Third Session

1.By far the most contentious issue before the Court is the fate of Roe v. Wade which held that a pregnant woman had a constitutional right to choose birth or abortion. President Trump has publicly committed to appoint to the court only nominees opposed to Roe and abortion. The five conservatives now on the Court have all expressed their aversion to a woman's right to choose. Although this antipathy has only increased since Roe was decided in 1972, it still survives even thou diminished. But it looks like this Court may finally succeed in killing Roe in one way or another. Part of the liberals problem in defending Roe is its obscure constitutional provenance. This history starts with a case called Griswold Connecticut.

2. Why is Roe's position so precarious at a time when even this most reactionary of Courts has sanctioned gay marriage? We will look at brief excerpts from Griswold v. Connecticut and Roe as well as excerpts from a wonderful 2015 article by Jill Lepore to shed light on this question. The final attachment for Roe v. Wade is a New Yorker interview with Linda Greenhouse, the dean of Supreme Court reporters.

SUPREME COURT OF THE UNITED STATES

Griswold v. Connecticut

Syllabus 1965

Appellants, the Executive Director of the Planned Parenthood League of Connecticut, and its medical director, a licensed physician, were convicted as accessories for giving married persons information and medical advice on how to prevent conception and, following examination, prescribing a contraceptive device or material for the wife's use. A Connecticut statute makes it a crime for any person to use any drug or article to prevent conception. Appellants claimed that the accessory statute, as applied, violated the Fourteenth Amendment. An intermediate appellate court and the State's highest court affirmed the judgment.

Held:

1. Appellants have standing to assert the constitutional rights of the married people.

2. The Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The statutes whose constitutionality is involved in this appeal... provide[s]: Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year.... The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute, as so applied, violated the Fourteenth Amendment.…

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that Lochner v. New York, should be our guide. But we decline that invitation, as we did in West Coast Hotel Co. v. Parrish, …We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation….

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights….

In NAACP v. Alabama, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.

Ibid. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion….

We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

* The Court said in full about this right of privacy:

The principles laid down in this opinion [by Lord Camden in Entick v. Carrington, 19 How.St.Tr. 1029] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the

breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment..

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK joins, dissenting.

Since 1879, Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law... As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion, the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We are told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much, I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. Compare Lochner v. New York, , with Ferguson v. Skrupa, …..

To Have and to Hold

Reproduction, marriage, and the Constitution.

Jill Lepore May 18, 2015 The New Yorker

In Griswold decided in June 1965, the Supreme Court ruled 7–2 that Connecticut’s ban on contraception was unconstitutional, not on the ground of a woman’s right to determine the timing and the number of her pregnancies but on the ground of a married couple’s right to privacy. “We deal with a right of privacy older than the Bill of Rights,” Justice

William O. Douglas wrote in the majority opinion. “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”…

In the half century since Griswold, Douglas’s arguments about privacy and marriage have been the signal influence on a series of landmark Supreme Court decisions. In 1972, Eisenstadt v. Baird extended Griswold’s notion of privacy from married couples to individuals. “If the right of privacy means anything,” Justice William Brennan wrote, “it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Griswold informed Roe v. Wade, in 1973, the Court finding that the “right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” And in Lawrence v. Texas, in 2003, Justice Anthony Kennedy, writing a 6–3 decision overturning a ban on sodomy, described Griswold as “the most pertinent beginning point” for the Court’s line of reasoning: the generative case….

A few weeks ago, the Supreme Court heard oral arguments in Obergefell v. Hodges, a consolidation of the petitions of four couples seeking relief from state same-sex-marriage bans in Kentucky, Michigan, Ohio, and Tennessee… The coincidence of the fiftieth anniversary of the Court’s ruling in Griswold and its anticipated decision in Obergefell makes this, inescapably, an occasion for considering the past half century of legal reasoning about reproductive and gay rights. The cases that link Griswold to Obergefell are the product of political movements that have been closely allied, both philosophically and historically….

The Constitution never mentions sex, marriage, or reproduction. This is because the political order that the Constitution established was a fraternity of free men who, believing themselves to have been created equal, consented to be governed. Women did not and could not give their consent: they were neither free nor equal. Rule over women lay entirely outside a Lockean social contract in a relationship not of liberty and equality but of confinement and subjugation. As Mary Astell wondered, in 1706, “If all Men are born free, how is it that all Women are born Slaves?” …

Essentially, the Constitution is inadequate. It speaks directly only to the sort of people who were enfranchised in 1787; the rest of us are left to make arguments by amendment and, failing that, by indirection. Historically, people who were originally left out of the Constitution or who have wanted to make constitutional arguments about things not originally in the Constitution have most often grounded their arguments in the Bill of Rights. This is a disadvantage. During the debates over the ratification of the Constitution, Federalists warned that if a bill of rights was adopted it would severely constrain constitutional argument. Bills of rights prevent kings from abusing the liberties of the people, but in the United States the people are sovereign, and in the Constitution the people grant to the government certain powers, and no others. Alexander Hamilton argued that it was therefore not only unnecessary to make a list of rights held by the people—“Why declare that things shall not be done which there is no power to do?”—but also dangerous, because once such a list was written down it would imply that those were the people’s only rights…

By the time that [plaintiff's attorneys in Griswold] set about crafting arguments on behalf of their plaintiffs, the Constitution had been much amended. [They] chose to base their argument on the Fourteenth Amendment, which lies at the heart of this year's same-sex-marriage cases, too…. The Fourteenth Amendment was first discussed by Congress in 1865; its purpose, in the aftermath of Emancipation, was to guarantee citizenship, due process of the law, and equal protection of the law for all Americans… With this gain came a loss. Section 1 prohibited discrimination by race. Section 2 mandated discrimination by sex: it guaranteed the right to vote not to all citizens but to all "male inhabitants." When Elizabeth Cady Stanton and Susan B. Anthony, who had been fighting for universal suffrage, learned about that language, they straightaway began petitioning Congress for language that would, instead, specifically "prohibit the several States from disenfranchising any of their citizens on the ground of sex." When that failed—the amendment was ratified in 1868—they tried to get universal suffrage incorporated into the Fifteenth Amendment; that failed, too…

All amendments are not created equal. As the Yale legal scholar Reva B. Siegel argued in a brilliant Harvard Law Review article called "She the People," the Court at first understood the Nineteenth Amendment as making a foundational change by providing grounds for countering discrimination on the basis of sex. But then that interpretation was abandoned, and the Nineteenth Amendment was left, jurisprudentially, to wither…

In the opinion issued by the Court in June, Douglas… insisted that although a "right to privacy" is not mentioned either in the Constitution or in the Bill of Rights, it is nevertheless there, not in words but in the shadow cast by words. He wrote, mystically, that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." No one mentioned the Nineteenth Amendment, or the idea of equal rights for men and women. "The Constitution nowhere refers to a right of privacy in express terms," [Griswold] argued in [its] brief. "But various provisions of the Constitution embody separate aspects of it…."

"There is nothing in the United States Constitution concerning birth, contraception, or abortion," Jay Floyd told the Court in Roe v. Wade, when the case was first argued, in 1971. Floyd spoke on behalf of the Dallas County prosecutor, Henry Wade, defending Texas's anti-abortion statutes. When Sarah Weddington, representing Jane Roe, a Texas woman who sought an abortion, was asked by Justice Stewart where in the Constitution she placed her argument against the Texas statutes, she said, in so many words: Anywhere it would stick… But in the Court's decision Justice Harry Blackmun, writing for the majority, located the right to an abortion in a right to privacy, wherever in the Constitution or amendments anyone cared to find it…

In Bowers v. Hardwick, in 1986, the Court refused to overturn a ban on sodomy in Georgia, disagreeing with the assertion of Bowers' attorney that the law was a violation of a right to privacy established by the chain of cases that began with Griswold, because "no connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other, has been demonstrated," and therefore the case turned on an asserted "fundamental right to engage in homosexual sodomy," which, the Court

determined, did not exist. But in a stinging dissent Justice Blackmun countered that the case did indeed turn on a right to privacy, because "if that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.' "

The year after Bowers, Harvard Law School's Martha Minow wrote an essay called "We, the Family," in which she argued that, despite the Court's claim that it was relying on a long-standing tradition, the privacy doctrine it had fashioned from Griswold to Bowers was new, incoherent, and unpredictable. "The family is not mentioned in the Constitution," Minow pointed out, adding that Douglas's language about "a right of privacy older than the Bill of Rights" was the language of fiction.

In the nineteen-eighties and nineties, while the reproductive-rights movement struggled against efforts to overturn or roll back Roe, the gay-rights movement, fighting AI DS, grew. "Privacy" remained a watchword of the reproductive- rights movement—and abortion became more hidden, and more difficult to procure—but L.G.B.T. activists insisted on the importance and the urgency of visibility, of pride, and of coming out. The legal reasoning employed by these two movements began to split. Privacy arguments, long troubling to feminists, were especially troubling to gay-rights activists. And the divide widened when the fight to overturn anti-sodomy laws became a fight for same-sex marriage, a movement whose watchword is "equality."

In many ways, this split made sense: sexuality and reproduction may be private but, as the historian Nancy F. Cott demonstrated in the book "Public Vows," marriage is public….Still, contraception and abortion don't lie entirely outside the state, either, as the continued agitation over public funding of health care for women has made abundantly clear…The fork in the constitutional road that led the reproductive-rights movement to Hobby Lobby and the gay- rights movement to Obergefell came in 2003. In June of that year, in Lawrence v. Texas, the Supreme Court overruled Bowers by declaring a Texas sodomy law unconstitutional. Presented with two Fourteenth Amendment arguments, a due-process privacy argument and an equal-protection argument, Justice Kennedy, in the majority opinion, explained that the Court had decided the case on the strength of the Griswoldian privacy argument. In a concurring opinion, Justice Sandra Day O'Connor said that she based her decision on the equal-protection argument, asserting that the Texas law constituted sex discrimination: a man could not be prosecuted for engaging in a particular activity with a woman but could be prosecuted for engaging in that same activity with a man. O'Connor's reasoning, not Kennedy's, marked the way forward for L.G.B.T. litigation that turned, increasingly, to marriage equality… There is a lesson in the past fifty years of litigation. When the fight for equal rights for women narrowed to a fight for reproductive rights, defended on the ground of privacy, it weakened. But when the fight for gay rights became a fight for same-sex marriage, asserted on the ground of equality, it got stronger and stronger...

A Supreme Court Reporter Defines the Threat to Abortion Rights

Isaac Chotiner The New Yorker May 14, 2019

The past two weeks have been some of the worst on record for abortion rights in the U.S. Last week, the governor of Georgia, Brian Kemp, signed a bill that outlaws abortion after six weeks of pregnancy. Now Alabama is planning to go a step further, with the country's most extreme anti-abortion law. Under the proposed legislation, abortion would be criminalized, with no exceptions for cases of rape or incest; doctors could face a ninety-nine-year prison sentence for terminating a pregnancy. The Alabama House has passed the bill, and the Senate is expected to vote on the measure on Tuesday evening.

Both the Georgia and Alabama laws are sure to be challenged in court, but the legal climate surrounding abortion is different than it was just last year. After the replacement of the Supreme Court Justice Anthony Kennedy with Justice Brett Kavanaugh, Chief Justice John Roberts is the swing vote, and many conservatives have reason to hope that the Court will rule in favor of new restrictions on abortion and eventually even overturn Roe v. Wade.

To discuss the Court's decision-making on abortion, I spoke by phone with Linda Greenhouse, the Knight Distinguished Journalist in Residence and Joseph M. Goldstein Lecturer in Law at Yale Law School and a columnist for the Times. Greenhouse covered the Supreme Court for the Times for decades, won a Pulitzer Prize for her reporting there, and wrote a biography of Justice Harry Blackmun, the author of the Roe decision. During our conversation, which has been edited for length and clarity, we discussed what these state laws really aim to do, how the Court's conservatives might go about weakening Roe, and what Roberts might want to accomplish.

When you look at the history of abortion law in the United States, is there anything about this law in Georgia or the proposal in Alabama that you find interesting, or new, or different?

Well, they're shockingly aggressive. They purport to take us back to the pre-Roe regime, where abortion was criminal until the mid-sixties in all fifty states—despite the fact that, by the time the Court decided Roe, Gallup and other polls showed that a strong majority of the public believed that abortion should be left as a matter between a woman and her doctor. And the pro-choice majority held throughout all demographics: men, women, Catholics, Republicans. Republicans were the pro-choice party at that time. So, what's happening today is pretty breathtaking, actually.

What specifically in these laws do you see as the biggest challenge to Roe?

I don't think these laws per se are challenges to Roe because they're so extreme. I actually think the challenge to Roe will come with ostensibly milder measures that will let the courts find cover in seeming not to be extreme even though these laws can have

the extreme effect of destroying the abortion infrastructure and cutting off access for most women. I'm referring to, for instance, the laws that Louisiana passed to require doctors who provide abortions to have admitting privileges at local hospitals. A challenge to that law is right now pending before the Supreme Court, and it is a complete twin to the Texas law that the Court overturned in 2016, before Justice [Neil] Gorsuch and Justice Kavanaugh joined the Court. The vote in that case was 5–3, Justice [Antonin] Scalia having died.

So that's a law that, on the surface, provides some cover, because the state says, "Oh, we're doing this for women's health," even though it has absolutely nothing to do with women's health. But I think that's a more appealing place for the current Supreme Court to land. And even thinking of upholding a law that would criminalize abortion from the moment that a fertilized egg is implanted in the uterus, which is what I gather the Alabama law would provide, when you would need a microscope to find it, let alone be aware of a pregnancy, that's just preposterous.

So you don't interpret the aggressiveness of these laws as conservatives feeling emboldened and thinking they're going to overturn Roe?

Well, I think they're doing a couple things with these laws. They're appealing to a base. These are politicians who are passing these laws, and these are elected governors who are purporting to sign them. It's a way of keeping issues hot and alive. It's also a way of, as we've seen throughout this battle, carving abortion out of normal medical practice by turning doctors into criminals for providing a medical service that something like thirty per cent of all American women will avail themselves of during their reproductive lifetimes….Laws like this have almost nothing to do with the fetus, or the embryo, or the fertilized egg, and everything to do with the role of women in society today. It's all about the dignity and agency of the female half of the population. And that's what's at stake, frankly.

It seems like we're now at a place where this is largely an issue for John Roberts or is likely to be. So you see almost no chance that he would uphold these laws?

Yes, I think that's accurate. And I'm not sure the Court would even take such a case, because they'll be struck down in district court, and that will be upheld in the court of appeals. And Georgia and Alabama are in the same circuit. So there'd be no conflict in the circuits, which is the marker for the Court's willingness to hear a case. The easiest thing for the Court to do is just to deny review. The Court doesn't have to say anything.

There have been three strains of thinking about Roberts. One is that maybe he won't overturn Roe. He doesn't want to upset the apple cart. The second is that he does want to overturn Roe but will find a sort of subtle way of doing it. And the third is that, now that conservatives are in strong control of the Court, he will just overturn Roe. Do you have a sense, from studying him, of which of those three things is likely to happen?

Well, I'm assuming he thinks Roe was wrongly decided. I'm assuming he wishes it was not precedent. He does have a dilemma about what to do about that. And I think taking the path that I suggested of upholding laws that present substantial obstacles to the right to abortion but don't write the right to abortion off the face of the statute books would be a more appealing thing for him to do.

He was a dissenter in the 2016 decision that struck down the Texas admitting- privileges law. He was a fifth vote with the four people to his left back in February to grant a stay of Louisiana law to allow the abortion clinics in Louisiana to file their Supreme Court appeal. So that was pretty interesting, because, had he not joined them over four dissents to his right, I think all but one abortion clinic in Louisiana would have had to shut down. And he didn't want that to happen. I can only infer he didn't want that to happen without giving the clinics a chance to make their case before the Supreme Court. That doesn't bind him to agreeing with their case. But at least it shows us some awareness of the optics of the Court letting something as drastic as that occur without any kind of oversight by the Justices. So it's a kind of interesting data point.

These laws like the Louisiana law don't specifically go against Roe. They just kind of neutralize it. But is your sense that passing these laws would be enough for abortion opponents? Or is your sense that, at some point, despite all these laws, Roe would have to be formally overturned?

Overturned by the Supreme Court, you mean?

Yeah.

I think one template we might take for that is a case that has absolutely nothing to do with abortion. It's a decision called Janus [v. AFSCME], in the area of labor law, that the Supreme Court issued, last June. This is a case in which the Court overturned a forty-year-old precedent by a vote of 5–4. The precedent had said that a public employee who doesn't want to join the public-employee union doesn't have to join the union, but they can be required by state law to pay that portion of the union dues that goes to the union's bargaining and representation function because that benefits everybody in the workplace. And so it was deemed a fair share that they don't have to subsidize the union's political activities, but they have to pay for those services from which they benefit. The Supreme Court overturned this precedent. And it did it in such a way that the ultimate decision, in June, was inevitable, and totally not surprising. The Court had issued a series of decisions over six years leading up to this where, case by case, they whittled away the old precedent. They cast doubt on it. They spoke about it in very snarky terms over dissents from people like Justice [Elena] Kagan, who knew what was afoot, but she couldn't stop it.

I've looked at that as a template for what might happen to Roe. They could uphold this obstruction, and they could uphold that obstruction, and they could send all these signals. And it would take a number of years—not a huge number of years, maybe. And so, if

Roe finally falls, it'll fall with a little push of a pinkie, rather than a frontal assault, because there won't be much left of it…

Roe's been around for more than thirty-five years now. Many people think the most serious challenge to it was that 1992 case, Casey. Do you agree with that? And why did Casey represent such a threat to Roe?

Casey came up when the only Justice left on the Court who had been part of the Roe majority was Justice Blackmun himself. And in place of these Justices had come Clarence Thomas, David Souter, Anthony Kennedy, Sandra Day O'Connor. And both Kennedy and O'Connor had written things about abortion since they got on the Court that were very hostile to Roe. So, just counting noses, it seemed very unlikely that Roe would survive, because it wasn't that the law had changed, it was that the Court had changed. Roe emerged changed, modified, but the right to abortion remained. That was a very surprising outcome in that case.

How was it changed and modified?

The Court elevated the right of states to act in the interest of unborn life from the moment of conception. Roe had basically said to the states, "Hands off before viability"… And Casey said, "No, actually, the states' interest runs from the very beginning of pregnancy." So Casey upheld a couple of things that Roe had found unconstitutional: a waiting period, mandatory so-called counselling by the doctor, and that sort of thing. It changed the balance, but, at the end of the day, Casey says explicitly that the state can seek to persuade a woman to carry a pregnancy to term, but the state cannot impede her ability to terminate the pregnancy by imposing what the Court called an "undue burden."

I was wondering whether the door had been opened to some of these state laws because of something what the Court found in Casey. But it seems like what you're saying is that maybe that would be true for certain laws, but certainly nothing even remotely like what we're seeing now.

Oh, that's right. I mean, what we're seeing now is totally incompatible with Casey. Now we have one-day, two-day, three-day waiting periods. We have extensive mandatory counselling in which doctors are required to tell lies to their patients, such as, if you have an abortion you'll increase your chance of suicide. That's totally false, that's been totally disproven, but lower courts have upheld that kind of fake counselling. So Casey did open the door to a lot of unnecessary and harmful restrictions on access to abortion. But nothing like what we're seeing now.