprudence.

E. Re-Affirmation and Modification of Roe: The Webster Case

Three years later, yet another reproductive rights case reaches the Court, in which they drastically alter their judicial approach. Again, the Court's shift signals another transition in abortion case law history. *Webster v. Reproductive Health Services* (1989) marks the end of a *Lochner*-esque era of abortion jurisprudence and the departure from employing substantive due process under the trimester framework developed in *Roe*. (Zampa, 1990, 9) For many scholars, it also indicated the textual compromise of the right to an abortion under the protection of *Roe*. (Allen, 1992, 4-5)

The *Webster* case specifically dealt with the constitutionality of four provisions under a Missouri statute aimed at regulating abortion. The provisions included: the preamble, the ban on using public facilities and/or employees to perform an abortion, the prohibition on public funding for abortion counseling, and the obligation on attending physicians to conduct viability testing as a prerequisite to performing an abortion. (Allen, 1992, 1-2) Instead of analyzing the aggregate effect of the entire statute upon the women's ability to make an independent decision, the majority (headed by Chief Justice Rehnquist) deconstructed the statute into its elements. Under this approach, they reviewed each provision as distinct components and determined the constitutionality on an incremental basis. (Gunther and Sullivan, 2004, 573) Additionally, the Court also refrained from engaging in a *Thornburgh* analysis by not textually searching for an anti-

abortion intent from the legislators to base their decision. (Zampa, 1990, 10) This shift to a textual analysis on an individual basis was not the only manner by which the Court would part from past methods in abortion case law review.

The Court began in *Webster* by synthesizing the constructs of the Preamble of the Missouri law, which asserted that “[t]he life of each human being begins at conception, and that unborn children have protectable interests in life, health, and wellbeing.” (*Webster v. Reproductive Health Services* 1989) Within the *Akron* dictum, the Court mandated that “a State may not adopt one theory of when life begins to justify its regulation of abortions.” (*Webster v. Reproductive Health Services* 1989) In delivering the opinion of the Court, Justice Rehnquist asserted that this dictum is in fact being applied too broadly to abortion regulating legislation. (Bopp and Coleson, 1989, 4-5) Here, Justice Rehnquist made the point that a State could not “justify any abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State's view about when life begins.” (*Webster v. Reproductive Health Services* 1989)

Since the preamble failed to meet the criteria to fall under the *Akron* dictum because it does not regulate any aspect of the medical procedure of abortion, the plurality of the Court rejected the Eighth Circuit’s holding. (Zampa, 1990, 10) This determination subsequently allowed the Court to uphold the preamble on the grounds that it was simply a value judgment on the part of the State and did not conflict with *Roe*’s statement that “a State may not adopt one theory of when life begins to justify its regulation of abortions.” (Sullivan and Gunther, 2004, 573) I argue these systematic contradictory messages from the Court further convolute abortion jurisprudence and entrench an ambiguous meaning to the right to an abortion.

The significance in both *Akron* and *Thornburgh* is that the Court relied heavily upon an anti-abortion intent, which legitimized the usage of a strict scrutiny analysis in their evaluation of the constitutionality of abortion regulating provision. (Gray Jan, 1990, 9) This demonstrated another considerable shift in the Court's level of analysis, which suggests a varying degree of instability and lack of continuity on judicial decision-making. I argue that this vacillation in applicable scrutiny standards greatly risks the legitimacy of past precedent in abortion jurisprudence and stability of future reproductive case law.

In contrast, Justice Blackmun joined by Justices Brennan and Marshall, dissented and argued in *Webster* that the preamble did in fact violate the Court's previous holdings on abortion precedent. (Zampa, 1990, 10) He asserted that "by the preamble's specific terms, these declarations apply to all of Missouri's laws which are to be interpreted to protect the rights of the unborn." (*Webster v. Reproductive Health Services* 1989) In other words, the State's textual expression of interest in protecting fetal life sheds light on the inherent aims of the State to unravel the right of women to choose. Specifically, scholars argue that these provisions are essentially targeted at undermining the woman's scope of reproductive privacy, which subsequently encompasses contraceptive usage (such as the "morning after pill"). (Bopp and Coleson, 1989, 4-5) I argue that this re-emergence of the definitional struggles previously encountered by the Court is evidenced by the varying degree of interpretation of the inherent meaning of State's legislative aims. With the Court's divisiveness and perpetual non-consensus on the abortion issue, I assert that this adds yet another layer of textual ambiguity and complexity to an already confused body of abortion jurisprudence precedent.

In the plurality's review of the second and third provisions regarding the prohibition on the use of public facilities/employees in performing abortion and public-funded abortion counseling, they also reversed the findings by the lower court of appeals. (Jan Gray, 1990, 2-3) The Court justified upholding the Missouri provision of "recognizing that a government's decision to favor childbirth over abortion through the allocation of public funds does not violate *Roe v. Wade*" and thus "confer no affirmative right to governmental aid" under a Due Process framework analysis. (*Webster v. Reproductive Health Services* 1989) Once again, the plurality argued that the value judgment of the State to promote childbirth did not foreclose or significantly impact the availability of abortion. (Sullivan and Gunther, 2004, 573) As scholars note, the Court asserted that this implementation of public-funding restriction policy favoring childbirth as a valued alternative did not affect its constitutionality under the *Roe* precedent. (Grant, 1989, 2-3)

The plurality's decision on this provision was also found to contain serious fallacies by the dissenting justices. Justice Blackmun, within his dissent, pointed out the lack of continuity within the plurality's use of previous abortion precedent. He argued that there is a real difference between this current case and other abortion funding cases of the past. (Grant, 1989, 5) Justice Blackmun asserted that the Missouri provision has "taken affirmative steps to assure that abortions are not performed by private physicians in private institutions." (*Webster v. Reproductive Health Services* 1989) As Justice Blackmun further articulated, this is accomplished through another manipulatory and interpretive maneuver by the State in defining the term "public."

As Justice Blackmun continued in his dissent in *Webster*, he argued that “by defining as public every health care institution with some connection to the State,” this inevitably brings to “bear the full force of its economic power and control over essential facilities.” (*Webster v. Reproductive Health Services* 1989) As Zampa also notes, with this reclassification of public facilities as those with some tie to the State, the access and availability of abortion is thus greatly narrowed. (1990, 11) As displayed in my previous discussion, the Court again struggled in both clearly interpreting and delineating terms in the abortion debate with an increased lack of clarity. As scholars agree, I thus argue that this failure to provide lucidity in the Court’s decision further contributes to the overall ambiguity in abortion jurisprudence and creates increased difficulty for States to craft policy with such indefinite/highly disputed guidelines. (Grant, 1989, 5)

Perhaps the most divisive provision in the Missouri statute dealt with the viability-testing requirement, which presented the most direct challenge to the trimester framework constructed in *Roe*. (Zampa, 1990, 12) The viability testing provision provided that:

“Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother”
(*Webster v. Reproductive Health Services* 1989)

The first matter the Court examined in determining the constitutionality was when exactly and in what circumstance these tests would be directly applied. The plurality

determined that the lower Court of Appeals had “fallen into plain error” in their statutory interpretation within their assertion that the second sentence mandated the actual tests. (Zampa, 1990, 12) In contrast, the Court found that the “second sentence is read to require only those tests that are useful to making subsidiary findings as to viability.” (Webster v. Reproductive Health Services 1989) In other words, the plurality stated that by interpreting the second sentence to mandate viability testing in all circumstances, even when the physician’s “judgment indicates that the tests would be irrelevant to determining viability or even dangerous to the mother and the fetus,” this would be in direct conflict with the requirements of the first sentence. (Webster v. Reproductive Health Services 1989)

With the interpretation of the provision intended to further the State’s interest in potential life by requiring only those tests to be conducted for the purpose of determining viability, the Court then proceeded to systematically analyze the provision’s applicability to the matter of abortion. (Grant, 1989, 2-3) The Court, particularly Chief Justice Rehnquist in writing the opinion, began with a bitter criticism on the core structure in *Roe*. He regarded the “key elements of the [rigid] *Roe* framework -- trimesters and viability – [as] not found in the text of the Constitution.” (Webster v. Reproductive Health Services 1989) I argue that this staunch, increasingly disapproval of *Roe* embedded in the following Supreme Court decisions hinders the legitimacy of the right to an abortion. Additionally, I assert that these criticisms also serve to increase the divisiveness among the justices and further thwart any chance of the Court to enunciate a clear/solid framework to stabilize *Roe*.

The plurality commenced their analysis by recognizing that under the precedent of *Roe*, State's were allocated increasingly power of intervention and abortion regulation after the first trimester. This authority also increased after the State demonstrated a legitimate and compelling interest in fetal life. (*Webster v. Reproductive Health Services* 1989) With this established, the Court then proceeded with detailing the specific conflict between the methods in viability determination within the Missouri provision and their prior decision in *Coluatti v. Franklin* (1979). (Zampa, 1990, 12) In *Coluatti*, the Court held that "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." (*Coluatti v. Franklin* 1979) As Zampa argued, the conflict was thus contingent on whom and what agency has the authority to proscribe the use of viability testing and the specific determinant of when the State has a compelling interest in the life of the fetus. (1990, 12)

The plurality determined that "to the extent that [the Missouri provision] regulates the method for determining viability, it undoubtedly does superimpose state regulation on the medical determination whether a particular fetus is viable," which evidenced a conflict with judicial precedent. (*Webster v. Reproductive Health Services* 1989) Yet, instead of invalidating the Missouri provision based on this precedent conflict, the plurality engaged in a discussion of the *Roe* trimester framework and the legal fallacies that have subsequently de-stabilized the right to an abortion. (*Webster v. Reproductive Health Services* 1989)

The Court posited that the current amount of legal contestation and legislative attacks regarding the right to an abortion is a "reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in *Roe*" has buttressed the convoluted

nature of abortion jurisprudence. (*Webster v. Reproductive Health Services* 1989) As the Court continued, this abortion case law confusion in constitutional law is further evidenced given that the “result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.” (*Webster v. Reproductive Health Services* 1989) This total and utter disapproval of *Roe* eventually led the Court to conclude in pragmatically severing ties with the trimester framework.

With the Court’s increasing loss of faith in the rigid trimester framework as a “method of constitutional analysis,” the plurality instituted a modified rationality standard in place of the framework established in *Roe*. It was under this new standard that the viability testing was “permissible” and thus upheld. (Zampa, 1990, 13) The Court also made a point that it would cease applying strict scrutiny under the discredited and problematic substantive due process doctrine from *Lochner*. In *Webster*, the Rehnquist Court’s acknowledgement of both textual ambiguity and problematic legal rationale inherent in *Roe* marked a significant milestone. (Allen, 1992, 8) I argue that this recognition of the flawed nature of *Roe* provokes the Court to be ambivalent in further maintaining this problematic ruling. This judicial ambivalence leads to an apprehension to appropriately clarifying the right to an abortion, which largely compromises its legitimacy in law.

Although Justice O’Connor concurred with the plurality’s decision, she still fought for the continued use of the undue burden test (also articulated in her dissent in *Akron*). (Johnson and Alexander, 2003, 5) Instead of subscribing to Justice Rehnquist’s legal reasoning behind upholding the viability testing, O’Connor asserted that the

plurality's reasoning would ultimately lead to the overturning of *Roe*. She argued that "there is no necessity to accept the State's invitation to reexamine the constitutional validity of *Roe v. Wade*." (*Webster v. Reproductive Health Services* 1989) In place of interpreting the provision under the lens of a modified rationality test, Justice O'Connor found that the "performance of examinations and tests useful to determining whether a fetus is viable...does not impose an undue burden on a woman's abortion decision." (*Webster v. Reproductive Health Services* 1989) She concurred with the plurality's decision in keeping with her use of the undue burden test. (Grant, 1989, 2) I argue that this exemplifies the considerable variance of applicable testing standards promoted by different members of the judiciary. As Chlapowski notes, it also suggests a consistent and systematic non-consensus on the leading precedent in these cases and on an inability to settle on a single standard for future cases that would help to clarify this complicated area of law. (1991, 4)

Justice Blackmun's aggressive dissent, joined by Justices Marshall and Brennan, essentially accused the plurality of creating further instability and volatility within abortion jurisprudence. (Zampa, 1990, 14) In *Webster*, he asserted that the plurality constructed a point of contention resting on viability and "exaggerat[ed] the conflict between [the Missouri provision's] untenable construction" and the *Roe* framework. (*Webster v. Reproductive Health Services* 1989) Ultimately, Justice Blackmun asserted that this has "precipitat[ed] a constitutional crisis." (*Webster v. Reproductive Health Services* 1989) Through their creation of this conflicting situation between precedents, Justice Blackmun claimed that the Court had essentially overturned *Roe* in an unofficial capacity by discarding the trimester framework as "unworkable." (Zampa, 1990, 14)

Justice Blackmun continued by arguing that the Court has skirted the true jurisprudential issue on “whether the Constitution includes an ‘unenumerated’ general right to privacy as recognized in many of our decisions...and to what extent, such a right to privacy extends to matters of childbearing.” (*Webster v. Reproductive Health Services* 1989) As Zampa notes, the Court instead criticized and argued that several of the core elements found to be supporting the trimester framework are not textually found in the Constitution. (1990, 13-14) Although the plurality went on to state that under this approach “countless constitutional doctrines” would fail, Justice Blackmun argued that this is a rather inconsistent allegation. He points to the plentiful amount of other prior judicial decisions essentially constructing rights that are largely unenumerated in the actual body of the Constitution. (Zampa, 1990, 14) Through the Court’s engagement in balancing individual rights with competing State interests, Justice Blackmun concluded that judicial analysis “lies at the very heart of constitutional adjudication...in defin[ing] the scope of constitutional rights” in relation to the complex matters of procreation. (*Webster v. Reproductive Health Services* 1989)

Justice Blackmun’s synthesis on truly discerning the internal problematic facets embedded within abortion jurisprudence significantly highlights the fact that they are often contrived by the Court’s convoluted interpretation and legal reasoning. I argue that the Court’s confused and often contradictory rulings further contribute to the perpetual controversy surrounding this issue. Justice Blackmun argued that the opinion contained “not one word of rationale for its view of the State's interest,” largely resulting in a “it-is-so because we say so jurisprudence.” (*Webster v. Reproductive Health Services* 1989) Here, Justice Blackmun hits the nail right on the head. I assert that this lack of substantial

legal basis for the judiciary's abortion decisions calls into question the credibility and legitimacy of the Court's overall use of judicial power.

In keeping with the Court's history of overstepping judicial boundaries through its engagement in policy-making and legislating in reproductive privacy cases, I argue that the plurality of the Court has again failed to provide a comprehensive testing standard in abortion jurisprudence. Additionally, the Court has again failed in delivering a clear contextual explanation on when this testing standard is applicable. (Zampa, 1990, 15) The plurality in *Webster* has also struggled in interpreting and redefining terms (such as "viability") with sufficient clarity. In addition, the Court has also failed in providing clear textual foundations for their use of a new "modified" rationality standard. Through the Court's inability to provide clear-cut definitions and adequately legitimize their drastic transition in testing standard, I argue that the Court has further contributed to the textual ambiguity of this area of law. As Zampa notes, this lack of clear guidelines further frustrates State's attempts at crafting compliant abortion regulating provisions that would withstand changing judicial review. (1990, 15)

F. A Swift Departure from Roe: Planned Parenthood v. Casey

With inconsistent, changing standards of review (substantive due process in *Griswold*, fundamental rights analysis in *Roe*, a medical standard in *Akron*, then now an obscure modified rationality test in *Webster*), I argue that the Court's actions have thus far propagated an unstable, textually ambiguous, highly fragmented right to an abortion in modern jurisprudence. Although *Webster* did not serve as the last word on the

perennial abortion debate, *Planned Parenthood of Southeastern Pa. v. Casey* (1992) is still categorized as one of the most muddled and confusing decisions the Court has handed down on the abortion issue. (Howard, 1993, 12) As other scholars note, the Court again shifted to establish a confusing, problematic framework to ground the right to an abortion. (Wharton, Frietsche, and Kolbert, 2006, 25) In *Casey*, I argue that the Court against shifts the standard of review and delivers another highly fragmented decision that further compromises any future existence of domestic legitimacy of the right to an abortion in constitutional law.

The methodological approach utilized in *Casey* by the joint opinion has been criticized for being not only contradictory and inconsistent in terms of its basis, but also problematic in its heavily reliance on the force of precedent. (Sullivan and Gunther, 2004, 587-588) The Court began by first engaging in a significant discourse on the current status and constitutionality of *Roe's* underpinnings up to that point in abortion jurisprudence. Within this in-depth discussion by the Court, there is an inherent acknowledgement of the pervasive textual ambiguity in reproductive case law. (Schneider, 1993, 2) Additionally, the Court also implicitly recognized the presence of some degree of judicial ambivalence due to the contentiousness and disputed nature of the legal rationale upholding the right to an abortion. (Schneider, 1993, 2-3) Justice O'Connor clearly stated that 19 years after its inception, "Roe's definition of liberty is still questioned" and challenged by legal experts and State legislators alike. (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) Nevertheless, the Court made it a point and declared that the central holding in *Roe* "should be retained and once again re-affirmed." (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) With this statement,

the Court set the stage to address the commonly launched criticisms aimed at destabilizing the right to an abortion.

Instead of settling on one foundational principle under which to ground the right, the Court broke from reproductive tradition and took a different route in constructing a hybrid approach in establishing the constitutionality of *Roe*. (Howard, 1993, 7) The Court asserted that the “constitutional protection of the woman’s decision...derives from the Due Process Clause [with] the controlling word [being] ‘liberty.’” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) Here, the Court made a pro-active effort to establish the moral and conceptual link from “choices central to personal dignity and autonomy” to the “centrality of liberty protected by the Fourteenth Amendment.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) Following their exposition on the constitutional necessity to imbue this right with legal protection from arbitrary state intervention, the Court then discussed their stance on the stare decisis doctrine in reference to the legality of the right to an abortion. (Schneider, 1993, 6)

As demonstrated in Justice Rehnquist’s opinion in *Webster*, scholars argue that the split nature of the Court implicates an identifiable apprehension among Court justices to maintain and uphold the central legal underpinning in *Roe*’s logic. (Allen, 1992, 2-3) Varying Court members have engaged each other in rhetorical battle, which is most vividly depicted by the bitter exchanges between Justice Rehnquist and Justice Blackmun in *Webster*. This stark disagreement suggests there is some inherent fallacy within the logic of *Roe* given the sheer amount of contentiousness among the members of the leading judicial body for the nation. (Schneider, 1993, 5) With this said, Justice O’Connor did make explicit reference to the “reservations any of us may have in

reaffirming the central holding of *Roe*,” which further suggests there is a dichotomous existence of judicial ambivalence. (*Planned Parenthood of Southeastern Pa. v. Casey* 1992)

The dichotomous nature of judicial ambivalence, particularly in latter abortion jurisprudence, is two-fold. On one side, several members of the majority (including Justices O’Connor, Kennedy and Souter) subscribe to the idea that “overruling *Roe*’s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court’s capacity to exercise judicial power.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) Here, the majority asserted that by overturning the legally-established precedent in *Roe*, this would not only acknowledge a serious error in prior judicial analysis, but would call into question the credibility and legitimacy of the Court to make over-arching decisions on such divisive issues. (Howard, 1993, 7)

The other side of the coin, as best articulated by Chief Justice Rehnquist, with whom Justice White, Justice Scalia and Justice Thomas join in dissenting, lies in a full belief that “*Roe* was wrongly decided” due to an apparent “emptiness of reasoned judgment.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) Thus, they concluded that the framework is rendered unworkable and illegitimate. (Allen, 1992, 2-3) The invocation of *stare decisis*’ “unworkable” clause to overturn the right is necessary to prevent further manifestations of judicial ambivalence, given the flawed nature of the initial logic and perpetual non-consensus on the issue. (Schneider, 1993, 7) Additionally, the dissenting justices argued that the conceptualization of “liberty finds no refuge in a jurisprudence of doubt.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) As

exemplified in both the joint opinion and dissent, judicial ambivalence regarding both the decision to either uphold or overrule and move on has significantly plagued the Court. (Moses, 2004, 4) I argue that this judicial indecision has essentially led to a stalemate situation, in which the right to an abortion is destined to remain contentious and convoluted in nature without any true consensus in order to make progress towards clarity. (Howard, 1993, 12)

In *Casey*, the joint opinion thus concluded that “the promise of constancy” in case law rationale far outweighs the likelihood of stare decisis in this case. (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) This statement led into the Court’s next section, which was their attempt to further clarify and re-define the parameters of *Roe*. Within the Court’s attempt to do so, Schneider asserts that the Court only adds yet another layer of complexity by arbitrarily selecting which elements to uphold and which to discard. (1993, 6) Howard and other scholars argue that this contributes to the overall lack of clarity and Court’s infamous “doublespeak.” (Howard, 1993, 5) The contradiction here is that while the joint opinion praises the survival of *Roe*, it virtually dismantled its core constructs leaving behind a framework so narrowly tailored that almost nothing can fit inside it.

The Court continued in *Casey* by asserting that the woman’s liberty is not absolute, thus “the line should be drawn at viability,” so that before that point the woman is empowered with the right to choose to terminate her pregnancy. (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) The Court’s decision to adhere to the viability standard was firstly due to stare decisis, and secondly rested on the conceptualization of viability. (Wharton, Frietsche and Kolbert, 2006, 4-5) The joint opinion found that

viability is the most appropriate measure in mediating the rights of the woman and the power of the State in protecting fetal life. (Schneider, 1993, 7) Thus, the Court officially discarded the trimester framework constructed in *Roe* because it “misconceives the nature of the pregnant woman’s interest and undervalues the State’s interests in potential life.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992)

The Court then made another significant departure in *Casey* by rejecting the modified rationality test in *Webster* and, for all intensive purposes, resuscitating Justice O’Connor’s unduly burdensome standard. (Zampa, 1990, 14) This newly re-vamped test was adopted by the Court since they deemed the “undue burden standard [as] the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) According to the Court in *Casey*, an undue burden is essentially imposed when a State regulation or provision “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992)

The Court also made a point in their departure from applying strict scrutiny to all abortion regulations. (Cavendish, 2002, 2-3) Additionally, the Court emphasized that they would not textually analyze a regulation for an anti-abortion intent, thus “a state measure designed to persuade [a woman] to choose childbirth over abortion will be upheld.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) As Howard notes, the Court shifted again in their standard of review to a two-pronged test articulated by Justice O’Connor in previous case law. (1993, 10) The test consists of first determining whether the regulation imposes an “undue burden” on the woman, and second if there is no

evident undue burden, then the Court reverts to utilizing a rational basis review of the regulation. (Schneider, 1993, 7)

As demonstrated in *Webster*, the joint opinion again conducted an individual analysis on each provision of the Pennsylvania statute. The Court began with the statute's definition of medical emergency, in reference to its 24 hour waiting period regulation and informed consent requirement. (Sullivan and Gunther, 2004, 579) Under the Pennsylvania statute, a physician is required to inform the woman of the nature of the abortion procedure, the health risks associated with both abortion and childbirth, and the "probable gestational age of the unborn child" at least 24 hours prior to performing the abortion, with an exception for medical emergencies. (*Planned Parenthood of Southeastern Pa. v. Casey 1992*) Thus, an abortion may not be performed unless the woman signs a consent form indicating that she was informed about the risks, benefits, and given the option to review supplementary material on alternative choices. (Schneider, 1993, 8)

The joint opinion concluded that the mandatory 24 hour waiting period did not constitute an undue burden, given that the nature of the informational literature was non-misleading and expressed truthful facts. (Metzger, 1994, 16-17) Although in reaching this conclusion, the Court did stumble on explicitly clarifying and denoting the difference between "particularly burdensome" and "unduly burdensome." (*Planned Parenthood of Southeastern Pa. v. Casey 1992*) By instituting a mandatory waiting period, this entailed making a first appointment to receive and review the information materials, and then making a second trip during which the abortion would be performed. (Howard, 1993, 6-7) Even the lower district courts determined that instances of "trauma, delay and

harassment” were demonstrated to be substantial obstacles, which the Court failed to address in their decision. (*Planned Parenthood of Southeastern Pa. v. Casey* 1992)

Without clear, pragmatic and “conceptual boundaries” to this new standard of review, I argue that the Court has again produced an ambiguous and inconsistent standard that is vulnerable to judicial subjectivity. (Howard, 1993, 6)

Additionally, it appears that for some women who are of limited, financial means or “have difficulty explaining their whereabouts to husbands, employers, or others,” the 24-hour waiting period is particularly burdensome. (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) But, the Court is quick to point out that “a particular burden is not of necessity a substantial obstacle.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) As Schneider notes, the serious implication here is that this loose definition of an “unduly burden” essentially proscribed abortion for poor women given the increased financial burden incurred from this requirement. (1993, 8) Furthermore, Schneider concludes that this requirement virtually invalidates the right to an abortion for some of the female population. Nevertheless, the joint opinion largely ignored and sidestepped the real consequences and life situations for a large part of society.

The Court’s arbitrary conclusion that significant problems endured by poorer women do not substantiate an “undue burden” according to their definition is contradictory at best. (Howard, 1993, 6) While the Court heralded the enjoyment of this right to choose for many female generations to come, it will only be those select women with substantial financial means to actually utilize this right. (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) I argue that the unclear and impractical parameters of what constitutes an “undue burden” espoused in the *Casey* decision is both contradictory

and inconsistent. The Court again failed in providing a clear, contextual definition for their undue burden standard, which further contributes to the overall textual ambiguity of abortion jurisprudence and instability of this right.

The joint opinion in *Casey* then considered the spousal notification requirement in the Pennsylvania statute, which provided that except in cases of medical emergency, “no physician shall perform an abortion on a married woman” without a signed statement indicating that she had informed her husband of her intent to pursue an abortion.

(Planned Parenthood of Southeastern Pa. v. Casey 1992) The provision also included an alternative (in light of marital violence) in the form of a signed statement by the woman “certifying that her husband is not the man who impregnated her” or that the pregnancy was the result of spousal sexual assault. *(Planned Parenthood of Southeastern Pa. v. Casey 1992)* The Court then engaged in a discussion regarding the increased incidence of physical and psychological violence towards women, particularly when the “mere notification of pregnancy is frequently a flashpoint for battering and violence within the family.” *(Planned Parenthood of Southeastern Pa. v. Casey 1992)*

The Court conceded that the spousal requirement “does not merely make abortions a little more difficult or expensive to obtain,” but it will impose a “substantial obstacle” and deter woman from pursuing an abortion when their life and personal safety is in jeopardy. *(Planned Parenthood of Southeastern Pa. v. Casey 1992)* Under the Court’s undue burden analysis, the provision significantly hindered a woman’s decision and was thus rendered unconstitutional. (Schneider, 1993, 8) Although the large majority of woman who seek abortions are unmarried and thus unaffected, the Court made it clear that “the proper focus of constitutional inquiry is the group for whom the law is a

restriction, not the group for whom the law is irrelevant.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) As Howard notes, the Court failed to further clarify their degree of applicability of the undue burden test, in terms of how they go about measuring the extent by which a substantial obstacle impacts a population of women. (1993, 8) With a lack of concrete parameters and an inconsistent application standard, I argue that this further convolutes the functionality of the new standard and further compromises the legitimacy of the right to an abortion.

In *Casey*, the Court then proceeded to analyze the two remaining provisions under the Pennsylvania regulation: parental consent and reporting requirements. (Wharton, Frietsche, and Kolbert, 2006, 7-8) The parental provision held that “except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents provides informed consent.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) Because this was an alternative to parental notification, the Court determined that the statute was not overly narrowly tailored and re-affirmed the provision. (Howard, 12, 1993) In the case of the reporting requirement, because the “identity of each woman who has had an abortion remains confidential,” and because the collection of information is a “vital element of medical research,” this provision did not pose an undue burden. (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) The Court also upheld this provision, which marks the conclusion of the joint opinion.

As noted by the dissenting justices and critics of the decision, the *Casey* opinion is not only fraught with contention and ambiguity, but also maintains the fragmented tradition of abortion jurisprudence in U.S. Constitutional law. (Howard, 1993, 10-11) As many scholars argue, the inherent and explicit flaws intertwined within the central

holding of the joint opinion has thus created the most challenged and problematic abortion precedent to date. (Gabel, 1998, 4-5) As best articulated by the justices in their dissents, they note that a significant degree of instability and unnecessary complexity lies within several factors. I argue that the lack of clarity, the subjective nature of the undue burden test, the production of contradictory holdings, the inconsistent reliance on district court's findings, and the dramatic shift in the burden of proof arising from a largely incongruent appropriation of scrutiny fundamentally changes the nature of *Roe*. (Howard, 1993, 7) Furthermore, I argue that such monumental alterations and departures from the core legal reasoning in *Roe* not only dismantles the validity of the right to an abortion, but also severely cripples any lasting hope for the continued survival of this right. (Schneider, 1993, 12-13)

In constructing and later implementing the undue burden test, the joint opinion asserted that increasing the level of clarity in abortion case law was one of the primary reasons for the substitution. (Howard, 1993, 8) Yet, it appeared the Court has instead further complicated the issue with a revival of textual ambiguity and a failure to convey finite definitions for their use of term. Additionally, the parameters of these terms and the degree to which they are inconsistent subsequently increase the imprecision of the Court to deliver clear decisions on the abortion issue. (Schneider, 1993, 9) A vivid example of this was the lack of a solid, comprehensive explanation on the conceptual and functional difference between “particularly burdensome and “unduly burdensome.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) As Justice Scalia argued in a similar vein, “its [joint opinion] efforts at clarification make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.” (*Planned*

Parenthood of Southeastern Pa. v. Casey 1992) The implication here is that with a lack of clarification on a definitional level, this ultimately permeates into an applicable level demonstrated by an inability to render consistent rulings. (King, 2006, 5-6) I argue that the Court's failure to develop a concrete standard in *Casey* and instead implementing a standard with a high level of interpretive flexibility, leads to contradictory holdings that further threaten the integrity of the right to an abortion.

Within the *Casey* opinion, there are two identifiable contradictory holdings as pointed out by several legal scholars. Firstly, Howard asserts that the joint opinion essentially held that a State may attempt to "persuade" a woman from pursuing an abortion. But, a State may not place an "obstacle" before the woman seeking an abortion "if it was calculated to hinder the woman's decision." (Howard, 1993, 7) As best articulated by Justice Scalia, virtually any regulation of abortion that is "intended to advance what the joint opinion concedes is the State's 'substantial' interest in protecting unborn life will be 'calculated [to] hinder' the woman's decision to have an abortion." (*Planned Parenthood of Southeastern Pa. v. Casey 1992*) Consequently, Justice Scalia deduced that a State may advance its goals of promoting childbirth over abortion "only so long as it is not too successful" in its pursuits. (Howard, 1993, 8) I argue that this internal level of inconsistency within the Court's logic, as depicted within the dissents has severely weakened the applicability of the standard to subsequent abortion regulations. Additionally, the circular logic foundation constructed by the Court in *Casey* has also lessened the stability of the right to an abortion.

The inconsistency implicated in the joint opinion's holdings was further crystallized in their incompatible use of the district court's findings within their judicial

analysis of the Pennsylvania provisions. (Howard, 1993, 7) In reference to the Court's in-depth discussion of spousal notification and the constitutionality of that provision, Justice Scalia noted that the joint opinion relied "extensively on the factual findings of the District Court, and repeatedly qualified its conclusions by noting that they are contingent upon the record developed in this case." (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) With the many findings and factual data regarding the situation of battered women compiled by the district court, this proved to be supportive to the joint opinion's assertion that spousal notification was an undue burden. (Howard, 1993, 8)

In contrast, the Court largely discounted and discarded the findings made by the district court regarding the 24-hour waiting period. (Burnett, 2007, 2-3) As portrayed in the case law, the district courts concluded that women having to account for their whereabouts made it "extremely difficult" for them to travel to the clinics and then have to return for a second time, 24 hours later for the procedure. (Howard, 1993, 8) As Schneider notes, the actual waiting period may not directly create an obstacle in terms of accessing abortion, yet it may be construed to constitute a "substantial obstacle" (as with spousal notification) given the relevancy and significant amount of women it impacts. (1993, 9)

Nevertheless, the joint opinion arbitrarily rejected the district court's findings for the 24 hour waiting period, which suggests a subjective tendency to "highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden." (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) As Justice White added, "the undue burden standard...and the inherently standardless nature of this inquiry invites a district judge to

give effect to his personal preferences about abortion.” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) I argue that such a wide degree of variance in terminology further compounds inconsistent holdings by the Court and calls into question the core legitimacy and workability of the undue burden test. Consequently, I assert that the textual ambiguity of this undue burden standard increasingly destabilizes the right to an abortion by opening the floodgate for inappropriate, judicial subjectivity in abortion jurisprudence.

The Court also embarked on another significant departure from *Roe*, in that it rejected the use of strict scrutiny and substituted a mere rational review. (Moses, 2004, 2-3) As Schneider notes, by decreasing the scrutiny to a much lower level in abortion regulation cases, the Court virtually invalidates the fundamental liberty interest of the woman since only those rights deemed fundamental evoke increased judicial protections. (1993, 9) Within the Court’s discussion on the core constructs of balancing the interest of the State against the liberty interest of the woman, they isolated the phrase of the “State’s important and legitimate interest in protecting the potentiality of human life” from the *Roe* framework. (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) In doing so, the Court then determined that a strict scrutiny approach was an improper mode of analysis given their finite extraction and premature focus on the “legitimate interest,” without a fundamental acknowledgement of the contextual nature and rootedness in *Roe*. (Schneider, 1993, 10)

This misinterpretation of *Roe* and subsequent adoption of a rational review test has resulted in prioritizing the State’s interests over the fundamental protection of the woman’s reproductive privacy established in *Roe*. (Wharton, Frietsche and Kolbert, 2006,

5-6) In effect, this tipping of the scale enables the State to demonstrate a compelling interest to trump the woman's claim to reproductive, fundamental privacy even in the first trimester of pregnancy. (Schneider, 1993, 9) In contrast, the majority in *Roe* emphasized and centralized the necessity in applying a strict scrutiny analysis. Given the gravity in dealing with rights deemed fundamental to the personal liberty of the individual, the *Roe* Court found a lower level rational review to be inappropriate. (King, 2001, 2-3) In *Casey*, the joint opinion largely departed from this valid logic and essentially manipulated the language and judicial rhetoric in *Roe* to fashion a standard, which would permit State regulations before the fetus had reached viability. (Schneider, 1993, 10) By discarding the trimester framework and fundamental rights conceptualization central in *Roe*, the Court has drastically re-structured the logic to further buttress the legitimacy of their new undue burden standard. (Schneider, 1993, 11) I argue this re-formulation of logic posits serious implications for the constancy of a woman's legal right to privacy and reproductive privacy.

As Justice Blackmun asserted in *Casey*, "strict scrutiny of State limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion." (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) Given the importance of defining and protecting individual liberty in modern jurisprudence, Schneider argues that the Court's prior application of a strict scrutiny analysis accomplished several objectives. First, it defined the parameters within which the Court must examine actions of the state (eliminating the potential for judicial decisions to be anchored in "moral bias"). Also, it effectively safeguarded fundamental liberties "commensurate with the value we ascribe them," and

discouraged States from peremptorily restricting rights deemed fundamental. (Schneider, 1993, 11) As Howard adds, the value in implementing a strict scrutiny analysis in fundamental rights cases is central to the valid holding in *Roe* and would perpetuate a consistency in the judicial adjudication in abortion regulation review. (1993, 9) With the Court's institution of a new, largely unworkable undue burden test in *Casey*, I argue that this essentially subverts the fundamental element in protecting a woman's liberty interest in her own reproductive self-determination. Consequently, this reformatting of the Court's standard of review also marks a shift in the burden of proof from the State to the bodily integrity of the woman.

The standard established in *Roe*, as with other fundamental rights, charged the State with the burden of justifying its regulation of abortion as well as crafting provisions that would be narrowly tailored in order to satisfy the strict scrutiny in judicial review. (Schneider, 1993, 9) With the joint opinion's virtual invalidation of a fundamental rights framework and rejection of a strict scrutiny analysis, the Court's restructuring of the right to an abortion in *Casey* has vastly altered the burden of proof. Now, individuals challenging State regulations on abortion must demonstrate and prove the statute is "unduly burdensome" and, therefore unconstitutional (*Planned Parenthood of Southeastern Pa. v. Casey* 1992) As noted by Justice Scalia, the problem here is that the undue burden standard is "not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for this case." (*Planned Parenthood of Southeastern Pa. v. Casey* 1992)

A clear, textual example of this was demonstrated in the fact that the Court found no evidence proving that the informed consent requirement was an undue burden, thus

the judiciary upheld it. (Schneider, 1993, 11) The largely ambiguous and imprecise construction of what is considered to be “unduly burdensome,” (despite the sufficient findings of the district courts and demonstrated plight of financial dependent woman) was unable to prove that the 24-hour waiting period was an undue burden. (Burnett, 2007, 5-6) Additionally, Howard notes that this textual ambiguity essentially overturns the right to an abortion for some woman, but further empowers the Court to inject their subjective predilections into the supposed objective nature of the rule of law. (1993, 8)

As vociferously emphasized by both the dissenting justices in *Casey* and legal critics alike, the increased subjectivity that the undue burden standard creates is undeniable. (Schneider, 1993, 8) As Chief Justice Rehnquist clearly articulated:

“In evaluating abortion regulations under [this] standard, judges will have to decide whether they place a ‘substantial obstacle’ in the path of a woman seeking an abortion. Ante, at 34. In that this standard is based even more on a judge’s subjective determinations than was the trimester framework, the standard will do nothing to prevent ‘judges from roaming at large in the constitutional field’ guided only by their personal views” (*Planned Parenthood of Southeastern Pa. v. Casey* 1992)

Here, Chief Justice Rehnquist pointed out the overt flexibility entrenched within the new undue burden test. This not only entails the “amorphous standard of review” espoused by the joint opinion, but also severely compromises the constancy of the woman’s asserted right to an abortion even within the first trimester given the subjective nature in evaluating undue burden. (Schneider, 1993, 10)

With the varying and changing interpretations of the undue burden conceptualization as conceived by Justice O’Connor and Justice Kennedy in past abortion regulation cases, the subjectivity recognized then has perpetuated into future judicial determinations. (Gabel, 1998, 1-2) With the demonstrated unworkability of the new

undue burden test coupled with a mere rational review, legal scholars extrapolate that future abortion regulations that approach the bench will largely be upheld and evoke increased contention due to the current divisiveness among the Court. (Howard, 1993, 12) These speculations regarding the future legal status of the right to an abortion are most troubling and disconcerting from the standpoint of pro-choice advocates and pro-choice legal feminists alike. (Mayeri, 2004, 4)

G. A House of Cards: Results Analysis and Concluding Discussion

The issue of a right to an abortion in American society still remains highly contentious in the both the legal and political realms. It was my primary intention within this thesis to disentangle and map out some problematic characteristics contributing to the instability evident in abortion jurisprudence. Thus, I argue that there has been a demonstrative manifestation of not only textual ambiguity in the reproductive privacy case law, but also a significant degree of judicial ambivalence arising from a failure to construct firm standards of review and concrete definitional parameters. Through a virtual non-adherence to precedent logic and fundamental case law holdings, the Court has further perpetuated and entrenched foundational instability within the legal rationale to ground this controversial right. With this evident instability and inconsistency in judicial adjudication, the abortion jurisprudence area of law largely remains unsettled, thus vulnerable to a further dismantling of the core construct established in *Roe*.

This constraining trend identified within abortion jurisprudence has been further evidenced by the very recent decision in *Gonzales v. Carhart* (2007), in which the Court

upheld the constitutionality of the Partial Birth Abortion Ban Act of 2003. This Act is primarily a third trimester procedure involving dilation and extraction of the fetus. (Burnett, 2007, 3-4) The Court upheld this provision on the grounds that the respondents have failed to prove that this Act “imposes an undue burden on a woman’s right to abortion based on its overbreadth or lack of a health exception.” (*Gonzales v. Carhart* 2007) Although the analysis of this case would support the primary claim within this thesis, *Carhart* was not textually synthesized given its recent deliverance by the Court and the lack of a vast body of legal literature deconstructing its differing elements.

I argue that through my textual compilation and analysis on the plethora of law reviews detailing the finite facets of each reproductive case, it appears the hypothesized statement asserted in the beginning of this thesis was partially accurate. Specifically, textual ambiguity and judicial ambivalence were evidenced to account for the instability and resulting lessened legitimacy of the right to an abortion. Although judicial ambivalence is inherently difficult to fully encapsulate and define in the first place, it seemed to be less salient in the case law analysis and its impact on the legal instability of abortion.

On the flipside, the discredited doctrine of substantive due process (conceived initially as an exogenous third variable) played a more integral role in disrupting and further threading contention throughout reproductive privacy jurisprudence. As first fully formulated in *Lochner*, the substantive due process appeared to incur and propagate a more significant degree of divisiveness among the justices. Given its notorious past and capacity for transmitting judicial subjectivity within the rule of law, it seemed to have a compounding effect on an already convoluted abortion jurisprudence. Thus, it could be

argued that substantive due process was the catalyst and/or stimulus for the latter fruition of judicial ambivalence in the case law, although this is merely speculative.

I conclude that the legal framework and constitutional approach by the Court has proved to be highly problematic and subsequently proved ineffective in securely and legitimately grounding the right to an abortion. Additionally, I argue the increasingly fettered nature of the right to abortion in modern constitutional law is vividly evidenced by the Court's inconsistent use of precedent and continuous, arbitrary alterations made to the original legal logic in *Roe*.

In sum, I have argued that the Court has faced numerous struggles in sufficiently and effectively establishing a legal right to an abortion. In *Lochner*, the Court engaged and implemented an unclear substantive due process analysis to frame privacy as central to the inherent liberty of each individual. The Court's subsequent invalidation of many economic regulations under this discredited substantive due process doctrine spurred vast criticism of inappropriate judicial activism. (Chlapowski, 1991, 3) Additionally, the Court refrained from adequately clarifying the parameters and extent of their conceptualization of liberty. This unsettled ambiguity inevitably marked the beginning of the Court's troubles with constructing definitions with ample clarity and lucidity.

With *Lochner* as a rocky and contested guiding precedent, the Court further compounded the instability of the fledgling right to privacy in *Griswold*. The Court again grappled with definitional clarity and clearly substantiating the legal roots of a largely unenumerated reproductive privacy right. In *Griswold*, the Court was highly splintered and divided on both the existence of a right to reproductive privacy and its location within legitimate constitutional principles. The subsequent fruit of their labor was a

fragmented, ambiguous privacy right laden with unclear applicability and legal instability.

The Court's logic and rationale in *Roe* followed a similar, confusing route. In *Roe*, the Court was still split on where exactly is this right to privacy in the Constitution. Similarly, their creation of a right to an abortion was problematic essentially because it was predicated and hinged on an already highly unstable right to privacy. As I have demonstrated, *Roe's* unstable and unanchored foundation has produced a multitude of legal problems for the Court in successfully legitimizing this right in American constitutional law. I argue this instability embedded in the *Griswold* and *Roe* decisions has translated and trickled down into the most recent abortion cases such as *Webster* and *Casey*.

Roe's progeny further complicated and destabilized the right to an abortion through inconsistent modifications, vacillating standards of review, unclear terminology and lack of legitimate grounding legal principles. With the recent nominations of politically conservative justices such as Roberts and Alito, the tide has changed with a solid conservative majority now comprising the Supreme Court. (Chemerinsky, 2006, 8-9) The legal future of a woman's right to choose is beginning to look cloudy and grim. Thus, I have deduced that the Court has essentially built the right to an abortion in modern jurisprudence upon a house of cards; only time will tell when they will topple.

IV. The Human Rights Connection: Policy Implications for Abortion Rights

I believe there is a better and more efficacious avenue to legitimately establish a women's right to an abortion. In order to transcend the contention and divisiveness largely conjured by the members of the Supreme Court, there must be first be an implicit acknowledgment in textual law of the centrality of human rights to the essence of an individual's liberty. By imbuing and integrating international human rights legal norms into the heart of domestic law, I argue this would create an open-texture to constitutional jurisprudence to permit the right to an abortion to be identified as a woman's human right. This essentially entails a fundamental re-conceptualization of the right to an abortion, in which both parties (mother and fetus) are allocated rights creating the transitional, emergent nature of this evolving human right.

In other words, the women's right to an abortion would not be absolute; fetuses far into the third trimester should be granted the human right to life. (Smith, 2005, 207-208) By transitioning to the utilization of human rights diction and a human rights oriented framework to codify the right to an abortion, this would essentially eliminate the instability of the current legal right to an abortion. Additionally, the accompanying volatility would also be largely extinguished by subverting the authority of the justices to overturn this right through an adoption of an automatic self-executing clause in hard law. (Richardson, 2000, 4) Thus, the United States should adopt a South African Approach to implementing human rights domestically. I advocate that a transition to utilizing a South African approach in contextualizing the right to an abortion in international human rights

law, which would provide a more efficacious platform in establishing this right in American modern law. (Thomas, 1997, 4)

Although the concept of human rights had been developed and re-articulated throughout history, it was not until the creation and establishment of the Universal Declaration of Human Rights in 1945 that the actual term “human rights” was textually substantiated in the modern era. (Jackson, 2003, 2) With this universal body of law serving as the model for human right implementation internationally, I assert that the United States needs to adopt similarly phrased document in order effectively integrate human rights protections within domestic law. (Jackson, 2003, 2-3) As many human rights and legal scholars agree, South Africa has proved to be instrumental in emulating a pragmatic approach to legally grounding and embedding human rights norms within a structured system of law. (Slye, 2001, 2)

Legal human rights scholars depict a South African approach as a method drawing heavily on international human rights law, and directly inserting international norms and values into domestic bodies of law. (Wet, 2005, 2-3) I argue that utilizing this approach would eliminate both the textual ambiguity, problematic past of the substantive due process doctrine, and judicial ambivalence that has significantly convoluted and destabilized the right to an abortion.

Numerous international law scholars note the apprehension of numerous First World nations in adopting provisions from international bodies of law, which poses serious obstacles to the realization of human rights in American law. As Wet point out, these industrialized nations (including the United States) are highly protective of sovereignty and domestic values. (2005, 11) Unfortunately, the United States has had a

dark history of perpetrating what the international community would consider human rights violations, with little acknowledgement or reconciliation for these acts. (Jackson, 2003, 2-3) This limited and apprehensive use of international legal norms by the U.S. indicates a serious impediment to successfully adopting a South African Approach. (Hovell and Williams, 2005, 13)

It is for this reason that I argue adopting and implementing only the three primary constructs that comprise the South African Approach to modern human rights. The first pillar of this approach would entail directly imbuing international human rights norms into the United States Constitution. (Hovell and Williams, 2005, 12) As demonstrated in the South African Constitution of 1996, both themes of equality and non-discrimination are centrally located at the heart of the legal document. (Hovell and Williams, 2005, 14) In particular, the “Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” (South African Constitution, Chapter 2, Section 1) With the concept of equality, the South African Constitution is able to better safeguard women’s human rights in contrast to the U.S. Constitution. (Jackson, 2003, 9-10)

The second pillar involves constructing a judicial review body that would consist of two monitoring mechanisms. As in South African, I assert that by establishing a secondary legal body (a Human Rights Commission) to the Supreme Court, this would largely reduce the capacity for judicial subjectivity and textual ambiguity. (Wet 2005, 6) The primary function of the Human Rights Commission is to oversee the compliance to international human rights law, as well as providing an available body to which individuals can contact with human rights infringement complaints. (Hovell and

Willaims, 2005, 14) I argue that this construction of a human rights orientated, monitoring body would aid in clarifying the already convoluted abortion case law, in addition to implementing the right to an abortion as a women's human right.

The third and final pillar is the incorporation of a self-executing provision into American domestic law. (Richardson, 2000, 4) According to international legal principles, self-executing rights (also known as directly applicable rights) essentially allow individuals to invoke a human right without the need for it to be indoctrinated and translated into domestic jurisprudence first (Richardson, 2000, 4-5) In this way, the enactment of a self-executing provision for a human right to an abortion would allow women to bypass constraining domestic laws and file complaints to the Human Right Commission.

By adopting and implementing a South African approach to women's human rights, I argue that this pragmatic method would solve many of the problematic issues inherent within the current right to an abortion. This approach will certainly not be easy or even feasible to fully implement at this current moment in American legal history. With the shadow of the Iraq war still looming over the nation, the United States is still fixated on other political pressing matters. Yet, I believe the future will hold many unforeseen developments in the realm of international human rights, because the future of a woman's right to maintain autonomy over her reproductive faculties is far too important to simply ignore.

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