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The Rehnquist Court and the Devolution of the Right to Privacy

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THE REHNQUIST COURT AND THE DEVOLUTION OF THE RIGHT TO PRIVACY

Scott P. Johnson*
Robert M. Alexander**

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I. INTRODUCTION

The right to privacy has evolved from its early roots in property rights and capitalism¹ to its modern role grounded in individual freedom.² The United

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¹ See generally BRUCE A. ACKERMAN, PROPERTY AND THE CONSTITUTION (1977); BENJAMIN

States Supreme Court has recognized that the right to privacy exists in the context of marital privacy,³ heterosexual relations,⁴ and abortion rights.⁵ However, it has not extended the right to privacy to such areas as homosexual behavior⁶ or the right to die.⁷ The right to privacy remains a controversial issue among a wide variety of legal scholars because it is not mentioned specifically in the United States Constitution. Hence, conservative scholars who practice a strict, or literal, reading of the Constitution have been troubled by the recognition of such implied rights. Because a growing movement has developed on the Supreme Court to temper, or eliminate, the right to privacy, it is necessary to explore whether conservative justices have been successful in their attempt to return to a strict interpretation of the Constitution.

To determine whether the right to privacy has devolved, this article analyzes the history and development of the right to privacy as well as the relevant case law that recognized the right of privacy in the 1960s and 1970s. Part II explores the history and development of the right to privacy beginning with its early advocacy by future justice Louis D. Brandies through the abortion decisions and the issue of homosexuality. Part III examines recent decisions by the Rehnquist Court challenging the right to privacy to determine if personal privacy has devolved since its recognition in *Griswold v. Connecticut*⁸ in 1965 and evolution through the Burger Court era of the 1970s and early 1980s. Part IV discusses the voting behavior of justices on the Rehnquist Court in privacy cases using an interagreement matrix and bloc voting analysis. Finally, Part V draws a comparison between the Burger and Rehnquist courts and concludes that the right to privacy has been significantly altered by the conservative agenda of the Rehnquist Court.

TISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942).

² See generally Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing a right to privacy by declaring a Connecticut law prohibiting the sale of contraceptives unconstitutional).

⁴ The federal courts have acknowledged a right to privacy for consensual heterosexual behavior. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down a Massachusetts law banning the use of contraceptives by unmarried persons).

⁵ See *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a right to privacy regarding the abortion procedure).

⁶ See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (A majority of the justices on the Court declared a Georgia sodomy law constitutional based largely upon states' rights.).

⁷ See *Vacco v. Quill*, 521 U.S. 793 (1997); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

⁸ 381 U.S. 479 (1965).

II. HISTORY AND DEVELOPMENT OF THE RIGHT TO PRIVACY

A. *The Brandeis Brief*

In the late nineteenth century, the right of privacy was recognized to protect the property rights of business owners, but privacy was not applied to individuals at this time.⁹ From 1880-1937, the Supreme Court promoted a laissez-faire environment where the privacy rights of large corporations were protected from government regulation.¹⁰ However, during this same time period, legal scholars were debating the evolution of privacy as it related to the rights of individuals.¹¹ One such scholar was Louis D. Brandeis who, prior to his confirmation to the Supreme Court, co-authored a law review article with Samuel Warren which posited that privacy should extend beyond property to include human rights to be free from technological and psychological interference.¹²

After his confirmation to the Supreme Court in 1907, Justice Brandeis persisted in his arguments for a right to personal privacy. In particular, he authored a famous dissent in the landmark case of *Olmstead v. United States*,¹³ where he laid the foundation for the future recognition of the right to privacy as it related to individuals. In *Olmstead*, the Court in a five to four decision upheld the conviction of several defendants arrested under the National Prohibition Act for the illegal sale of alcohol, even though the evidence used by the federal officers had been secured through the wiretapping of telephone conversations.¹⁴

Dissenting, Justice Brandeis wrote that the wiretapping violated the right to privacy found in the search and seizure clause of the Fourth Amendment. He argued that “[t]he makers of the Constitution conferred, as against the government, the right to be let alone.”¹⁵ The Court’s subsequent development of the right to privacy has proved Brandeis’ dissent to be prophetic.

B. *Griswold, the Penumbra Theory, and the Ninth Amendment*

Even though Brandeis blazed a new trail with his dissenting argument for individual privacy, it was not until the landmark case of *Griswold v. Connecticut*¹⁶ that a majority of justices recognized the existence of a constitutional

⁹ See generally ACKERMAN, *supra* note 1.

¹⁰ See generally ARTHUR S. MILLER, *THE SUPREME COURT AND AMERICAN CAPITALISM* (1968).

¹¹ See Brandeis & Warren, *supra* note 2, at 193; see also *Boyd v. United States*, 116 U.S. 616 (1886) (recognizing protection for privacy interests under the Fourth and Fifth Amendments).

¹² See Brandeis & Warren, *supra* note 2, at 193

¹³ 277 U.S. 438 (1928).

¹⁴ See *id.* at 456-57.

¹⁵ See *id.* at 477 (Brandeis, J., dissenting)

¹⁶ 381 U.S. 479 (1965). In *Griswold*, the Court relied upon *Meyer v. Nebraska*, 262 U.S. 390

right to personal privacy. *Griswold* involved a Connecticut state law that banned the sale and distribution of contraceptives as well as the distribution of information relating to such products.¹⁷ In a seven to two decision, the Court struck down the law as unconstitutional because it infringed upon marital privacy.¹⁸ However, because the Constitution does not explicitly mention a right of privacy, the majority in *Griswold* had to address where privacy existed implicitly in the document. While a number of the justices issued opinions on the matter,¹⁹ Justice William O. Douglas' majority opinion and Justice Arthur Goldberg's concurring opinion have received the most attention.

Douglas' majority opinion stated that the right to privacy could be found in the penumbras, or "shadows," of the Bill of Rights.²⁰ He wrote that "specific guarantees in the Bill of Rights have penumbras, formed by the emanations from those guarantees that give them life and substance" and that these "[v]arious guarantees create zones of privacy."²¹ In contrast to Douglas' Bill of Rights analysis, Goldberg emphasized the Ninth Amendment to the Constitution, which states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."²² He remarked: "My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported . . . by the language and history of the Ninth Amendment."²³ Hence, Douglas and Goldberg each found the right to personal privacy in vague parts of the Constitution. The vagueness of the penumbra theory and the Ninth Amendment analysis would compel the justices to develop the contours of the right to privacy more specifically in future cases.

Writing in dissent, Justices Hugo Black and Potter Stewart took a literalist approach by arguing that a right of privacy did not exist in the Constitution because it was not specifically written into the text.²⁴ Each was harshly critical of the flexible approaches used to discover a constitutional right to personal

(1923), where the Court struck down a state law that prohibited modern languages other than English from being taught to grade school children. For other pre-*Griswold* privacy cases, see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹⁷ 381 U.S. at 486.

¹⁸ *Id.*

¹⁹ Justice Douglas authored the majority opinion, Justice Goldberg and Justice Harlan both issued separate concurring opinions, and Justice Black and Justice Stewart each wrote dissenting opinions.

²⁰ *Griswold*, 381 U.S. at 480.

²¹ *Id.* at 484. Douglas discussed such specific guarantees in the First, Third, Fourth, Fifth, and Ninth Amendments as they related to privacy.

²² U.S. CONST. amend. IX.

²³ *Griswold*, 381 U.S. at 487.

²⁴ *See id.* at 530 (Black, J., dissenting).

privacy.²⁵ In the cases following *Griswold*, the Court was forced to articulate explicitly where privacy existed in the Constitution and also the scope of its protection for the individual in society.

C. *Privacy and Abortion Rights*

While the Court did not specify in *Griswold* exactly where privacy existed in the Constitution, a majority of justices in the early 1970s further developed the right to privacy by tying it to a specific provision, the Due Process Clause of the Fourteenth Amendment. In *Roe v. Wade*,²⁶ the Court extended the right to privacy to include a woman's right to abortion when it struck down a Texas statute prohibiting the controversial medical procedure.²⁷ Justice Harry Blackmun's majority opinion discussed a variety of amendments to the Constitution that implied privacy, but eventually settled on the Due Process Clause of the Fourteenth Amendment.²⁸ The Due Process Clause was strategically selected because of its focus on freedom and liberty as well as its ability to nationalize the right of personal privacy to the governments of all fifty states.²⁹

Having acknowledged that privacy was a fundamental right derived from the Due Process Clause, federal and state governments would have to show a compelling state interest and a means narrowly tailored to achieve that interest in restricting this basic right.³⁰ In *Roe*, the Court ruled that a woman's

²⁵ See *id.* at 508-27 (Black, J., dissenting); *id.* at 528-32 (Stewart, J., dissenting).

²⁶ 410 U.S. 113 (1973).

²⁷ *Roe v. Wade* involved a woman, Norma McCorvey, who attempted to obtain an abortion in Texas where abortions were prohibited by state law. Her name was changed to "Jane Roe" to maintain her anonymity. At the time of the case, McCorvey was a single mother of one child and she considered herself too poor to have a second child. Attorneys for McCorvey argued that the Texas statute violated her privacy rights found in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution. KAREN O'CONNOR & LARRY SABATO, *AMERICAN GOVERNMENT: CONTINUITY AND CHANGE* 165 (2001); see also *Roe*, 410 U.S. at 121.

²⁸ *Id.* at 122. Blackmun focused upon the concept of personal "liberty" found within the Due Process Clause of the Fourteenth Amendment: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend XIV.

²⁹ See generally Raoul Berger, *The Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981). The Fourteenth Amendment refers specifically to the regulation of *state* power. U.S. CONST. amend XIV.

³⁰ The Due Process Clause of the Fourteenth Amendment was originally designed to prohibit certain state actions. Specifically, it was developed with the intent to limit the power of states from endorsing the practice of slavery. For an example of how the Fourteenth Amendment has been used to nationalize the Bill of Rights and other fundamental guarantees, such as a right to privacy, see RICHARD CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES* (1981). In regard to a right to privacy, Blackmun discussed the First, Fourth, Fifth, and Ninth Amendments, however, these amendments listed in the Bill of Rights would have limited only the federal government (i.e. "Congress shall make no law . . ."), not state governments. *Roe*, 410 U.S. at 123.

right to privacy was absolute in the first trimester of her pregnancy term.³¹ Hence, there was no compelling state interest that could justify the infringement of a woman's right of privacy in the first twelve weeks of pregnancy.³² However, in Blackmun's majority opinion, he recognized that the health of the pregnant mother and the pre-natal health of the fetus were compelling state interests in the second and third trimesters, respectively.³³ Because of these compelling state interests, states can regulate abortions between the twelfth and twenty-fourth weeks and can also ban abortions in the final twelve weeks of pregnancy.³⁴

The two dissenters in *Roe*, Justices William Rehnquist and Byron White, opposed the majority's decision to establish a fundamental right to abortion using the right to privacy. Rehnquist and White concluded that the right to privacy was unrelated to the abortion decision and argued that the Court should have exercised judicial restraint by deferring the issue to state governments. In his dissenting opinion, Rehnquist wrote:

The fact that a majority of the States reflecting . . . the majority sentiment in those states, have had restrictions on abortions for at least a century is strong indication . . . that the asserted right to abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."³⁵

Rehnquist expressed concern that the majority in *Roe* had engaged in a type of judicial activism that was comparable to legislating, not interpreting.³⁶ Since it was unclear whether the plaintiff Roe was in her first trimester of pregnancy during the pendency of the lawsuit, Rehnquist argued that the majority's proscription of state regulation of first trimester abortions was an impermissibly broad holding under the "precise facts."³⁷ Rehnquist also maintained that state restrictions related to abortion should be treated as social and economic legislation which traditionally invoked the rational basis test because the medical procedure of abortion "[was] not 'private' in the ordinary usage of the word."³⁸

³¹ 410 U.S. at 163.

³² Blackmun stated that the decision to obtain an abortion was between the woman and her attending physician. *Id.* at 164-65.

³³ *Id.* At the twelfth week of pregnancy, a "compelling point" is reached where the state has a compelling interest to regulate the abortion procedure for the purposes of maternal health.

³⁴ *Id.* At the twenty fourth week of pregnancy, a "second compelling point" allows for states to ban abortions at the point of viability, or whenever the fetus can survive on its own from the mother. The compelling state interest, at this point, is the potentiality of human life.

³⁵ *Id.* at 174 (Rehnquist, J., dissenting).

³⁶ *Id.* at 173 (Rehnquist, J., dissenting).

³⁷ *Id.* at 171-72 (Rehnquist, J., dissenting).

³⁸ *Id.* (Rehnquist, J., dissenting).

Under the rational basis test,³⁹ a law regulating abortions was more likely to be upheld because it only needed to be rationally related to a valid state interest instead of being narrowly tailored to achieve a compelling state interest. In short, the rational basis test would have provided less protection for a woman's right to abortion by giving the states more latitude to legislate.

D. *Homosexuality and the Right to Privacy*

Prior to 1986, the Supreme Court had been evasive and ambiguous about addressing the right to privacy in the context of homosexual behavior.⁴⁰ Finally, in *Bowers v. Hardwick*,⁴¹ the Burger Court granted certiorari to a case involving the constitutionality of state laws making homosexual acts a criminal offense. In *Bowers*, Michael Hardwick of Atlanta, Georgia was arrested for having sexual relations with another adult male in his bedroom.⁴² Similar to other states at this time, Georgia prohibited anal, or oral, sex with another person under a sodomy law.⁴³ While Hardwick could have received a prison sentence of twenty years for violation of the statute, the District Attorney for the city of Atlanta decided not to pursue charges.⁴⁴ After his arrest, Hardwick received support from the American Civil Liberties Union, who challenged the constitutionality of the statute in federal court by arguing that the sodomy law

³⁹ For a summary of the rational basis test, see *Lindsey v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

⁴⁰ See *Doe v. Commonwealth's Att'y for the City of Richmond*, 425 U.S. 901 (1976) (affirmed without opinion). In this case, the Court found that a Virginia sodomy law was constitutional; however, the decision was a summary opinion because only three justices voted to hear oral arguments. The Court simply allowed for the District Court decision upholding the law to stand. See *Doe v. Commonwealth's Att'y for the City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975). It was not deemed to be controlling precedent. See also *Bd. of Educ. of Oklahoma City v. Nat'l Gay Task Force*, 470 U.S. 903 (1985) (voting 4-4 to leave intact a lower court ruling that declared an Oklahoma law unconstitutional because it provided for dismissal of teachers who advocate homosexual relations).

⁴¹ 478 U.S. 186 (1986).

⁴² A police officer was serving an arrest warrant for Hardwick because he had failed to appear in Court on a charge of drinking in public. A housemate of Hardwick's let the police officer into the home and told him he could look in his room. The officer discovered Hardwick and his male companion in bed together. See PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 394-95 (1990).

⁴³ GA. CODE ANN. § 16-6-2 (1999) (first passed in 1816) (stating: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."); see also *MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955*, at 362 (Peter Irons & Stephanie Guitton eds., 1993). But see *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (holding GA. CODE ANN. § 16-6-2 unconstitutional under the Georgia Constitution).

⁴⁴ IRONS, *supra* note 42, at 396-97.

violated Hardwick's right to privacy.⁴⁵ Hardwick's attorneys relied on precedent establishing the right to privacy in such landmark rulings as *Roe*.⁴⁶

For many observers, it seemed logical to extend the right of privacy to homosexual behavior because the Court already had recognized a zone of privacy for married couples, women seeking abortions, and heterosexual relations.⁴⁷ However, the Court ruled by a narrow five to four vote that the right of privacy did not confer a right upon homosexuals to engage in sodomy, therefore, the Georgia sodomy law was judged constitutional.⁴⁸ In Justice Byron White's majority opinion, he distinguished the privacy cases from *Griswold* to *Roe*. Justice White wrote that "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy"⁴⁹ Furthermore, the majority concluded that "[n]o connection between family, marriage, or procreation, on the one hand and homosexual activity on the other has been demonstrated"⁵⁰

In his dissenting opinion, Justice Blackmun began by quoting Justice Oliver Wendell Holmes in response to the majority's reliance upon history in the *Bowers* decision. Blackmun wrote:

Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."⁵¹

Next, Blackmun criticized the majority for an "almost obsessive focus on homosexual activity"⁵² In reality, the sex or status of the person committing the crime was not stipulated by the sodomy law.⁵³ According to Blackmun, the majority distorted the issue by using homosexuality to avoid the question of

⁴⁵ See THOMAS R. HENSLEY ET AL., *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* 802-03 (1997).

⁴⁶ See IRONS, *supra* note 42, at 386.

⁴⁷ See David R. Carlin, Jr., *Leviathan at Large: The Court and the Right to Privacy*, COMMONWEALTH, Sept. 12, 1986, at 456; Mark F. Kohler, *History, Homosexuals, and Homophobia: The Judicial Intolerance of Bowers v. Hardwick*, 19 CONN. L. REV. 129 (1986).

⁴⁸ *Bowers*, 478 U.S. at 195-96.

⁴⁹ *Id.* at 190-91.

⁵⁰ *Id.* at 191.

⁵¹ *Id.* at 199 (Blackmun, J., dissenting) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

⁵² *Id.* at 200 (Blackmun, J., dissenting).

⁵³ Justice Blackmun wrote that "[t]he sex or status of the persons who engage in the [criminal] act is irrelevant as a matter of [Georgia] law." *Id.* (Blackmun, J., dissenting).

whether the sodomy law violated the right to privacy.⁵⁴ Blackmun argued that the sodomy law clearly violated the right to privacy found in the Due Process Clause and should have been declared unconstitutional.⁵⁵

Finally, Blackmun discussed how each person defines him or herself according to their sexuality. In regard to intimate sexual relationships, all persons should have freedom of choice. Without this fundamental right, citizens will lose the freedom and privacy to express themselves as individuals.⁵⁶

Some legal scholars speculated that the *Bowers* decision was based upon the majority's attitudes about the morality of homosexuality.⁵⁷ The case can also be criticized as a disregard for precedent.⁵⁸ However, Justice White relied upon both historical⁵⁹ and institutional⁶⁰ grounds in ruling against Hardwick's claim of privacy for homosexual behavior.⁶¹ While it seemed inevitable that the Court would stop expanding privacy into new areas because it is an implicit right, one scholar, Norman Vieira, suggested that *Bowers* might signal the beginning of the end for the right to privacy. Vieira argued that "*Hardwick* opened the way for significant restrictions even on family-related claims, by repudiating the basic reasoning of *Roe v. Wade*."⁶² Vieira concluded that the main target of the conservative justices in *Bowers* might not have been homosexual behavior, but the right to privacy in general.⁶³ Vieira's argument is convincing in light of Justice White's opinion in *Bowers* where he states that the

⁵⁴ *Bowers v. Hardwick*, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting).

⁵⁵ *Id.* at 199-214 (Blackmun, J., dissenting).

⁵⁶ *Id.* at 205 (Blackmun, J., dissenting).

⁵⁷ It has been recognized that the prohibition against homosexual sodomy is an issue of morality based upon the idea that homosexuality is a sin against God and nature. See HENSLEY ET AL., *supra* 45, at 803.

⁵⁸ See *Bowers*, 478 U.S. at 204-06 (Blackmun, J., dissenting).

⁵⁹ In his majority opinion, Justice White wrote about sodomy laws having ancient roots and how all of the original thirteen colonies enacted sodomy laws. As recently as 1960, all fifty states criminalized homosexual behavior. *Id.* at 192.

⁶⁰ White discussed how the judiciary should exercise restraint when it is faced with issues not grounded in the Constitution. The legitimacy and authority of the Court as an institution are threatened when it establishes judge-made law with little or no roots in the Constitution. *Id.* at 194.

⁶¹ While White discussed historical and institutional reasons for the Court's ruling, the absence of case precedent to support his majority opinion was evident. See *id.*

⁶² See Norman Vieira, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181, 1183 (1988). Vieira argues that the *Hardwick* decision undermines *Roe v. Wade*. He wrote: "The Court in *Roe* had relied on historical and prudential arguments to invalidate state controls on abortion. In *Hardwick*, the Court paid lip service to such historical arguments and ignored prudential ones." *Id.* Vieira also suggests alternative ways for establishing a right to privacy, such as the Thirteenth Amendment's ban on involuntary servitude. *Id.* at 1189-91.

⁶³ *Id.* at 1186.

flexible interpretation of the Constitution establishing a right to privacy has harmed the integrity of the Court as an institution.⁶⁴ It remains unclear, however, whether the real motivation behind the *Bowers* decision was the majority's attitudes toward homosexuals or an attack on the legal reasoning that established the right to privacy.

In the end, *Bowers* was an ominous sign for the supporters of the right to privacy. Future cases dealing with privacy would be decided by a more conservative Court led by Chief Justice William Rehnquist and a number of appointments made by Republican Presidents Ronald W. Reagan and George H. W. Bush.⁶⁵ As the leadership and composition of the Court have changed in the conservative direction during the Rehnquist Court era, it is noteworthy that three justices who had supported the right to privacy have been replaced.⁶⁶

III. THE REHNQUIST COURT AND THE RIGHT TO PRIVACY

In 1986, President Ronald Reagan nominated Associate Justice William H. Rehnquist to become the next chief justice of the United States Supreme Court.⁶⁷ Rehnquist was confirmed by the Senate, but not without controversy regarding his conservative philosophy emphasizing majoritarianism and judicial restraint.⁶⁸ Legal observers expected Rehnquist to lead the Court toward a conservative counterrevolution.⁶⁹ As part of this revolution, many scholars and activists predicted that the right to privacy would be modified considerably, or even eliminated.⁷⁰ The following analysis investigates this prediction by dividing the Rehnquist era privacy cases into two categories: those concerning abortion and cases involving a claimed right to die.

⁶⁴ *Bowers*, 478 U.S. at 194-95. Whenever the U. S. Supreme Court recognizes rights that are not explicitly listed in the Constitution, scholars claim that the Court goes beyond the law and becomes too political. This harms the image of the law as being above politics. See generally ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

⁶⁵ President Ronald Reagan appointed Justice Sandra Day O' Connor in 1981, Justice Antonin Scalia in 1986, and Justice Anthony Kennedy in 1988. Reagan also promoted William Rehnquist from Associate Justice to Chief Justice in 1986. President George H. W. Bush appointed Justice David Souter in 1990 and Justice Clarence Thomas in 1991. See HENSLEY ET AL., *supra* note 45, at 69-80.

⁶⁶ Justice William Brennan (1956-1990) was replaced by Justice David Souter (1990-present), Justice Thurgood Marshall (1967-1991) was followed by Clarence Thomas (1991-present), and Justice Harry Blackmun (1970-1994) was replaced by Justice Stephen Breyer (1994-present). *Id.*

⁶⁷ *Id.* at 63-64.

⁶⁸ See generally SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* (1989).

⁶⁹ Judicial scholars often have referred to an upcoming conservative counterrevolution as a reaction to the liberal revolution of the 1950s and 1960s wherein Chief Justice Earl Warren led the Court toward judicial activism. See David M. O'Brien, *The Supreme Court: From Warren to Burger to Rehnquist*, 20 PS: POL. SCI. & POL. 12, 12-20 (1987).

⁷⁰ See HENSLEY ET AL., *supra* note 45, at 832-859.

A. *Abortion Rights*

As of 2002, the Rehnquist Court has decided eight cases that centered upon abortion and the right to privacy. This section divides these cases into three categories: 1) direct challenges to *Roe*, 2) minors and abortion policy, and 3) federal funding and abortion.

1. Direct Challenges to *Roe*: *Webster* and *Casey*

The Rehnquist Court heard its first privacy case during the 1988-89 term. In *Webster v. Reproductive Health Services*,⁷¹ the Court addressed the constitutionality of several abortion regulations. Missouri had enacted legislation that defined life as “begin[ning] at conception,” banned the use of public facilities or employees to perform abortions, prohibited public funding for abortion counseling and, finally, required physicians to conduct viability tests before performing an abortion.⁷² *Webster* was a much anticipated decision because legal scholars predicted that the regulations would be upheld and the *Roe* precedent would be overturned.⁷³

In a five to four vote, the Court upheld the viability tests⁷⁴ and the ban on public facilities and employees as constitutional,⁷⁵ but chose not to rule on the question of when life begins or the ban on public funding for abortion counseling.⁷⁶ In Chief Justice Rehnquist’s plurality opinion, he stated that the state’s declaration that life begins at conception was not a regulation on the abortion procedure, but merely an expression of the value of life by the state.⁷⁷ Likewise, Rehnquist asserted that the ban on public funding did not adversely affect the right to an abortion.⁷⁸ In upholding the regulations related to the prohibition of public facilities or employees being used for abortions, Rehnquist wrote that the regulations did not create a government obstacle for a woman seeking an abortion and that precedent “support[ed] the view that the State need not commit any resources to facilitat[e] abortions”⁷⁹

The real threat to *Roe* emerged with Rehnquist’s discussion of viability testing. The Missouri law required all women to be tested at the twentieth week

⁷¹ 492 U.S. 490 (1989).

⁷² *Id.* at 501.

⁷³ After Justice Kennedy was appointed in 1988, a majority of the court in favor of overturning *Roe* appeared to exist for the first time. See HENSLEY, ET AL., *supra* note 45, at 836.

⁷⁴ *Webster*, 492 U.S. at 519-20.

⁷⁵ *Id.* at 507.

⁷⁶ *Id.* at 506-07.

⁷⁷ *Id.* at 505.

⁷⁸ *Id.* at 507-10.

⁷⁹ *Id.* at 511.

of pregnancy to determine if the fetus could survive on its own.⁸⁰ Rehnquist maintained that because *Roe* only protected the fetus after the third trimester, or beyond the twenty fourth week of pregnancy, that the trimester approach in *Roe* would have to be abandoned.⁸¹ Rehnquist argued that this would not overturn *Roe*,⁸² although the dissent maintained that this significant change would have essentially overturned *Roe*.⁸³

While Justice Sandra Day O'Connor voted with the plurality to uphold the abortion regulations including viability testing, she disagreed with Rehnquist's legal reasoning concerning viability testing.⁸⁴ She refused to sign on to that section of Rehnquist's opinion because she felt that his interpretation of viability testing would have overturned *Roe*.⁸⁵ With only four justices signing on to Rehnquist's plurality opinion,⁸⁶ it did not carry the weight of precedent⁸⁷ and therefore *Roe* and the trimester approach were not overturned.⁸⁸

In dissent, Justice Blackmun expressed real concern for the liberty and equality of women in arguing that all of the regulations should have been struck down as unconstitutional.⁸⁹ In particular, Blackmun considered the viability testing to be dangerous and unnecessary because it did not promote maternal and fetal health, a requirement of the trimester approach in judging the constitutionality of abortion regulations during the second trimester.⁹⁰

Three years after *Webster*, the Rehnquist Court issued one of its most important decisions to date concerning privacy and abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁹¹ While many observers again expected *Roe* to be overturned, the Court instead issued a fragmented and ambiguous decision that left judicial scholars uncertain about the true meaning of the ruling.⁹² *Casey* involved several provisions passed by the Pennsylvania legislature that placed restrictions on abortion procedures.⁹³ Specifically, the

⁸⁰ *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 513 (1989).

⁸¹ *See id.* at 518-19.

⁸² *Id.* at 521.

⁸³ *Id.* at 538 (Blackmun, J., dissenting); see CHRISTOPHER E. SMITH, COURTS AND PUBLIC POLICY 119-20 (1993) (discussing Blackmun's dissenting opinion).

⁸⁴ *Webster*, 492 U.S. at 525 (O'Connor, J., concurring in part and concurring in the judgment).

⁸⁵ *Id.* at 525-26 (O'Connor, J., concurring in part and concurring in the judgment).

⁸⁶ The four justices forming the plurality were Rehnquist, White, Scalia, and Kennedy.

⁸⁷ It takes a majority of the justices on the Court, or five justices, to establish binding case precedent. See HENSLEY ET AL., *supra* note 45, at 897 (defining majority opinion).

⁸⁸ *See Webster*, 492 U.S. at 537 (Blackmun, J., concurring in part and dissenting in part).

⁸⁹ *See id.* at 539-41 n.1 (Blackmun, J., concurring in part and dissenting in part).

⁹⁰ *See id.* at 542-43 (Blackmun, J., concurring in part and dissenting in part).

⁹¹ 505 U.S. 833 (1992).

⁹² *See HENSLEY ET AL.*, *supra* note 45, at 845-47.

islature that placed restrictions on abortion procedures.⁹³ Specifically, the Pennsylvania statute required informed consent from the pregnant woman, a mandatory twenty-four hour waiting period, parental consent for minors, spousal notification, and public reporting and disclosure requirements.⁹⁴

In a plurality opinion joined by Justices Sandra Day O'Connor, David Souter, and Anthony Kennedy, the trio expressed doubt about *Roe* but asserted that its basic principles⁹⁵ must be affirmed to preserve judicial integrity and to maintain respect for Court precedent.⁹⁶ While *Roe* was not overturned, it was altered considerably in the Court's opinion. First, all of the Pennsylvania statutory provisions were upheld as constitutional, with the exception of spousal notification.⁹⁷ By allowing these abortion restrictions to stand, the Court changed course significantly in its application of *Roe*.⁹⁸ The Court also decided to abandon the trimester approach in favor of an "undue burden" analysis.⁹⁹ This analysis determined whether a substantial obstacle had been placed in the path of a woman trying to secure an abortion prior to fetal viability.¹⁰⁰ As such, "a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."¹⁰¹ As Justice O'Connor explained, "understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decisions before fetal viability could be constitutional. The answer is no."¹⁰² *Casey* perplexed many Court observers because, while it appeared to preserve *Roe*, it also returned considerable power to the States who could more easily restrict and influence the abortion procedure using the "undue burden" analysis.¹⁰³ In the plurality opinion, the three justices noted:

⁹³ 505 U.S. at 844.

⁹⁴ *Id.*; 18 PA. CONS. STAT. §§ 3203-3220 (1990).

⁹⁵ *Casey*, 505 U.S. at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*.").

⁹⁶ *Id.* at 845-46.

⁹⁷ *Id.* at 900.

⁹⁸ The Supreme Court previously struck down similar provisions based on *Roe*. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

⁹⁹ *Casey*, 505 U.S. at 873, 879.

¹⁰⁰ *Id.* at 877.

¹⁰¹ *Id.*

¹⁰² *Id.* (internal citations omitted).

¹⁰³ See HENSLEY ET AL., *supra* note 45, at 858.

[T]he State may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses not to raise the child herself.¹⁰⁴

It was clear that abortion restrictions at the state level would no longer be subject to the highest level of judicial scrutiny, unless deemed an undue burden. This was evident in *Casey*, where only the spousal consent provision was judged as an undue burden.¹⁰⁵ Moreover, by abandoning the trimester approach in favor of the point of viability, or when the fetus can survive outside of the mother's womb, states could issue the most severe restrictions at viability. Under the trimester approach, the point of viability had been set firmly at the twenty-fourth week of pregnancy, but this was strongly criticized as time-bound and unworkable in post-*Roe* rulings.¹⁰⁶ Interestingly, this point of viability continues to be debated within state legislatures¹⁰⁷ and also has been susceptible to change given advances in technology.¹⁰⁸

Technically, *Casey* was a five to four vote; however, only three justices, O'Connor, Souter, and Kennedy, formed the plurality.¹⁰⁹ Justices John Paul Stevens and Harry Blackmun, the author of the majority opinion in *Roe*, wrote separate opinions where both concurred in part and dissented in part.¹¹⁰ While Blackmun praised the plurality for reaffirming *Roe*,¹¹¹ he would have struck down all of the provisions as unconstitutional using the highest standard of strict

¹⁰⁴ *Casey*, 505 U.S. at 873.

¹⁰⁵ *See id.* at 900.

¹⁰⁶ *See, e.g., City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452-54 (1983) (O'Connor, J., dissenting).

¹⁰⁷ Thirty state legislatures passed laws banning partial-birth abortions using the viability argument; however, these laws were struck down as unconstitutional in *Stenberg v. Carhart*, 530 U.S. 914 (2000).

¹⁰⁸ *See id.* at 924. As technology evolves, it is likely that the point of viability will occur earlier during the pregnancy term. *Akron Ctr. for Reprod. Health*, 462 U.S. at 452-53 (O'Connor, J., dissenting).

¹⁰⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 843-44 (1992).

¹¹⁰ *See id.* at 911 (Stevens, J., concurring in part and dissenting in part); *id.* at 922 (Blackmun, J., concurring in part and dissenting in part).

¹¹¹ *Id.* at 922 (Blackmun, J., concurring in part and dissenting in part).

scrutiny.¹¹² Blackmun also expressed concern that the Court was only one vote away from overturning *Roe*.¹¹³

The four dissenting justices, Chief Justice Rehnquist and Justices Scalia, White, and Thomas voted to overturn *Roe* and send the abortion issue back to the states.¹¹⁴ Rehnquist argued that abortion was not a fundamental right and claimed that, while the plurality opinion recognized this point, their decision would allow *Roe* to continue to exist only as an “illusion of reality.”¹¹⁵ Rehnquist chastised the plurality for developing the “undue burden” standard which created an “entirely new method of analysis, without any roots in constitutional law . . . to decide the constitutionality of state laws regulating abortion.”¹¹⁶ He concluded by noting that “[n]either *stare decisis* nor ‘legitimacy’ are truly served by such an effort.”¹¹⁷ In a separate dissent, Justice Scalia argued that states should be able to prohibit abortion because the Constitution is silent on the issue and because the “longstanding traditions of American society” have allowed for such laws.¹¹⁸ Scalia emphasized that his views on abortion were based solely on the law, not on his personal views.¹¹⁹ While no direct challenge to *Roe* has been heard since the *Casey* ruling,¹²⁰ an example of the Court’s application of the “undue burden” standard was evident in the 1997 decision of *Mazurek v. Armstrong*¹²¹ wherein the Court upheld a Montana law that required only licensed physicians to perform abortions.¹²² In a six to three decision, the Court held that such restrictions did not constitute an “undue burden” on a woman seeking an abortion.¹²³ In *Mazurek*, it was clear that the “undue burden” standard would make it easier for the conservative justices to uphold restrictions

¹¹² *Id.* at 926 (Blackmun, J., concurring in part and dissenting in part).

¹¹³ *See id.* at 923 (Blackmun, J., concurring in part and dissenting in part).

¹¹⁴ *See id.* at 944 (Rehnquist, J., concurring in the judgment in part and dissenting in part) (joined by Justices Scalia, White, and Thomas).

¹¹⁵ *Id.* at 954 (Rehnquist, J., concurring in the judgment in part and dissenting in part).

¹¹⁶ *Id.* at 966 (Rehnquist, J., concurring in the judgment in part and dissenting in part).

¹¹⁷ *Id.* (Rehnquist, J., concurring in the judgment in part and dissenting in part).

¹¹⁸ *Id.* at 980 (Scalia, J., concurring in the judgment in part and dissenting in part).

¹¹⁹ *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

¹²⁰ Since *Casey*, the Court has denied review of a number of cases dealing with potential challenges to the *Roe* precedent. *See* *Planned Parenthood v. Miller*, 63 F.3d 1452 (8th Cir. 1995), *cert denied*, 517 U.S. 1174 (1996); *Barnes v. Mississippi*, 992 F.2d 133 (5th Cir. 1993), *cert denied*, 510 U.S. 976 (1993); *Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992), *cert denied*, 507 U.S. 972 (1993); *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992), *cert denied*, 506 U.S. 1021 (1992); *Ada v. Guam Soc’y of Obstetricians & Gynecologists*, 962 F.2d 1366 (9th Cir. 1992), *cert denied*, 506 U.S. 1011 (1992).

¹²¹ 520 U.S. 968 (1997) (per curiam).

¹²² *Id.* at 974-75.

¹²³ *Id.* at 976.

on the abortion procedure because if a restriction is deemed not to be an undue burden then it only must pass the rational basis test.¹²⁴

The most recent decision involving an application of the “undue burden” standard concerned the issue of partial-birth abortion. In *Stenberg v. Carhart*,¹²⁵ the Rehnquist Court voted five to four to strike down a Nebraska law prohibiting partial-birth abortion, unless necessary to save the life of the mother.¹²⁶ *Stenberg* constituted the only liberal, or pro-choice, ruling from the Rehnquist Court in eleven privacy cases.¹²⁷

Writing for the majority, Justice Stephen Breyer struck down the law as unconstitutional because it did not provide an exception for protecting the health of the mother and placed an undue burden on women seeking abortions.¹²⁸ Breyer reaffirmed the precedent established in *Roe* and *Casey* “that the Constitution offers basic protection to the woman’s right to choose.”¹²⁹ In a dissenting opinion, Justice Clarence Thomas argued that the states had an interest in protecting the unborn and applied the undue burden analysis to find that the Nebraska law did not create a substantial obstacle for women seeking an abortion.¹³⁰ Thomas argued that the state’s interest in protecting life had been decided in *Casey*.¹³¹ Further, the Nebraska statute did not place a substantial obstacle to obtaining an abortion because the Court failed to identify a real barrier to a woman’s ability to obtain an abortion and the Court failed to demonstrate that the statute would affect a significant number of women.¹³²

2. Minors and Abortion Rights

In 1990, the Rehnquist Court handed down three privacy decisions involving the parental notification of minors attempting to obtain abortions. In

¹²⁴ *Id.*

¹²⁵ 530 U.S. 914 (2000).

¹²⁶ *See id.* at 922.

¹²⁷ A liberal vote is one which favors the individual claiming a civil rights or liberties violation by the government. Hence, a vote in favor of privacy is considered a liberal vote. *See generally* HAROLD SPAETH, UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953-1997 TERMS, at 88 (1999), available at <http://www.polisci.umn.edu/faculty/tjohnson/4309/cb9422.yr99.pdf>; HENSLEY ET AL., *supra* note 45, at 832.

¹²⁸ *Stenberg*, 530 U.S. at 930.

¹²⁹ *Id.* at 921. One of the problems with the Nebraska statute was that it did not draw a clear distinction between the procedure of partial birth abortion and the procedure used for second trimester abortions. *See* NEB. REV. STAT. §§ 28-326 (9), 28-328 (1-4) (Supp. 1999); *Stenberg*, 530 U.S. at 943-44.

¹³⁰ *Stenberg*, 530 U.S. at 1006-13 (Thomas, J., dissenting).

¹³¹ *Id.* at 981 (Thomas, J., dissenting) (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 83 (1992)).

¹³² *See id.* at 1013 (Thomas, J., dissenting).

Hodgson v. Minnesota,¹³³ the justices split five to four in striking down a Minnesota law requiring physicians to notify both parents before an abortion was performed on a minor and requiring physicians to wait forty-eight hours after the notification before proceeding with the abortion. Justice Stevens announced the majority opinion and stated that the two parent notification rule would cause difficulties for minors whose parents were separated or divorced.¹³⁴ In addition, it is possible that one parent may have deserted a minor.¹³⁵ Stevens also noted that the two parent notification rule increased the likelihood that minors might be exposed to trauma or family violence.¹³⁶ According to the majority, the two parent notification served no legitimate state interest, however, a one parent notification rule would serve the best interest of the minor.¹³⁷

While the Court struck down the two parent notification rule, the justices voted to uphold a critical portion of the Minnesota law that provided a judicial bypass procedure.¹³⁸ This section of the law allowed for a minor to obtain an abortion if she convinced a judge that an abortion without notifying her parents was in her best interest.¹³⁹ In upholding this less restrictive portion of the Minnesota law, the Rehnquist Court maintained its conservatism toward the freedom of a minor to seek an abortion.

In a companion case to *Hodgson*, the Court voted six to three in *Ohio v. Akron Center for Reproductive Health*¹⁴⁰ to uphold an Ohio law involving a one parent notification rule with a judicial bypass procedure that involved testimony from a relative of the minor. The controversy focused upon whether the bypass procedure met the constitutional requirements for such a procedure set forth in *Bellotti v. Baird*.¹⁴¹ A six justice majority concluded that the bypass procedure met the requirements and did not place an undue burden upon minors attempting

¹³³ 497 U.S. 417 (1990).

¹³⁴ *Id.* at 419.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 450.

¹³⁸ *Id.* at 420.

¹³⁹ *Id.* at 427.

¹⁴⁰ 497 U.S. 502 (1990).

¹⁴¹ 443 U.S. 622 (1979). In *Bellotti*, the Court struck down a Massachusetts parental consent law with a judicial bypass procedure because the bypass procedure did not protect the privacy rights of the minor. *Id.* at 651. Justice Lewis Powell set forth three requirements for a legitimate judicial bypass procedure: 1) the minor must exhibit maturity in the abortion decision or that the abortion decision is in her best interests; 2) the minor's anonymity must be assured; and 3) the appeals process must be provided with expedition. *Id.* at 643-44.; see also *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976).

to secure abortions.¹⁴² Justice Kennedy's majority opinion stated that, while the judicial bypass procedure has never been required in regard to parental notification laws, the Ohio law provided for a bypass procedure that met the standard for cases involving parental consent laws which is more intrusive to the minor than parental notification.¹⁴³

Dissenting, Justices Blackmun, Marshall, and Brennan argued that the Ohio law did not meet the Court's standards for a bypass procedure and also obstructed minors who sought to exercise their right to an abortion. Blackmun commented that "the statute deliberately places state created obstacles . . . in the legislative hope that [the minor] will stumble, perhaps fall, and at least ensuring that she 'conquer a multi-faceted obstacle course' before she is able to exercise her constitutional right to an abortion."¹⁴⁴

Blackmun noted that requiring a minor to seek approval from a judge, after the filing of court documents and testimony from a relative that the minor could face abuse, might have drastic consequences. A minor might be traumatized if she is forced to reveal that she has been sexually abused by a parent in order to prove to a judge that she has clear and convincing evidence required for a judicial bypass.¹⁴⁵

In 1997, the Rehnquist Court decided *Lambert v. Wicklund*¹⁴⁶ and reaffirmed the *Hodgson* and *Akron Center* holdings regarding parental notification and the judicial bypass procedure. In a six to three vote, the Court held that Montana's 1995 Parental Notice of Abortion Act was constitutional and provided sufficient protection for a minor's right to abortion.¹⁴⁷ The statute contained a judicial bypass procedure, similar to those discussed in the *Hodgson* and *Akron Center* cases, wherein the courts could waive the notice requirement if it was not in the best interest of the minor to notify a parent.¹⁴⁸

3. Federal Funding and Abortion Rights

Another constitutional issue concerning abortion involves the question of federal funding for the procedure. In 1980, the Court ruled that it was consti-

¹⁴² *Akron Ctr. for Reprod. Health*, 497 U.S. at 503.

¹⁴³ *Id.* at 510. In *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976), the Court ruled that to prevent another person from having complete power over a minor's decision to have an abortion, a bypass procedure must be provided by the State if it chooses to require parental consent. See also *Bellotti*, 443 U.S. 622.

¹⁴⁴ *Akron Ctr. for Reprod. Health*, 497 U.S. at 527 (Blackmun, J., dissenting).

¹⁴⁵ *Id.* at 537 (Blackmun, J., dissenting).

¹⁴⁶ 520 U.S. 292 (1997).

¹⁴⁷ *Id.* at 298-99.

¹⁴⁸ See *id.* at 293-94.

tutional for Congress to ban the use of federal funds for abortions.¹⁴⁹ The Rehnquist Court returned to the issue of federal funds and abortion policy in *Rust v. Sullivan*.¹⁵⁰ At issue was the Public Health Service Act of 1970 which specified that federal funds appropriated under Title X for family-planning services were not to be used in programs where abortion was a method of family planning.¹⁵¹ Early on, Title X was interpreted by officials at the Health and Human Services Department within the Reagan administration so that clinics could not provide abortions, but could provide abortion counseling.¹⁵² In 1988, the Secretary of Health and Human Services within the Reagan administration implemented new regulations to prohibit any counseling or advocating of abortion services at family planning agencies.¹⁵³ Hence, clinics receiving federal monies could not even discuss abortion with pregnant women.¹⁵⁴ Planned Parenthood challenged the “gag rule” as a violation of freedom of speech as well as a violation of abortion and privacy rights established in *Roe*.

The Rehnquist Court handed down a controversial five to four ruling with Justice Souter, in his first term, casting the deciding vote to uphold the gag order and the Reagan administration’s interpretation of Title X.¹⁵⁵ In his majority opinion, Chief Justice Rehnquist focused upon the ambiguous language of Title X as well as the Court’s deference to administrative agencies as a basis for upholding the “gag rule.”¹⁵⁶ The broad language used by Congress within Title X allowed for a flexible interpretation by the Secretary of Health and Human Services.¹⁵⁷ Because Title X does not define “method of family planning” or specify what types of counseling services are appropriate for federal funding, Rehnquist stated that the Court was unable to find the new regulations to be

¹⁴⁹ *Harris v. McRae*, 448 U.S. 297, 323 (1980) (holding that the congressional ban on federal funding for abortions did not violate the equal protection rights of poor women who could not afford an abortion).

¹⁵⁰ 500 U.S. 173 (1991). The large majority of Supreme Court cases involving abortion regulations concern state laws. In fact, the Court has ruled on only two cases involving federal law in the area of abortion: *Harris* and *Rust*. See HENSLEY ET AL., *supra* note 45, at 844.

¹⁵¹ *Rust*, 500 U.S. at 178.

¹⁵² See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 223 (1992).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Justice David Souter replaced Justice William Brennan, a generally more liberal justice, who most likely would have voted to strike down the gag rule in *Rust*. Hence, the appointment of Souter to replace Brennan immediately had a significant impact on abortion policy. For a discussion of Souter’s impact during his first term on the Court, see Christopher E. Smith and Scott P. Johnson, *David Souter’s First Term on the Supreme Court: The Impact of a New Justice*, 75 *JUDICATURE* 238 (1992).

¹⁵⁶ *Rust*, 500 U.S. at 180.

¹⁵⁷ *Id.* at 184.

impermissible without infringing upon the jurisdiction of a federal agency.¹⁵⁸ Rehnquist wrote:

The Secretary's construction of Title X may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. In determining whether a construction is permissible, "[t]he court need not conclude that the agency construction was the only one it could permissibly have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it.¹⁵⁹

In regard to arguments that the application of Title X violated freedom of speech and a woman's right to abortion, Rehnquist noted that federal programs consistently have placed conditions upon programs that received federal monies without violating free speech.¹⁶⁰ While acknowledging that a woman's decision concerning an abortion might be made easier by information from a family-planning clinic, he concluded that "the Constitution does not require that the Government distort the scope" of the program to offer information to pregnant women considering an abortion.¹⁶¹

Justice Blackmun argued in his dissenting opinion that the "gag rule" violated both freedom of speech and the right to abortion.¹⁶² According to Blackmun, the rule was an unconstitutional content-based and viewpoint-based restriction that "manipulat[ed] . . . the doctor/patient dialogue."¹⁶³ Blackmun also stated that the gag rule created a significant obstacle for poor women because the family planning clinics provided their only information about abortion.¹⁶⁴

¹⁵⁸ *Rust v. Sullivan*, 500 U.S. 173, 184 (1991).

¹⁵⁹ *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

¹⁶⁰ *Id.* at 198.

¹⁶¹ *Id.* at 203.

¹⁶² *Id.* at 206 (Blackmun, J., dissenting).

¹⁶³ *Id.* at 212 (Blackmun, J., dissenting).

¹⁶⁴ *Id.* at 214 (Blackmun, J., dissenting).

B. Right to Die Cases

The Rehnquist Court has also ruled upon privacy cases not involving the issue of abortion. Since 1990, the Rehnquist Court has decided three cases involving privacy and the right to die. Within the right to die controversy, the Court has recognized a distinction, which carries constitutional significance, between withholding medical treatment and actively assisting the suicide of a patient. In *Cruzan v. Director, Missouri Department of Health*,¹⁶⁵ the Court handed down a five to four decision stating that “clear and convincing” evidence of a living will must be presented before a patient could be removed from life support systems. The majority opinion, authored by Chief Justice Rehnquist, held that states have the right to protect incompetent patients from the errant decisions of others who might not represent their best interests. Rehnquist wrote:

Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, “[t]here will be of course, some unfortunate situations in which family members will not act to protect a patient.” A State is entitled to guard against potential abuses in such situations.¹⁶⁶

Although the majority did not base its decision on the right to privacy, it did acknowledge that, based upon individual liberty interests in the Due Process Clause of the Fourteenth Amendment, competent adults have the right to make medical decisions about themselves that might result in their own death.¹⁶⁷ Hence, a constitutional right to die was given limited recognition by the majority, but not within the context of the right to privacy.¹⁶⁸ Even as the Court recognized a constitutional right to reject medical treatment, states continued to retain considerable power in preserving the life of incompetent patients.¹⁶⁹

In his dissenting opinion, Justice Brennan asserted that Missouri’s requirement of a living will or clear and convincing evidence of the patient’s will to withdraw medical treatment to end a life was too demanding.¹⁷⁰ Aside from a living will, Brennan suggested that statements made to close friends and relatives should be sufficient to determine if an incompetent patient wishes to be

¹⁶⁵ 497 U.S. 261 (1990).

¹⁶⁶ *Id.* at 281 (quotation omitted).

¹⁶⁷ *Cruzan*, 497 U.S. at 261. The Court believes that this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest. See HENSLEY ET AL., *supra* note 45, at 853.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 281.

¹⁷⁰ *Id.* at 325 (Brennan, J., dissenting).

removed from life support.¹⁷¹ In a separate dissent, Justice Stevens contended that states should seek to determine the best interest of the patient and abandon the clear and convincing evidence standard per se.¹⁷² Stevens argued that the best interest of the patient should be determined by the particular facts of each case.¹⁷³

The Court addressed the issue of euthanasia in 1997, where the justices unanimously rejected the practice of physician-assisted suicide as falling under a right to privacy in two companion cases with opinions both written by Chief Justice Rehnquist. First, in *Washington v. Glucksberg*,¹⁷⁴ the Court held that a Washington statute making assisted suicide a felony did not violate the “liberty interest” found in the Fourteenth Amendment. Here, Chief Justice Rehnquist recognized the legal, historical, and practical condemnation of assisted suicide in the political tradition of the United States and rejected the claim that individuals have a clear “liberty” interest regarding the mastery of their fate.¹⁷⁵ Specifically, he noted that the Court usually will support Due Process claims that are “deeply rooted in this Nation’s history and tradition,” but assisted suicide is not included within the history and tradition of the American experience.¹⁷⁶

In declaring Washington’s ban of assisted suicide constitutional, Rehnquist rationally connected the law to a legitimate government interest – an “unqualified interest in the preservation of human life”¹⁷⁷ Moreover, the fact that almost every state has recognized suicide as a crime demonstrates the commitment of the states to the preservation of human life.¹⁷⁸

¹⁷¹ *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 325 (Brennan, J., dissenting).

¹⁷² *Id.* at 350 (Stevens, J., dissenting).

¹⁷³ *Id.* (Stevens, J., dissenting).

¹⁷⁴ 521 U.S. 702 (1997).

¹⁷⁵ *Id.* at 706.

¹⁷⁶ *Id.* at 721 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

¹⁷⁷ *Id.* at 728 (citing *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 282 (1990)).

¹⁷⁸ See ALA. CODE § 22-8A-10 (1990); ALASKA STAT. §§ 11.41.100, 18.12.080(a), (f) (2002); ARIZ. REV. STAT. § 36-3210 (Supp. 1996); ARK. CODE ANN. §§ 20-13-905(a), (f), 20-17-210(a), (g) (1995); CAL. HEALTH & SAFETY CODE § 20-13-905 (West 1997); CAL. PROB. CODE § 4723 (West Supp. 1997); COLO. REV. STAT. §§ 15-14-504(4), 15-18-112(1), 15-18.5-101(3), 15-18.6-108 (1987 & Supp. 1997); CONN. GEN. STAT. § 19a-575 (Supp. 1996); DEL. CODE ANN. tit. 16, § 2512 (Supp. 1996); D.C. CODE ANN. §§ 6-2430, 21-2212 (1995 & Supp. 1996); FLA. STAT. ch. 765.309(1), (2) (Supp. 1997); GA. CODE ANN. §§ 31-32-11(b), 31-36-2(b) (1996); HAW. REV. STAT. § 327D-13 (1996); IDAHO CODE § 39-152 (Supp. 1996); 755 ILL. COMP. STAT. §§ 35/9(t), 40/5, 40/50, 45/2-1 (1992); IND. CODE §§ 16-36-1-13, 16-36-4-19, 30-5-5-17 (1994 & Supp. 1997); IOWA CODE §§ 144A.11.1-144A.116, 144B.12.2 (1989 & Supp. 1997); KAN. STAT. ANN. §§ 65-28, 109 (1985); KY. REV. STAT. ANN. § 311.638 (Banks-Baldwin Supp. 1992); LA. REV. STAT. ANN. § 1299.58.10(A), (B) (West 1992); ME. REV. STAT. ANN. tit. 18-A, § 5-813(b), (c) (West 1996); MD. CODE ANN., HEALTH-GEN. I § 5-611(c) (1994); MASS. GEN. LAWS ch. 201D, § 12 (Supp. 1997); MICH. COMP. LAWS § 700.496(20) (1995); MINN. STAT. §§ 145B.14, 145C.14

In the companion case of *Vacco v. Quill*,¹⁷⁹ the Court also unanimously agreed that New York's ban on physician-assisted suicide was constitutional and did not violate the Equal Protection Clause of the Fourteenth Amendment. Rehnquist's unanimous opinion for the Court refused to acknowledge that terminally ill patients who wished to participate in physician-assisted suicide were being denied their equal rights because they were treated differently than patients who simply were allowed to die by refusing medical treatment, such as life support systems.¹⁸⁰ In denying the equal protection claim, the Court drew a rational distinction between the refusal of medical treatment and physician-assisted suicide because letting a patient die and forcing a patient to die were deemed fundamentally different.¹⁸¹

Rehnquist relied heavily upon the intent behind each act because, while each may result in death, the distinction between causation and intent must be established.¹⁸² He stated that a person refusing medical treatment dies from an underlying pathological disease, however, physician-assisted suicide causes a person to die from the medication administered by the physician.¹⁸³ Rehnquist cited the overwhelming majority of state legislatures that recognized this distinction.¹⁸⁴ As with the *Cruzan* decision earlier, *Vacco* and *Glucksberg* placed bright-line limits on the right to die and encouraged states to rely upon their legislatures and the democratic process in making such difficult decisions about life and death.

(Supp. 1997); MISS. CODE ANN. §§ 41-41-117(2), 41-41-119(1) (Supp. 1992); MO. REV. STAT. §§ 459.015.3, 459.055(5) (1992); MONT. CODE ANN. §§ 50-9-205(1), (7), 50-10-104(1), (6) (1995); NEB. REV. STAT. §§ 20-412(1), (7), 30-3401(3) (1995); NEV. REV. STAT. 449.670(2) (1996); N.H. REV. STAT. ANN. §§ 137-H:10, 137-H:13, 137-J:1 (1996); N.J. STAT. ANN. §§ 26:2H-54(d), (e), 26:2H-77 (1996); N.M. STAT. ANN. § 24-7A-13(B)(1), (C) (Supp. 1995); N.Y. PUB. HEALTH LAW §2989(3) (McKinney 1993); N.C. GEN. STAT. §§ 90-320(b), 90-321(f) (1993); N.D. CENT. CODE §§ 23-06.4-01, 23-06.5-01 (1991); OHIO REV. CODE ANN. § 2133.12(A), (D) (Supp. 1996); OKLA. STAT. tit. 63, §§ 3101.2(C), 3101.12(A), (G) (1996); 20 PA. CONS. STAT. § 5402 (Supp. 1996); R.I. GEN. LAWS §§ 23-4.10-9(a), (f), 23-4.11.10(a), (f) (1996); S.C. CODE ANN. §§ 44-77-130, 44-78-50(A), (C), 62-5-504(O) (Supp. 1996); S.D. CODIFIED LAWS §§ 34-12D-14, 34-12D-20 (1994); TENN. CODE ANN. §§ 32-11-110(a), 39-13-216 (Supp. 1996); TEX. HEALTH & SAFETY CODE ANN. §§ 672.017, 672.020, 672.021 (1992); UTAH CODE ANN. §§ 75-2-1116, 75-2-1118 (1993); VT. STAT. ANN. tit. 18, § 5260 (1987); VA. CODE ANN. § 54.1-2990 (1994); W. VA. CODE §§ 16-30-10, 16-30A-16(a), 16-30B-2(b), 16-30C-14 (1995); WIS. STAT. §§ 154.11(1), (6), 154.25(7), 155.70(7) (Supp. 1996); WYO. STAT. ANN. §§ 3-5-211, 35-22-109, 35-22-208 (1994 & Supp. 1996).

¹⁷⁹ 521 U.S. 793 (1997).

¹⁸⁰ See DAVID M. O'BRIEN, SUPREME COURT WATCH 1997, at 117 (1998).

¹⁸¹ *Vacco*, 521 U.S. at 807 (citing *Cruzan*, 497 U.S. at 278).

¹⁸² *Id.* at 801.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 804.

The following sections will explore the voting behavior of the justices of the Rehnquist Court in the privacy cases discussed above. The analysis below attempts to explain more fully the attitudes of the Rehnquist Court justices toward the right to privacy.

IV. THE VOTING BEHAVIOR OF INDIVIDUAL JUSTICES IN PRIVACY CASES (1986-2000)

This part provides an empirical investigation of the voting behavior of individual justices in privacy cases¹⁸⁵ during the Rehnquist Court era. Descriptive statistics are employed to highlight the liberal and conservative voting record of the individual justices. In addition, an interagreement matrix and bloc voting analysis show which justices voted together most often in privacy cases. Finally, a comparison is drawn between the Rehnquist and Burger Courts to examine whether significant change has occurred in the area of privacy since Rehnquist became Chief Justice.

A. *Ideological Trends*

Table 1 (see Appendix) illustrates the percentage of votes cast in the liberal¹⁸⁶ and conservative¹⁸⁷ direction by individual justices in privacy cases.¹⁸⁸ As depicted in Table 1, Justices William Brennan, Thurgood Marshall, and Harry Blackmun voted 100% in the liberal direction, demonstrating strong support for the right to privacy. Throughout the late 1980s and early 1990s, these three justices comprised the liberal wing on a conservative Court packed with justices appointed by Republican Presidents Richard M. Nixon, Ronald W. Reagan, and George H. W. Bush.¹⁸⁹

With the departure of Brennan in 1990, Marshall in 1991, and Blackmun in 1994, Justice John Paul Stevens apparently sat alone as the only liberal member of the Court, at least in terms of privacy rights. Stevens has participated in all of the privacy cases during the Rehnquist Court era, voting 73 per-

¹⁸⁵ For the purposes of this study, a privacy case is defined as any case that directly involves the right to privacy as implied by the Due Process Clause of the Fourteenth Amendment. Justice Harry Blackmun initially recognized the right to privacy in the Due Process Clause in his majority opinion in *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁸⁶ A liberal vote is one which favors the individual claiming a civil rights or liberties violation by the government. Hence, a vote in favor of privacy is considered a liberal vote. See HENSLEY ET AL., *supra* note 45, at 56.

¹⁸⁷ A conservative vote favors the government infringing upon the rights of individuals. Therefore, a vote against privacy is defined as conservative for the purposes of this study. *Id.* at 56.

¹⁸⁸ It should be understood that the terms liberal and conservative are ambiguous concepts that contain more than one dimension. See *id.* at 863-64.

¹⁸⁹ President Richard Nixon appointed William Hubbs Rehnquist as Associate Justice in 1972. For Reagan and Bush appointees, see *id.* at 877.

cent in the liberal direction. Interestingly, Stevens has regained allies with recent appointments made by President William Jefferson Clinton, namely Justices Ruth Bader Ginsburg and Stephen Breyer.¹⁹⁰ In addition, Justice David Souter, appointed by President George H.W. Bush in 1990, has voted often with Stevens and has surprised many conservatives with his moderate to liberal voting record.¹⁹¹

As evidenced by the data in Table 1, Justices Ginsburg and Breyer supported privacy in three of the five cases in which they participated for a 60% voting record in the liberal direction. While Souter acknowledged the right to privacy during his Senate confirmation hearings and aligned often with the liberal bloc on other issues,¹⁹² he has provided less support for the liberal side in privacy cases. Table 1 shows that Souter voted 71 percent in the conservative direction with five of seven votes cast against privacy rights. It is worth noting, however, that Souter did side with the liberal bloc in *Stenberg*¹⁹³ and also cast a critical vote in *Casey* that prevented the *Roe* precedent from being overturned.¹⁹⁴ Hence, while the right to privacy did lose support with the departure of three liberal justices in the early 1990s, the appointments of Ginsburg and Breyer by President Clinton have provided renewed support for privacy and one Republican appointment, Souter, holds some promise for the liberal side.¹⁹⁵

The justices who have voted consistently against the right to privacy are led by Chief Justice William Rehnquist, Justices Antonin Scalia, Clarence Thomas, and Byron White, who retired in 1993. Each of these four justices voted 100% conservative in privacy cases. Justice Anthony Kennedy, President Reagan's last appointment in 1987, has also voted conservative in 91 percent of

¹⁹⁰ For a discussion of Justice Ginsburg's influence on the Court, see Joan Biskupic, *Nominee's Philosophy Seen Strengthening the Center*, WASH. POST, June 15, 1993, at A1. For a discussion of Justice Breyer's influence, see Linda Greenhouse, *Portrait of a Pragmatist*, N.Y. TIMES, July 14, 1994, at A1-A10.

¹⁹¹ During Justice Souter's first term on the Court (1990-1991), he voted with Justice Stevens in 49% of cases involving civil liberties and civil rights. However, since his first term, Souter has aligned with Stevens in approximately 75% of cases from 1991-2000. See HENSLEY ET AL., *supra* note 45, at 86-89 and Supp. 2002 at 19-24. From 1990-2000, Justice David Souter's overall voting record in civil rights and liberties cases is 61% in the liberal direction. His voting record in the last ten years suggests an increasing trend toward liberalism.

¹⁹² See Christopher E. Smith & Scott P. Johnson, *Newcomer on the High Court: Justice Souter and the Supreme Court's 1990 Term*, 37 S.D. L. REV. 21, 23 (1992).

¹⁹³ See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking down a Nebraska law prohibiting partial-birth abortions unless necessary to save the life of the mother).

¹⁹⁴ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹⁹⁵ Because Souter has exhibited a moderate to liberal voting record overall and has voted with the liberal bloc in two landmark cases involving privacy, it is conceivable that Souter will consistently support the right to privacy as opportunities arise in future cases. In addition, Table 2 illustrates that Souter's agreement with Stevens, Ginsburg, and Breyer surpasses the Court mean of 52.22. See also generally William S. Jordan, *Justice David Souter and Statutory Interpretation*, 23 U. TOL. L. REV. 491 (1992).

privacy cases. Justices David Souter and Sandra Day O'Connor complete the list of conservative justices voting 71 and 63 percent respectively against privacy interests.

With six current justices voting consistently against the right to privacy, it is possible that the Court is in the midst of a conservative counterrevolution.¹⁹⁶ Table 1 reveals the conservatism of the Rehnquist Court with a distribution of 63% conservative and 36% liberal votes cast in privacy cases. This suggests a significant lack of support among the Rehnquist Court justices for the right to privacy with approximately two of every three votes cast against the right to privacy.

B. *Interagreement and Bloc Voting Analysis*

Table 2 provides an interagreement matrix of all justices who participated in privacy cases during the Rehnquist Court era. This matrix provides percentages showing how frequently each justice voted with other justices.¹⁹⁷ Table 2 also offers a view of the voting blocs for the eleven privacy cases. A bloc voting analysis shows the degree to which each individual justice agreed with his or her colleagues on the Court. According to the established criterion,¹⁹⁸ a number of voting blocs can be identified on the Rehnquist Court in privacy cases.

Justices Brennan, Marshall, and Blackmun constituted a liberal bloc as they consistently voted together 100% of the time in four cases during the late 1980s and early 1990s. A "new" liberal bloc was formed with the departure of Brennan, Marshall, and Blackmun. In this "new block," Justices Ginsburg and Breyer voted 100% of the time with Justice Stevens in five cases. Justice Souter completes the "new" liberal bloc of four justices measuring an interagreement index of 79.50, slightly above the criterion for establishing a voting bloc. It

¹⁹⁶ A conservative counterrevolution is the overturning of liberal precedent from the Warren court era of the 1950s and 1960s. Many legal scholars have predicted this revolution because of the negative reaction from the public to many of the Warren court decisions such as the elimination of school prayer, desegregation, and expansion of criminal defendants' rights, etc., and because Republican presidents have dominated the appointment of justices to the Supreme Court since the early 1970s. See, e.g., HENSLEY, ET AL., *supra* note 45, at 3-7.

¹⁹⁷ An interagreement matrix yields a score for each pair of justices in all pertinent cases. This score is determined by taking the number of cases in which the justices voted together, both liberal, or both conservative, and dividing by the total number of cases in which they participated. See WALTER MURPHY & JOSEPH TANENHAUS, *THE STUDY OF PUBLIC LAW* 160 (1972).

¹⁹⁸ Voting blocs are distinguished by using the "Sprague criterion." See JOHN SPRAGUE, *VOTING PATTERNS OF THE UNITED STATES SUPREME COURT* (1968). John Sprague's formula establishes a consistency measure that justices must achieve to be regarded as a bloc. Therefore, in Tables 3 and 4, the rate must be larger than a set amount: subtract the average of all interagreement rates from 100, then divide by two and add the resulting number to the average of all interagreement rates.

should be noted that the “new” liberal bloc decreased considerably in strength with the addition of Souter.

The conservative blocs in privacy cases are considerably larger than the liberal blocs. Table 2 shows an “old” conservative bloc consisting of Chief Justice Rehnquist and Justices White, Scalia, Kennedy, and Thomas who voted together approximately 95 percent of the time between 1986 and 1993. A “new” conservative bloc composed of Rehnquist, Scalia, Kennedy, Thomas, and Souter has emerged recently with an interagreement score of 86 percent. When this group of five conservatives increased in size to six with the addition of Justice O’Connor, the interagreement index score failed to qualify as a voting bloc based upon the Sprague criterion.¹⁹⁹

The results of this bloc voting analysis depict a Supreme Court that is less supportive of privacy as it enters the twenty-first century. In the battle over privacy rights, the conservatives have established a solid five-justice majority. While the liberal bloc matches the conservative bloc in terms of voting strength, it is smaller in size comprising only three justices. When the conservative and liberal blocs increase in size beyond these numbers, the strength of the voting blocs is reduced substantially as evidenced by the percentages listed in Table 2.

It is apparent that Justices Souter and O’Connor, as well as future appointments to the Court, will be the key players in the battle over privacy rights. Souter and O’Connor clearly have become the swing votes in privacy cases. Based upon the bloc voting analysis, Souter established himself as the only member on the Rehnquist Court to align with both the conservative and liberal blocs, while O’Connor was the only member not to align with any ideological bloc. Hence, Souter and O’Connor hold the power to increase, or decrease, the size of the ideological blocs in any given case. While Souter and O’Connor have voted more often against privacy, each has demonstrated a willingness to support privacy interests at critical junctures. In particular, Souter and O’Connor both played critical roles in reaffirming the *Roe* precedent in *Casey* and both voted with the liberal bloc in *Stenberg*. Souter’s moderate to liberal voting record overall and O’Connor’s status as the first woman on the Court might provide some insight into their future behavior. It would seem unlikely that the deciding vote to overturn *Roe*, and eliminate certain privacy rights for women, would come from Souter, who has steadily become more liberal since his appointment to the Court in 1990,²⁰⁰ or O’Connor, who appears cognizant that her vote is crucial to women’s rights.²⁰¹

¹⁹⁹ See *supra* note 198.

²⁰⁰ See HENSLEY ET AL., *supra* note 45, at 84 and Supp. 2002 at 17.

²⁰¹ See Justice O’Connor’s concurring opinion in *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989).

C. *A Comparative Perspective of the Burger and Rehnquist Courts in Privacy Cases*

Table 3 provides a comparison of right to privacy cases during the Burger era of 1969-1985, and Rehnquist Court era of 1986 to the present, and offers some evidence of a serious decline in support for privacy. During the tenure of Chief Justice Warren Burger, the Court split about evenly between conservative and liberal decisions in privacy cases.²⁰² However, a dramatic shift has occurred under the leadership of Chief Justice William Rehnquist wherein ten of eleven rulings have been decided in the conservative direction.²⁰³ A chi square test²⁰⁴ was performed and illustrated that the difference in privacy rulings between the Court eras is highly unlikely by chance.²⁰⁵ Hence, the dramatic shift in the conservative rulings in privacy cases is most likely attributable to a change in the leadership and composition of the Court.

It also is interesting to note that the Rehnquist Court has decided about one-half the number of privacy cases as the Burger Court in approximately the same amount of time. The fact that the Rehnquist Court has decided signifi-

²⁰² The twenty-one cases judged to directly involve privacy during the Burger Court era are as follows: *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Ass'n. of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Baird II*); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Carey v. Population Services, Int'l*, 431 U.S. 678 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Kelley v. Johnson*, 425 U.S. 238 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Baird I*); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See HENSLEY ET AL., *supra* note 45, at 812-32; see also DAVID O'BRIEN, *CONSTITUTIONAL RIGHTS AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1199-1203* (1995).

²⁰³ *Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksburg*, 521 U.S. 702 (1997); *Mazurek v. Armstrong*, 520 U.S. 968 (1997); *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990); *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989).

²⁰⁴ The chi-square test is designed to evaluate whether the difference between the observed frequencies and expected frequencies establishes a statistically significant relationship. It is a non-parametric test that does not assume a normal distribution and does not require interval level data. This test is contrary to a parametric test of significance which assumes knowledge of the parameters in the population using the normal distribution and interval level data. See CHAVA FRANKFORT NACHMIAS & DAVID NACHMIAS, *RESEARCH METHODS IN THE SOCIAL SCIENCES 444-53* (2000).

²⁰⁵ A chi-square test of significance was conducted and illustrated a statistically significant relationship between the Rehnquist Court and a shift in the conservative direction in the area of privacy rights. The data revealed that this relationship is statistically significant at the .05 level indicating a 95% confidence level that the Rehnquist Court era and the dramatic shift toward conservatism in privacy cases are not independent of each other.

cantly fewer cases is consistent with a minimalist approach²⁰⁶ toward decision making whereby the Court allows the democratic process to reign, particularly when it “is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux.”²⁰⁷ The issues associated with the right to privacy, such as abortion, homosexuality, and the right to die, fit perfectly within this minimalist approach because the complexity of each issue has divided the American people. Consistent with the minimalist approach, the Rehnquist Court has produced opinions with a very narrow scope in the area of privacy.²⁰⁸ This contrasts sharply with the broad, sweeping opinions handed down during the Warren and Burger Courts that established the right to privacy.²⁰⁹

V. CONCLUSION

In the absolute sense, the right to privacy has not been eliminated during the Rehnquist Court years. In theory, the right to privacy stands as a fundamental right based upon Court precedent established in *Griswold*, *Eisenstadt*, and *Roe*. In practice, however, a conservative movement has significantly narrowed the scope of privacy. In terms of abortion policy, while *Roe* has not been overturned, the Court has made it easier for states to place obstacles in the path of women seeking abortions, particularly the young and the poor.²¹⁰ The trimester approach developed by Justice Blackmun in *Roe* has been abandoned in favor of judging abortion restrictions according to the ambiguous “undue burden” analysis. Given that the Rehnquist Court has adopted a minimalist approach,²¹¹ it is

²⁰⁶ A minimalist approach is consistent with the Court deferring to the elected branches of government such as Congress, the President, and state legislatures as well as exercising judicial restraint by deferring to state courts. See HENSLEY ET AL., *supra* note 45, at 65.

²⁰⁷ Cass Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 8 (1996).

²⁰⁸ See *supra* Part III.

²⁰⁹ See *supra* Part II.B.-D.

²¹⁰ The Court has made it more difficult for young women to obtain abortions because of the strict regulations and parental notification laws. Poor women are also severely burdened by the strict regulations. For example, the twenty-four hour notice regulations forces women to take significant time away from the workplace when they cannot afford to take time off their jobs and travel across a state where abortion services are provided. In Mississippi, it is estimated the number of abortions declined forty percent because of this required waiting period. In *Barners v. Moore*, 970 F.2d 12 (5th Cir. 1992), the Fifth Circuit rejected the argument that this waiting period was an “undue burden.” Additionally, women from higher levels of the socio-economic spectrum retain more options because they can afford to travel outside their home state or even to another country to receive abortion services with fewer restrictions. See SMITH, *supra* note 83, at 122.

²¹¹ It is widely recognized that the Rehnquist Court has adopted a minimalist approach because they are accepting and deciding significantly fewer cases every term in relation to previous Courts. DAVID M. O'BRIEN, SUPREME COURT WATCH 11-15 (1997). The Rehnquist Court has

highly unlikely that restrictive abortion laws passed by conservative states will be given attention. Even if a case is granted review, it is unlikely that the Court would invalidate such laws because the Court presently provides limited scrutiny for abortion regulations using the “undue burden” analysis. In short, the Rehnquist Court has left the privacy rights of women up to the democratic process, specifically state and local legislators.

In terms of right to die cases, the Court has resisted attempts to include such a right within the concept of privacy. As with abortion, euthanasia was treated with a minimalist approach whereby the states have been left to develop their own policies.²¹² In the area of homosexual rights, the Rehnquist Court simply refused to address the issue after the Burger Court nearly recognized privacy for gays in its last term.²¹³ Instead, the Rehnquist Court again has left the battle over gay rights and privacy to the state legislatures.²¹⁴

It is apparent that personnel changes on the United States Supreme Court have shifted policy in the conservative direction and, at the very least, have placed the right to privacy in jeopardy. With the current composition of the Court, the possibility of eliminating the right to privacy is unlikely. However, future appointments most definitely will be a deciding factor as the distance between the status quo and the elimination of privacy is only one vote as evidenced by the rulings in *Webster*, *Casey*, and *Stenberg*.

granted plenary consideration to a smaller number and percentage of cases than previous Warren and Burger Courts. Chief Justices Earl Warren and Warren Burger consistently heard a higher percentage of cases on the Court’s docket than the Rehnquist Court. *Id.* at 10-11.

²¹² See *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261 (1990).

²¹³ The Supreme Court recently granted certiorari to a case squarely addressing the constitutionality of a Texas law outlawing sodomy, *Lawrence v. Texas*, 41 S.W.3d 349 (2001), *cert. granted*, 123 S. Ct. 661 (Dec. 2, 2002), where the Court is likely to reevaluate its holding in *Bowers v. Hardwick*. A reversal of *Hardwick* is possible but would most likely establish a right to privacy for homosexuals and contradict the Rehnquist Court’s tradition of conservatism, judicial restraint, and states’ rights in the area of privacy.

²¹⁴ See *Bowers v. Hardwick*, 478 U.S. 186 (1986). The fact that several states have sodomy laws is testament to the Court’s deference to state legislatures and state courts in the area of homosexual rights and privacy. See generally ERIC MARCUS, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS (1992).

APPENDIX

Table 1. Liberal/Conservative Voting Record of U. S. Supreme Court Justices in Right to Privacy Cases, 1986-2000 Terms.²¹⁵

<i>Justice (years on Court)</i>	<i>Liberal Decisions</i>	<i>Conservative Decisions</i>
William Brennan (1956-1990)	100% (4)	0% (0)
Byron White (1962-1993)	0% (0)	100% (6)
Thurgood Marshall (1967-1991)	100%(5)	0% (0)
Harry Blackmun (1970-1994)	100% (6)	0% (0)
William Rehnquist (1972-)	0% (0)	100% (11)
John Paul Stevens (1975-)	73% (8)	27% (3)
Sandra Day O'Connor (1981-)	36%(4)	64% (7)
Antonin Scalia (1986-)	0%(0)	100% (11)
Anthony Kennedy (1988-)	9%(1)	91% (10)
David Souter (1990-)	29%(2)	71% (5)
Clarence Thomas (1991-)	0%(0)	100% (6)
Ruth Bader Ginsburg (1993-)	60%(3)	40% (2)
Stephen Breyer (1994-)	60%(3)	40% (2)
Rehnquist Court Totals	36%(36)	63%(63)

²¹⁵ The following is a listing of the specific votes of the justices in the privacy cases: Justice William Brennan voted liberal in *Webster*, *Hodgson*, *Akron Center*, and *Cruzan*.; Justice Byron White voted conservative in *Webster*, *Hodgson*, *Akron Center*, *Cruzan*, *Rust*, and *Casey*; Justice Thurgood Marshall voted liberal in *Webster*, *Hodgson*, *Akron Center*, *Rust*, and *Cruzan*; Justice Harry Blackmun voted liberal in *Webster*, *Hodgson*, *Akron Center*, *Rust*, *Cruzan*, and *Casey*; Chief Justice William Rehnquist voted conservative in *Webster*, *Hodgson*, *Akron Center*, *Rust*, *Cruzan*, *Casey*, *Lambert*, *Mazurek*, *Glucksberg*, *Vacco*, and *Stenberg*; Justice John Paul Stevens voted liberal in *Webster*, *Hodgson*, *Rust*, *Casey*, *Lambert*, *Mazurek*, *Cruzan*, and *Stenberg* and voted conservative in *Glucksberg*, *Vacco*, and *Akron Center*; Justice Sandra Day O'Connor voted liberal in *Rust*, *Casey*, *Stenberg*, and *Hodgson* and voted conservative in *Webster*, *Akron Center*, *Lambert*, *Mazurek*, *Cruzan*, *Glucksburg*, and *Vacco*; Justice Antonin Scalia voted conservative in *Webster*, *Hodgson*, *Akron Center*, *Rust*, *Cruzan*, *Casey*, *Lambert*, *Mazurek*, *Washington*, *Vacco*, and *Stenberg*; Justice Anthony Kennedy voted conservative in *Webster*, *Hodgson*, *Akron Center*, *Rust*, *Cruzan*, *Lambert*, *Mazurek*, *Washington*, *Vacco*, and *Stenberg* and voted liberal in *Casey*; Justice David Souter voted liberal in *Casey* and *Stenberg* and voted conservative in *Rust*, *Lambert*, *Mazurek*, *Glucksburg*, and *Vacco*; Justice Clarence Thomas voted conservative in *Casey*, *Lambert*, *Mazurek*, *Glucksburg*, *Vacco*, and *Stenberg*; Justices Ruth Ginsburg and Stephen Breyer both voted liberal in *Lambert*, *Mazurek*, and *Stenberg* and both voted conservative in *Glucksburg* and *Vacco*.

Table 2. Bloc Voting Analysis of Rehnquist Court Justices,²¹⁶ All Formally Decided Right to Privacy Cases, 1986-2000.

	RE	SC	WH	TH	KE	SO	OC	GI	BRY	ST	BR	MA	BL
RE	---	100	100	100	91	71	64	40	40	27	0	0	0
SC	100	---	100	100	91	71	64	40	40	27	0	0	0
WH	100	100	---	100	83	50	50	n/a	n/a	17	0	0	0
TH	100	100	100	---	83	67	67	40	40	33	n/a	n/a	0
KE	91	91	83	83	---	86	73	40	40	36	0	0	0
SO	71	71	50	67	86	---	86	60	60	57	n/a	0	33
OC	64	64	50	67	73	86	---	60	60	64	20	40	50
GI	40	40	n/a	40	40	60	60	---	100	100	n/a	n/a	n/a
BRY	40	40	n/a	40	40	60	60	100	---	100	n/a	n/a	n/a
ST	27	27	17	33	36	57	64	100	100	---	75	80	83
BR	0	0	0	n/a	0	n/a	20	n/a	n/a	75	---	100	100
MA	0	0	0	n/a	0	0	40	n/a	n/a	80	100	---	100
BL	0	0	0	0	0	33	50	n/a	n/a	83	100	100	---

Table 2a. Conservative Voting Blocs in Privacy Cases, 1986-2000.

<i>Justices</i>	<i>Percentage of Agreed Decisions</i>
Rehnquist, Scalia, White, Thomas	100.00
Rehnquist, Scalia, White, Thomas, Kennedy	94.80
Rehnquist, Scalia, Thomas, Kennedy, Souter	86.00
Rehnquist, Scalia, Thomas, Kennedy, Souter, O'Connor	75.87

Table 2b. Liberal Voting Blocs in Privacy Cases, 1986-2000.

<i>Justices</i>	<i>Percentage of Agreed Decisions</i>
Ginsburg, Bryer, Stevens	100.00
Bryer, Marshall, Blackmun	89.67
Bryer, Marshall, Blackmun, Stevens	79.50
Ginsburg, Bryer, Stevens, Souter, O'Connor	74.70

²¹⁶ Justices are designated by the first two letters of their last name except Justice Breyer, who is designated "BRY."

Table 3. Liberal/Conservative Outcomes of Right to Privacy Cases for the Burger and Rehnquist Courts, 1969-2000.

	<i>Burger Court (1969-1985)</i>	<i>Rehnquist Court (1986-2000)</i>	Total
<i>Liberal</i>	10 (48%)	1 (10%)	11
<i>Conservative</i>	11 (52%)	10 (90%)	21
Total	21 (100%)	11 (100%)	32

