

**FROM RIGHT TO PRIVACY TO PERSONAL
AUTONOMY: THE CHANGING NATURE OF
RIGHT TO PRIVACY IN THE US LEGAL
SYSTEM (1965 – 2008)**

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TABLE OF CONTENTS

Introduction	3
I. The Right to Privacy and the Battle for Birth Control: <i>Griswold v. Connecticut</i> (1965) and <i>Eisenstadt v. Baird</i> (1972)	12
II. Pandora’s Box Opened – The Right to Privacy in Terms of Abortion as Argued in <i>Roe v. Wade</i> and <i>Doe v. Bolton</i>	19
III. The Post-Roe Situation	24
Conclusion	31
Appendix	36
Endnotes	38
Bibliography	46

INTRODUCTION

“The makers of our Constitution understood the need to secure conditions favourable to the pursuit of happiness, and the protections guaranteed by this are much broader in scope, and include the right to life and an inviolate personality – the right to be left alone – the most comprehensive of rights and the right most valued by civilized men. The principle underlying the Fourth and Fifth Amendments is protection against invasions of the sanctities of a man’s home and privacies of life. This is a recognition of the significance of man’s spiritual nature, his feelings, and his intellect.”¹

When, in 1928, Justice Brandeis expressed his opinion in *Olmstead v. United States*,² mentioning the “right to be left alone”, it was unlikely that he could have foreseen the impact of these words. This ruling was to shape the decisions of U.S. courts for decades to come when they were called upon to adjudicate on matters pertaining to the “right to privacy”.

The right to privacy is not explicitly mentioned anywhere in the Constitution of the United States. However, the Bill of Rights specifically addresses aspects of privacy, such as the privacy of beliefs and of free speech (First Amendment), privacy of the individual and protection of their property from unreasonable searches (Fourth Amendment), or the Fifth Amendment’s protection of personal information. In addition, the Ninth Amendment states that the enumeration of certain rights in the Bill of Rights shall not be construed to deny or disparage other rights retained by people. The Ninth Amendment, in particular, and more recently the idea of “liberty” protected by the Due Process Clause of the Fourteenth Amendment were used to define and generally protect the privacy of family, marriage, motherhood, procreation, the right to choose one’s partner, to die and so forth.³

The question of whether the Constitution protects privacy in ways not expressly provided in the Bill of Rights is indeed controversial and in many cases basically divided those interested into two camps. The dilemma about the fundamental existence of our right to privacy and its extent has caused heated debates among scholars, justices, politicians and even laymen. It is impossible to distinguish where the boundaries of the right to privacy are – the courts' preference for a case-by-case approach and changing public opinion on its status make the matter even more complicated.

The aim of my research is to analyse the changing nature of privacy law and its evolution in U.S. jurisprudence from 1965, a year significant for the *Griswold* trial⁴, which heralded the beginning of modern era of privacy controversy, up to the present when in 2007 the Supreme Court expressed their decision on partial-birth abortion issue in *Gonzales v. Carhart*.⁵ The privacy issues faced by the courts in this period made for highly complex challenges. Assuming that there exists a general right of privacy, one has to establish what sort of conduct lies at its very centre and periphery and consider what sort of conduct should be outside of the protection of a right of privacy – a task, which is not easy at all and requires considerable evaluation of internal and external factors as well as possible consequences. Questions whether the right to privacy can and should protect individuals' actions, such as euthanasia, domestic violence, polygamy, drug usage and many more, are at the centre of heated debates within professional and laymen circles.

Right to privacy is a very broad term and consequently, there are a vast number of issues connected to it. Cases, which were decided on the grounds of privacy range from consent searches during traffic stops, through infrared imagining of homes (or other high-

tech scanning), drug usage or property trespassing, to more serious problems such as birth control rights, the right to marry, homosexual rights, the right to choose to die and many more. Analysing privacy rights on a case-by-case basis is beyond the scope of this thesis. For the purposes of this research, I will concentrate only on one aspect of right to privacy issues – birth control - which covers the right to use contraception and right to choose whether to continue pregnancy or not. Supreme Court decisions regarding birth control create very significant part of privacy rights; and in spite of the fact issues like right to die or homosexual rights are equally important, I believe that with regards to the limits of this paper, the changing nature of privacy rights can be best reflected specifically via analysis of birth control issues. Through the analysis of specific Supreme Court cases, I will try to demonstrate how the nature of privacy rights has changed and developed and what the current criticisms of these decisions are more than forty years after the modern era of privacy rights controversy began.

In relationship to the methodology employed, I analysed and evaluated a vast number of primary and secondary sources. First, as decisions of all Supreme Court cases, which I analyse in later sections of this paper, were decided on the grounds of constitutionality, The Constitution of the United States and its Amendments stand at the centre of my research – especially the First Amendment (which reflects privacy of beliefs and free speech), Fourth Amendment (unreasonable searches), Ninth Amendment (the enumeration of certain rights in the Bill of Rights shall not be construed to deny or disparage other rights retained by people) and liberty protected by the Due Process Clause of the Fourteenth Amendment, form the basis of the cases examined and thus the

whole privacy issue regarding birth control rights.

The second group of primary sources I used in order to evaluate the changing nature of privacy rights were the very Supreme Court cases, starting with *Griswold v. Connecticut* in 1965, that gave birth to the modern notion of privacy rights; through *Eisenstadt v. Baird* (1972),⁶ which extended the right to privacy in terms of birth control to unmarried couples; the landmark cases of *Roe v. Wade*⁷ and *Doe v. Bolton*,⁸ both argued in 1973, which justified the idea of privacy with regards to termination of pregnancy; or *Carey v. Population Services International* (1977),⁹ which extended the right to use contraceptives to minors. I then turn to a new era in which perspectives upon privacy became more conservative and restrictive, and even threatened to overturn the landmark *Roe* decision such as *Webster v. Reproductive Services* (1989);¹⁰ or *Planned Parenthood v. Casey* (1992)¹¹ upholding restrictions on abortion; up to very recent *Gonzales v. Carhart* (2007) upholding the “Partial-Birth Abortion Ban Act” of 2003¹².

Last, but not least, secondary literature provided valuable insights into the right to privacy controversy and a critical approach to the decisions made in the above cases. A very good introduction to the problem can be found in Amitai Etzioni, *The Limits of Privacy* (New York, 1999) and Philippa Strum, *Privacy: The Debate in the United States since 1945* (New York, 1998). John H. F. Shattuck, *Right of Privacy* (Illinois, 1979); David J. Bodenhamer and James W. Ely, ed., *The Bill of Rights in Modern America After 200 Years* (Bloomington and Indianapolis, 1993); and Hull, Hoffer and Hoffer, *The Abortions Rights: Controversy in America* (Chapel Hill and London, 2004) – they all study specific court cases and legal documents, which relate to privacy rights and personal liberties and provide valuable sources of primary documents. Birth control

rights literature is endless and one can find a vast number of articles, books or internet resources covering many aspects – whether we consider its history, controversy or criticism of specific laws or court decisions: Donald H. Regan, *Rewriting Roe v. Wade* (1979) and Jed Rubenfeld, *The Right of Privacy* (1989) both provide a critical approach regarding the *Roe* decision. More recent publications that offer valuable analysis of the core debates, clarify the jurisprudence behind the Court’s ruling, and gauge its impact on American society include Clare Cushman, ed., *Supreme Court Decisions and Women’s Rights* (Washington, 2001); Hull and Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (Kansas, 2001) or the very exhaustive volume by David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (California, 1998) – just to name a few. Although these publications are indubitably highly valuable and provide important insight into the problem, during my research I struggled to find a publication that would specifically deal with the historical development of the right to privacy and an analysis of its changing nature in the U.S. jurisdiction.¹³ My aim is to fill this gap although just on a very small scale.

Although neither the Constitution, nor the Bill of Rights explicitly mention “privacy”, some justices held the view that the right was to be found in the penumbras of other constitutional protections or was protected by the Due Process Clause of the Fourteenth Amendment.¹⁴ The other justices held concurring opinion in which they used the Ninth Amendment to defend the Supreme Court’s ruling, or state that the right to privacy is to be found nowhere in the Constitution.¹⁵ Although the modern issue of right to privacy officially dates from the 1965 case *Griswold v. Connecticut*, justices were

dealing with privacy issues nearly two centuries ago.

According to Rubinfeld, the first case, which can be considered as a “privacy” case, was decided in 1803 and called *Marbury v. Madison*.¹⁶ Rubinfeld argues that *Marbury* is “a progenitor of the right-to-privacy decisions because it too belongs to the diverse series of cases in which the Supreme Court has reached out beyond the express language of the Constitution and struck down on constitutional grounds some piece of federal or state legislation.”¹⁷ *Calder v. Bull* (1798)¹⁸ and *Trustees of Dartmouth College v. Woodward* (1819)¹⁹ also belong to this family, as they were decided on the grounds of the Ninth Amendment, which provides: “The enumeration in the Constitution, or certain rights, shall not be construed to deny or disparage others retained by the people”.

After the Civil War, the first passage of the Fourteenth Amendment gave the Court even more constitutional material to consider – especially its Due Process Clause.²⁰ In two decisions in 1920’s, the Supreme Court read the Fourteenth Amendment’s liberty clause to prohibit states from interfering with the private decisions of teachers and parents to shape the education of children – namely in *Meyer v. Nebraska* (1923)²¹ and *Pierce v. Society of Sisters* (1925).²² As Rubinfeld states, these two cases may be seen as the “true parents of the privacy doctrine, and today they are frequently classified together with other privacy decision.”²³

The privacy doctrine of the 1920’s was renewed during 1960’s, when the Warren Court in *Griswold v. Connecticut* (1965) struck down a state law prohibiting the possession, sale, and distribution of contraceptives to married couples. The Court stated that “right to privacy” could be discerned in the “penumbras” of the first, third, fourth, fifth and ninth amendments.²⁴

Two years later, in *Loving v. Virginia*²⁵ the Court struck down a law criminalizing interracial marriage. The Court ruled that states could not interfere in that manner with an individual's choice of whom to marry and on similar grounds; the Court also invalidated laws restricting the ability of poor persons to marry or divorce. Although the Court relied in part on the holding that the statute violated the equal protection clause, the opinion rested on a privacy rationale as well.²⁶ In 1969, the Court concluded that the right of privacy protected an individual's right to possess and view pornography in his own home. Justice Marshall wrote in *Stanley v. Georgia*:²⁷

“Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.”²⁷

In 1972, in *Eisenstadt v. Baird* the Court extended its *Griswold* decision to protect the distribution of contraceptives to unmarried persons. The next year, the Court took a further step and delivered its most controversial opinion probably since *Brown v. Board of Education*.²⁹ Justice Blackmun, with only two Justices dissenting, wrote in *Roe v. Wade* that the right to privacy was broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

After *Roe's* decision, the Court, however, resisted several invitations to expand the right even further. *Kelley v. Johnson (1976)*³⁰, in which the Court upheld a grooming regulation for police officers, illustrates the trend toward limiting the scope of the “zone of privacy”. The Court's important landmark decision, in which a 5-4 majority held that a state could make homosexual sodomy a criminal offence without violating the right to

privacy, was decided in 1986 in *Bowers v. Hardwick*.³¹ Although this decision was overturned in 2003 in *Lawrence v. Texas*,³² the Court in *Hardwick* necessarily drew a line: the right to privacy stops here. In spite of the fact the *Lawrence* decision overruled seventeen years old *Bowers* decision; this case substantially differed from the 1986 one: the Court in *Lawrence* found that the state lacked a legitimate interest in regulating the private sexual conduct of consenting adults. The vital vote of Justice O'Connor, however, rested not on the privacy grounds, but solely on the Equal Protection Clause.

In relationship to post-Roe cases regarding birth control rights, the Court upheld its conservative stance refusing to expand privacy rights in broader terms. Cases such as *Webster v. Reproductive Health Services*, *Hodgson v. Minnesota* (1989),³³ *Ohio v. Akron Center for Reproductive Health* (1990),³⁴ *Planned Parenthood v. Casey* (1992), or very recent *Stenberg v. Carhart* (2000)³⁵ and *Gonzales v. Carhart* (2007) – they all deal with issue of expanding privacy rights. These cases will be discussed in more detail in the following chapters. One feature, however, which all these cases have in common is that the Court refused fully bestow the privacy right to those concerned and also, shifted its decisions from dangerous (and for many controversial) privacy grounds to the “safer” equal protection and personal autonomy.

I want to conclude this brief outline of the historical development of privacy rights with one of the most sensitive problems – that is regarding the right to terminate life. The Court first addressed this issue in the 1990 case *Cruzan v. Director, Missouri Department of Health*³⁶. In *Cruzan*, the Court considered whether Missouri could insist on proof of evidence of a comatose patient's desire to terminate her life before allowing her family's wish to disconnect her feeding tube to be carried out. Although eight of nine

justices disagreed that the right to die was a liberty protected by the Due Process Clause, a bare majority of the Court upheld the state's insistence that the patient would wish to have intravenous feeding discontinued. Seven years later the Court again faced right to die issues, in two cases involving challenges to laws criminalizing physician-assisted suicide – *Washington v. Glucksberg*³⁷ and *Vacco v. Quill*.³⁸ Although the lower courts in each case found the law unconstitutional (decisions rested on due process right-to-privacy grounds and equal protection grounds), the Supreme Court reversed the decisions in both cases, finding the laws to be constitutional. Although the Court interpreted *Cruzan* as recognising a right to refuse medical treatment, the Court found no constitutional basis for a right to assisted suicide.³⁹

In the next sections I will analyse specific Supreme Court decisions and argue that the structure of privacy rights has changed during these trials. In Section I. I will elaborate on the beginning of the modern era of privacy, specifically concentrating on two cases *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972). Section II. will be dedicated to an analysis of *Roe v. Wade* (1973) and the less well-known, but concurrent and equally significant case of *Doe v. Bolton* (1973). Section III. will concentrate on post-Roe cases such as *Carey v. Population Services International* (1977), *Webster v. Reproductive Health Services* (1989), *Planned Parenthood v. Casey* (1992), *Stenberg v. Carhart* (2000) and the very recent *Gonzales v. Carhart* (2007).

I. THE RIGHT TO PRIVACY AND THE BATTLE FOR BIRTH CONTROL: *GRISWOLD V. CONNECTICUT* (1965) AND *EISENSTADT V. BAIRD* (1972)

As we learned in the introductory part of this research, issues regarding the right to privacy date back to the creation of the U.S. Constitution. In this section, I will concentrate on the beginnings of the modern era of privacy rights controversy and I will analyse a crucial starting point trial – *Griswold v. Connecticut* and the consecutive cases *Eisenstadt v. Baird* and *Carey v. Population Services*.

Abortion and birth control techniques were not treated as crimes during the United States' early history. Recipes of herbal abortifacients were commonly found in cookbooks and throughout the 1700s and 1800s midwives routinely provided women with abortion-inducing substances when they wanted to terminate pregnancy. Some states prohibited abortions after “quickening” – that is, after a woman first felt fetal movement, usually during the fourth month of pregnancy. Even then the act was considered no more than a minor offence rather than a crime.¹

The driving force behind the original anti-birth control statutes was a New Yorker called Anthony Comstock. Born in a rural Connecticut, he moved to New York and was appalled by what he saw in the city's streets: It seemed to him that the town was teeming with the prostitutes and pornography. By the late 1860s, he had already become a police informant, letting law enforcement know about sex workers and came to prominence with his anti-obscenity crusade. As a head of the New York Society for the Suppression of Vice, Comstock claimed to have “convicted persons enough to fill a passenger train of

sixty-one coaches, sixty containing sixty passengers each, and the sixty first almost full and also to have destroyed one hundred sixty tons of obscene literature”.² In 1873 he successfully lobbied the U.S. Congress to pass an “Act for the Suppression of Trade In and Circulation of Obscene Literature and Articles of Immoral Use”.³

In reality, the “Comstock Law”, as it was called later in time, was targeted not only at obscenity but at birth control devices and information on such devices, at abortion, and at information on sexuality and on sexually transmitted diseases. This law was widely used to prosecute those who distributed information or devices for birth control. When asked why he classified contraceptives as obscene, Comstock replied: “If you open the door to anything, the filth will pour in.”⁴ Soon after the federal law hit the books, twenty four states passed their own versions.

Planned Parenthood founder Margaret Higgins Sanger was a pioneer in establishing and protecting reproductive rights in the United States and fighting against the Comstock Laws. Working as a nurse in the ghettos of New York, she became familiar with the disturbing sights of many women dying of preventable deaths due to child labour, and the horrible methods of self-induced abortion. In 1912 she started writing a column for *the New York Call* entitled “What Every Girl Should Know” and by distributing a pamphlet, “Family Limitation”, to poor women, Sanger repeatedly risked scandal and imprisonment by acting in defiance of the Comstock Law of 1873. Two years later she launched “The Woman Rebel”, a monthly newsletter advocating contraception, and in 1916 Sanger opened a family planning and birth control clinic, which was the first of its kind in the United States.⁵

Sanger had travelled to Japan on many occasions and was in close touch with

Japanese feminist Kato Shidzue promoting birth control.⁶ In 1936 Sanger had a box of diaphragms mailed from Japan to a physician in New York City, Dr. Hannah Meyer Stone, who shared Sanger's passion for reproductive rights. The shipment was seized and confiscated under the Tariff Act of 1930⁷ and discussed at the court. The court held that the law could not be used to intercept shipments which originated from a doctor. The case *United State v. One Package of Japanese Pessaries*⁸ significantly weakened the Comstock Law and marked a turning point in birth control history.

After the Comstock Law was accepted by Federal government, twenty four states introduced their own version of that law, with Connecticut having probably the strictest one. Connecticut law prohibited the use of any drug, medicinal article or instrument for the purpose of preventing conception and penalized any person who advised about or provided contraceptive materials. Although the law was passed in 1879, the statute was almost never enforced. Despite the fact the attempts were made to test the constitutionality of the law, those challenges have failed on technical grounds.⁹ From 1941 to 1963 the Connecticut Birth Control League (now called the Planned Parenthood League of Connecticut), proposed a new reform bill during each legislative session. In 1961 they thought they had a winner – a case brought by clinic director and professor at the Yale School of Medicine, Dr. C. Lee Buxton, and several of his patients he deemed in medical need of contraception. Yet, in *Poe v. Ullman*,¹⁰ the Court refused to reach the constitutional question because the cases were brought in such a way as to “raise serious questions of nonjusticiability of [the] appellants’ claims.”¹¹

In 1965 Estelle Griswold, executive director of the Planned Parenthood together

with Dr. Buxton, tried to test the contraception law once again. The Planned Parenthood opened a clinic in New Haven and after outraged private citizens agitated for legal action, both Griswold and Buxton were arrested, tried, found guilty and fined. Griswold then appealed her conviction to the Supreme Court of the United States. In *Griswold v. Connecticut*, the Court finally struck down, by a vote of 7 – 2, the Connecticut law. They invalidated the statute on the ground that it infringed on the constitutionally protected right to privacy of married persons.¹²

What Justice William O. Douglas, writing for majority, did in *Griswold v. Connecticut*, was to unite what he called the “penumbras” inherent in specific guarantees in the Bill of Rights – the First Amendment’s right of association, the Third Amendment’s prohibition against the intrusive quartering of soldiers in civilians’ homes during peacetime, the Fourth Amendment’s search and seizure clause, the Fifth Amendment’s self-incrimination clause and Ninth Amendment’s guarantee to the people of rights not specifically mentioned in the Constitution.¹³ “We deal”, he says,

“...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.”¹⁴

This opinion was also joined by Justices Arthur Goldberg and William Brennan and Chief Justice Earl Warren relying on the rarely cited Ninth Amendment. The right to privacy, Goldberg maintained, predated the Constitution, and the Framers intended all liberties existing at the time should enjoy constitutional protection.¹⁵ Further, he argued:

“... In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment... It was proffered to quiet express fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected... To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever... [T]he Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive...”¹⁶

Justice John Marshall Harlan also concurred, but on a theory that the notion of liberty interests embedded in the Fourteenth Amendment’s Due Process Clause, which prohibits the states from denying any citizen “life, liberty or property without due process of law”, made sense and solved the entire problem of whether a right had been literally mentioned in the Constitution.¹⁷

This view contrasted sharply with the position expressed by the two dissenters, Justices Hugo Black and Potter Stewart, who argued that the Bill of Rights and the Fourteenth Amendment did not allow judicial annulment of state legislative policies, even if those policies were abhorrent to a judge or justice.¹⁸ “‘Privacy’”, says Justice Black,

“...Is a broad, abstract and ambiguous concept, which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court’s judgment and the reasons it gives for holding this Connecticut law unconstitutional”.¹⁹

Further, he argues: “I can not rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this

state law...²⁰

Griswold established the principle that the Bill of Rights as a whole created a right to make certain intimate, personal choices, including the right of married people to engage in sexual intercourse for reproduction or pleasure.²¹ This case represents a landmark in history of battle for right for birth control in the United States and it started the era of controversial debates, which are vivid even these days.

Seven years after *Griswold*, the Supreme Court redefined the right to use and counsel the use of contraception as a right of sexual privacy not limited to married persons. In Massachusetts, William Baird was charged with the felony for distributing contraceptive foams during lectures on population control at Boston University. According to Massachusetts law, contraceptives could have been distributed only by registered doctors or pharmacist and only to married persons. The case was appealed to the United States Supreme Court by Sheriff Eisenstadt. In a 6 – 1 decision, the Court established the right of unmarried people to possess contraception on the same basis as married couples and the right of unmarried couples to engage in sexual intercourse. The Court thus struck down a Massachusetts law prohibiting the distribution of contraceptives to unmarried people, ruling that it violated the Equal Protection Clause of the Constitution.²² The majority opinion was written by Justice Brennan, who held the view that

“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child... We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated [the] Massachusetts Laws... violate the Equal Protection Clause”²³

In 1977, the Supreme Court held, in *Carey v. Population Services International*, that a New York law banning advertising or display of contraceptives, or distribution of contraceptives to minors under sixteen, was unconstitutional, because it violated the right to privacy of adults and minors.²⁴

In sum, Etzioni concludes this section very well: As he points out, “protection to privacy had become almost absolute.” He further adds, “...although *Griswold* was limited to the use of contraceptives by married couples, *Eisenstadt* created a new, much more broader conception of privacy, that of individual: A person could carry this right anywhere; it was a freedom that would no longer be confined to one’s bedroom or house.”²⁵

II. PANDORA'S BOX OPENED: *ROE V. WADE* (1973) AND *DOE*

V. BOLTON (1973)

Griswold v. Connecticut held that no state may make pregnancy a state-imposed risk of sexual intimacy within marriage. The *Griswold* decision was explicitly rooted in rights of marital privacy. It reinforced the liberty of married persons to be free from searches and seizures conducted in their bedrooms, to be free from legal proceedings and to be exclusive to one another on terms of intimacy they, rather than some unit of government, deemed best. As Alstyne points out,

“Fully in keeping with *Griswold*, risks incidental to acts of intimacy within marriage are for the married couple to appraise. It is for them to decide how to act or not act in respect to those risks, with altogether such degree of care and precaution as both or as either may think best, without any hindrance by the state.”¹

The recognition of a fundamental right to privacy in *Griswold* opened the constitutional door to a previously unimagined argument: women with unwanted pregnancies shall have access to legal abortion as a fundamental right. The landmark cases dealing with this controversial issue – *Roe v. Wade* (1973) and the less well-known, but equally important companion case *Doe v. Bolton* (1973) that will be of main concentration of this part of research, opened Pandora's Box, which has since then contributed to law relating to not only contraception and abortion, but also sexual behaviour in general and even the right to terminate one's life. The Supreme Court decisions in *Roe* and *Doe* have stirred up the public opinion and divided the whole nation into two camps – “pro-life” and “pro-choice”.

In the United States, abortion laws began to appear in the 1850s, forbidding abortion after the fourth month of pregnancy. Before that time some states did not regulate abortion at all. There were deep social reasons for the campaign against abortion: the majority of women seeking abortion were married and this was for some observers a very alarming fact. According to “Victorian values”, a woman’s duty was to bear children and when the women killed their unborn baby – the life they were carrying – they were not only perverting their own natures and denying their “God-given role”; they were also helping America commit racial and genetic suicide.² Thus a woman who went to the abortionist or did abortion herself and got rid of her baby was committing a terrible sin against society, womanhood, motherhood and obedience, which were highly valued in the 19th century.³

The anti-abortion regime remained active throughout the 20th century, when attitudes toward women’s role in the family and society, as well as toward sexuality, birth control and abortion, began to shift. Despite the ban on spreading birth control information, many couples practised it. Abortion and contraceptive techniques were illegal, available and dangerous. Abortions remained a crime under almost all states’ laws through to the end of the 1960s. In 1962, forty-two states allowed abortion only when necessary to save the life of the mother. Eight other states allowed additional therapeutic exceptions for health, to prevent serious bodily injury or for the safety of mother. Many doctors, who supported the birth control legalisation argued that according to laws they would be prosecuted for helping or assisting women with the procedure.⁴ As Hull, Hoffer and Hoffer say,

“In 1962, the American Law Institute, an elite body of lawyers, judges and law professors, came to agree with these doctors that some reform of abortion law was necessary. The

members of the institute feared that a law so vague and varied, and so often disregarded, brought all law into disrespect.”⁵

At the end of 1960s, a few states changed their criminal codes to allow more scope for doctors’ discretion in performing abortions.⁶ However, although the abortion law had been reformed, in practice little had changed.

The situation rapidly changed in 1970s, after two lawyers – Sarah Weddington and Linda Coffee filed a suit in federal court against the “Texas anti-abortion law”⁷ on behalf of Norma McCorvey – “Jane Roe”. In the end, after the refusal of the district’s court to enjoin Texas from enforcing its abortion law, the U.S. Supreme Court agreed to hear the case. *Roe v. Wade* had the company of other abortion cases making their way toward the Supreme Court in 1971. Of the other cases on appeal, Georgian *Doe v. Bolton* also caught the attention of the justices. *Roe v. Wade* and *Doe v. Bolton* were argued before the Supreme Court in December 1971 and October 1972. The Court issued its decision on 22nd January 1973.⁸

Jane Roe, a pregnant single woman from Texas – which had rejected abortion – did not have sufficient financial means to seek an abortion in other states where the procedure was not restricted by law, and so she brought a class action challenging the constitutionality of the Texas abortion laws, which do not allow the performing of abortions except, on medical advice, for the purpose of saving mother’s life. Roe claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fifth, Ninth and Fourteenth Amendments. Roe purported to sue “on behalf of herself and all other women” similarly situated.⁹

The Does, a childless married couple, separately attacked the laws, concerned about complications connected with possible future pregnancy, such as non-preparation for pregnancy and parenthood together with medical problems connected with pregnancy affecting Mrs. Doe. In the case she became pregnant; they wanted to be able to terminate pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. Similar to the *Roe* case, the Does purported to sue “on behalf of themselves and all couples similarly situated”.¹⁰

In their decision on *Roe v. Wade*, the U.S. Supreme Court proclaimed that most laws against abortion violate a constitutional right to privacy under the Due Process Clause of the Fourteenth Amendment. They decided that for the stage prior of the first trimester, the abortion decision shall be left to the medical judgement of the pregnant woman and her physician. In the interest of protecting woman’s health, states may restrict, but not prohibit abortions in the second three months of the pregnancy and in the last three months of the pregnancy, states may regulate or even prohibit abortions to protect the life of the foetus, except when the abortion is necessary to save the woman’s life.¹¹ The *Doe v. Bolton* decision stated that “the medical judgement may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient. All these factors may relate to health...”¹²

In both cases Justice Harry Blackmun delivered the opinion of the Court, in which Chief Justice Warren Burger and Justices William Douglas, William Brennan, Potter Stewart, John Marshall and Lewis Powell joined. According to Justice Blackmun,

“The Constitution does not explicitly mention any right to privacy... [However], the Court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution... These decisions make it clear that only personal rights that can be deemed “fundamental”... are included in this guarantee of personal privacy.

They also make it clear that the right has some extension to activities relating to marriage... procreation... contraception... family relationships... and child rearing and education...”¹³

He further adds,

“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹⁴

Justices William Rehnquist and Edward White based their dissent upon the theory that the right of privacy being espoused is quite a different right from the traditional Fourth Amendment concept of privacy and that “the Constitution should be read strictly and the Court should not be inventing new rights that did not appear in the language of the Constitution”.¹⁵ As White expressed in his dissenting opinion in *Doe*,

“I find nothing in the language or history of the Constitution to support the Court’s judgement. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes... The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries.”¹⁶

The position of the Supreme Court is in many cases an unenviable one. The case would have opened Pandora’s Box whatever the Court’s decision. Considering that abortion laws were created on the basis that foetus becomes alive at the time of conception - what kind of questions would emerge? One can only imagine. Unsurprisingly there has not been more a controversial case argued, in the history of modern U.S. case law, than the one of Jane Roe and Mary Doe.

III. THE POST-ROE SITUATION

The decisions in *Roe* and *Doe* hit the nation like bombshells. Women's rights advocates were surprised at the scope of their victory; many doctors regarded the decision as a landmark in medical treatment. The Roman Catholic Church and other religious spokesmen strictly rejected the outcome of the case. Street demonstrations by both sides became commonplace. Soon after the case was decided, the National Conference of Catholic Bishops joined by a number of evangelical Protestant leaders called for the formation of pro-life organisations and the hierarchy ordered to more than six hundred Catholic hospitals in the country not to allow its doctors, whether they wanted or not, to perform abortions.¹

Also, in political arena, politicians who shared the anti-abortion views began to work for a legislative abridgement of *Roe*: a week after the *Roe* decision was announced, representatives of state of Maryland introduced a draft amendment to the Constitution to make the foetus a "person" and fetal life was to begin with conception; President Nixon had barred funding abortions unless they were a medical necessity, and such states as Connecticut and Pennsylvania denied the use of Medicaid funds for abortion "at any stage of the pregnancy unless one or more doctors certified in writing that the abortion was necessary to save the life or health of the mother, or foetus was likely to have crippling birth defects, or the pregnancy was the result of rape or incest that had been reported to the police".² Simply, anti-abortion state politicians sought to undermine *Roe* by imposing limitations on when and where an abortion could be performed, as well as the means by which a woman seeking an abortion might be convince to forgo it.

During the decade following the decisions in *Roe* and *Doe*, the Supreme Court had to deal with dozens of cases regarding *Roe*'s outcome, such as: funding the abortion, imposed burdens on physicians providing abortions and women with financial difficulties who were seeking abortions; beginning of foetus' life and the physical and emotional complications that may result from an abortion; the presence of another physician during abortion in order not to protect the health of the mother but to take control of the "child" and make every effort to save it if possible³; and many others. In sum, Congress reacted to the Court's decision in the years after *Roe* by passing over thirty laws that restricted the availability of abortions.⁴

During this period, there were a vast number of cases dealing with above issues. For the purpose of this research, I want to primarily concentrate on four specific cases, which in my opinion represent landmarks in further dealing with the outcome of cases of *Roe* and *Doe*: *Webster v. Reproductive Health Services* (1989), *Planned Parenthood v. Casey* (1992), *Stenberg v. Carhart* (2000) and very recent *Gonzales v. Carhart* (2007).

As a result of various legal changes, a constitutionally-based fundamental right to an abortion at early stages of pregnancy had barely survived and was no longer a fundamental right. State and federal medical care providers did not have to fund abortions and Justices White, Rehnquist and Scalia agreed that the Court had decided *Roe* wrongly and wanted it reversed, which would result in *Roe*'s constitutional underpinnings in the right to privacy being exposed to attack, also endangering *Griswold*.⁵ It appeared that year 1989 would be the year of decision.

In the early days of 1989, the Supreme Court agreed to hear *Webster v.*

Reproductive Health Services, another attempt by the majority in the Missouri state legislature to regulate abortion practices. The case was sensational, attracting extensive media coverage. In 1986, Missouri passed its anti-abortion laws, which included twenty provisions, seven of which were openly designed to discourage abortion, with the preamble stating that “the life of each human being begins at conception and unborn children have protectable interests in life, health, and well being”.⁶ The next provision required that all abortions after the sixteenth week be performed in hospitals, which created a problem for both doctors and patients given a third provision that no public hospital or public hospital worker was to take part in an abortion and no public hospital was expend funds on abortions. The next set of provisions applied a series of rules forbidding doctors from advising anyone to have an abortion, that abortion was available, or that one might be advisable, even if the pregnancy was in trouble. Finally, a last provision required doctors to ascertain, whether a foetus was viable.⁷ The state seemed to be telling doctors that it was more important to determine the viability of potentially viable foetus than to insure the health of the woman patient and that the potentially viable foetus was the doctor’s primary patient until proven otherwise.⁸

The Supreme Court in its decision upheld the constitutionality of a Missouri law and for the first time upheld the significant government restrictions on abortion. The justices issued five opinions, but no single opinion captured a majority. Justice Sandra Day O’Connor explained that she voted to uphold Missouri’s law because she did not feel that it would place an undue burden on the right to abortion – a new formula used, rather than the notion of “privacy” – but she declined to reconsider and overturn *Roe*. Justice Antonin Scalia sharply argued that the Court should have overturned *Roe* and returned to

the states the power to regulate abortions, rather than attempting to uphold both *Roe* and the laws at issue.⁹

In the Post-Webster Era, the response to the decision in the media was as polarised as the debate over abortion rights itself, but the journalists and the people they interviewed saw the issue in political, rather than legal, terms. In the course of allowing states to deny funding, ordain extensive consent procedures, require notification of parents and impose one-day waiting periods for women seeking abortions, the Court had torn Justice Blackmun's trimester formula to pieces. According to Hull, Hoffer and Hoffer,

“...The real danger to women's rights promoters as well as pro-choice advocates in the shift of the Court's reasoning was that, framed in the language of undue burden, reproductive choice was no longer a “fundamental right” as enunciated in *Griswold* and extended in *Roe*. For legislatures, the picture was somewhat different; they could continue to pass laws that restricted access to abortion and funding for abortion, while imposing regulations regarding notification, informed consent, and medical practices in abortions.”¹⁰

However, the situation was to change in 1992, when five abortion clinics and one physician representing himself, as well as a group of physicians who provided abortion services, brought suit seeking declaratory relief, arguing that five provisions of the “Pennsylvania Abortion Control Act” of 1982 – the informed consent rule, the spousal notification rule, the parental consent rule, 24-hour waiting period and the imposition of certain reporting requirements on facilities providing abortion services - were unconstitutional.¹¹ The case *Planned Parenthood v. Casey* was argued and decided in 1992 and the Court's lead plurality opinion upheld the right to have an abortion but lowered the standard for analysing restrictions of that right.¹² As none of the justices'

opinions was joined by a majority of justices, it is apparent that the Court remains deeply divided on the issue of abortion. Also, many have turned away from the idea of “privacy” as a justification for abortion rights. According to law professor Cass Sunstein, “the Equal Protection Clause of the Fourteenth Amendment was a better constitutional home for the abortion right than privacy or substantive due process”.¹³ Similarly, Ruth Bader Ginsburg had argued that the right to choose to end a pregnancy “should rest upon equal protection concepts rather than due process, as in *Roe*”.¹⁴

As many predicted, *Casey* was not the last word on state regulations. In 2000, a case - *Stenberg v. Carhart* - was heard by the U.S. Supreme Court dealing with a Nebraska law, which made performing “partial-birth abortion”¹⁵ illegal, unless necessary to save the mother’s life. Nebraska, like many other states, banned the procedure on the basis of public morality. The Court struck down the law by a 5-4 majority, finding the Nebraska statute criminalising “partial-birth abortions” violated the Fourteenth Amendment’s Due Process Clause, and ban placed an “undue burden” upon a woman’s right to choose an abortion, violation of the standard established in *Casey*.¹⁶

Several issues were brought up during the oral arguments, such as the lack of an exception for the woman’s health the state of Nebraska took the position that “partial-birth abortion” was never medically necessary, meaning that an exception was not needed. It was also argued whether or not the law could be construed to apply to other forms of abortion, in which case it would violate the right to privacy as described in the *Roe* and *Casey* decisions.¹⁷

In 2003, the federal government placed a ban on partial-birth abortion, again without any exception for the health of the mother. In 2006, the Supreme Court announced that it would hear the case *Gonzales v. Carhart*, which was then argued in November 2006 and decided on 18th April 2007, and which involved the “Partial-Birth Abortion Act” of 2003. Justice Anthony Kennedy wrote, for the five-justice majority, that Congress was within its power to generally ban the procedure, although the Court left the door open for challenges. Kennedy's opinion did not touch upon the question of whether the Court's prior decisions in *Roe v. Wade* and *Planned Parenthood v. Casey* were valid, but Kennedy did cite *Roe* and *Casey*, noting that the pre-viability or post-viability distinction was not implicated in this case. Also the majority's opinion said that the state's interest in the prospective child's life from conception was still valid, and that the Act was narrowly tailored to address this interest. Relying on Congress' findings that “intact dilation and extraction” is always unsafe, Kennedy held that a health exception was therefore not needed. Joining the majority were Chief Justice John Roberts, and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. Justice Ginsburg and the other three justices dissented, contending that the ruling ignored Supreme Court abortion precedent.¹⁸ Justice Ginsburg's dissent was the only opinion in this case that mentioned the word “privacy”, and then only to deny that this case was about privacy:

“Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.”¹⁹

The abortion rights debate is being held in wider prospects and has much wider impact rather than only on issues directly connected to abortion/anti-abortion laws. As

the abortion regulation controversy continued in the legislatures and courts of the nation, a new issue arose to trouble advocates on both sides: Could local, state, and federal governments regulate anti-abortion protests? Was the right to free speech unconstitutionally restricted when protesters at abortion clinics were either curbed by regulations or jailed for their activities? The violence feared by clinic doctors and their staff was not far away. In the late 1980s, extremists within anti-abortion groups engaged in a campaign of bombings. A number of physicians were killed by anti-abortion activists during the early 1990's – they justified their acts in announcements stating that the infants they were saving from the abortionists justified the murderous assaults on the doctors and their escorts.²⁰ As Hull, Hoffer and Hoffer argue, the controversy “touched the Establishment of Religion and Free Exercise Clauses of the amendment [and] it also reached out to Freedom of Speech provision.”²¹

From 1993 to 2000, pro-choice forces found an ally in President Bill Clinton and with his support Congress had to pass a law insuring free access to the clinics – “The Free Access to Clinic Entrances Act”.²² Pro-life groups immediately challenged this act's constitutionality as well as its application to their activities. In 2006, under the George Bush's presidency, the Legislature passed “South Dakota Women's Health and Human Life Protection Act” (H.B. 1215), which was signed into law and which would forbid pregnancy termination under virtually any circumstance. The act had specifically defined pregnancy as beginning at the point of conception rather than at implantation into the uterine wall, which would have meant that H.B. 1215 applied to emergency contraception and possibly all forms of hormonal contraception.²³ There is no doubt that this act would lead to a new wave of controversy in the U.S. legislature and jurisdiction.

CONCLUSION

In the preceding pages, I have presented a brief account of the problematic principle of the right to privacy in the U.S. jurisdiction. I deliberately concentrated only on one aspect of privacy rights – birth control issues, in order to analyse the changing nature of this “right” within limits of this research; a right many scholars identify as fundamental even as many others deny its existence at all. Deep and extensive analysis of all privacy right cases, even concentrating only on those decided by the United States Supreme Court, would inevitably require a much more lengthy analysis which would not serve the purpose of this research. I believe that concentrating only on one specific, but very important aspect of this problematic issue enabled a deeper and better-quality mastery of my initial goals.

Despite the origins of controversy in connection to privacy have begun in the nineteenth century (*Marbury v. Madison*, 1803), or as some scholars argue, even straight after the formation of the U.S. Constitution (*Calder v. Bull*, 1798), its modern history started in 1965 when the Supreme Court decided the landmark case *Griswold v. Connecticut*, granting the right to privacy to married couples within their intimate domain. The outcome of this case and landmark decisions in *Roe v. Wade* and *Doe v. Bolton* that were to follow was to take the lid from Pandora’s Box, putting the U.S. Supreme Court into the uneasy position of being in the middle of divided nation of pro-life and pro-choice camps, and holding Solomon’s sword of justice in one of the most controversial cases in American legal history. These cases opened the gate to further controversy regarding privacy rights and made room for heated discussions in

professional, academic, political and layman's circles. During post-Roe era, there was an attempt to apply privacy right to spheres other than birth control: homosexual rights (*Bowers v. Hardwick*, *Lawrence v. Texas*), the right to choose to die (*Cruzan v. Director, Missouri Department of Health*), euthanasia or assisted suicide (*Washington v. Glucksberg* and *Vacco v. Quill*) to name but a few. The right to practice polygamy, to use drugs, or to commit acts of domestic violence – can we also define these, and many other issues, within the “right to privacy” definition?

The controversy about abortion rights is not only limited to the question of the taking of innocent life. Many pro-life supporters also support their arguments by religious definition of the inception of life – a concept which claims that the legal life starts with “ensoulment” – God giving a soul to the infant at conception. The Constitution's First and Fourteenth Amendments forbid the federal government and the states from establishing one religion over the others and pro-choice lawyers question whether the courts should allow any one religious doctrine to become the very foundation of the U.S. laws.¹ What is clear for everybody is that the question of when life begins screams for a scientific answer. Also, many argue that one must look deeper in the cultural values and answer what the fundamental role of women in society is, in order to discover the answers regarding abortion rights: if woman's central role is childbearing and care, then abortion strikes at the heart of the social order. If women's role and men's role are exchangeable, then women should not be viewed as carriers of the next generation unless they choose so.²

Both *Griswold* and *Roe* (and *Doe*) were mostly based on the right to personal

autonomy and right to privacy. This was later criticised by even the friends of the pro-choice position, who argued that *Roe* was incorrectly framed and should have rested not on concepts of privacy, but rather on the Equal Protection Clause of the Fourteenth Amendment. As Tribe, Etzioni and Morgan argue, *Roe* protects a right, the right to privacy, that appears nowhere in the text of the Constitution.³ Rather, privacy was derived from the “penumbras” and “emanations” of the specifically detailed guarantees of the Bill of Rights. Carl Schneider put it effectively when saying that

“...Nevertheless, the Court next says, “This right of privacy... is broad enough to encompass a woman’s decision whether of not to terminate her pregnancy.” Why that right is “broad enough” the Court does not say. The Court does follow this sentence with a list of “detriments” a woman would suffer who could not have an abortion, and one may infer that it is the severity of the detriments that gives rise to the right. But while the Court cannot mean that “detriments” create rights – since all statutes impose “detriments”, and since most “detriments” do not give rise to a legal right – the Court does not say why detriments create a right here, or why there particular detriments create this particular right.”⁴

The language of judges’ opinions in abortion rights cases rests most firmly on constitutional law, rather than on criminal, domestic or economic law concepts. The Court’s majority found a fundamental right to privacy in the Constitution that included reproductive choice. Opponents of the decision argued that the state also had a constitutional duty to protect potential human life – particularly after viability.⁵ Deciding it upon the basis of concept of privacy, rather than upon the Equal Protection Clause or the concept of personal autonomy, made the language of the decision itself highly controversial. As we could see in post-*Roe* cases, for instance *Webster v. Reproductive Health Services* or *Planned Parenthood v. Pennsylvania*, even justices themselves acknowledged that *Roe* was decided incorrectly: Justices O’Connor and Ginsburg argued that the decision would have been framed better within equal protection and undue

burden grounds, rather than privacy grounds – and so they did in consecutive cases.

Second, as Tribe points out, “...the simplest argument against *Roe*, an argument that has great resonance in a nation devoted to principles of democracy, criticizes *Roe* as antidemocratic.”⁶ Both Tribe and Morgan strictly argue that the Supreme Court did not have the right to decide such an important issue itself, but rather, should have left this issue of “individual rights that was a matter of moral controversy to be decided solely by the legislative and executive branches.”⁷ It is arguable, whether passing the responsibility onto different branches would have solved the problem in efficient manner. In order to choose the right group to decide, we need to specify who the one to decide is about such an important matter as when the life begins – shall we leave this responsibility to theologians, medical professionals, or shall it be the task for legislators or members of the Supreme Court? The only thing one can be sure about is that no matter who decides, the decisions will always raise controversy.

Medical developments, such as better and more reliable types of contraception, “morning-after” pills, which may cause the dramatic decline in the number of abortions sought, also cause controversy as does the use of embryonic and foetal tissue used as vital components for the treatment of Parkinson’s disease, Alzheimer’s disease and other types of brain and spinal dysfunctions. Some argue that this research could lead to possible future experiments with the cloning of human beings. Pregnant women may give permission for the tissue of their aborted foetus to be used in such fashion (indeed, within the privacy concept), which may fuel the debate even more. The right to privacy controversy is still ranging, and the justices appear to have called a halt to any extension

of personal privacy.

Last, the presidential elections of 2008 will have inevitable impact on the future of abortion rights. Candidates Barack Obama and John McCain have both different viewpoints on this issue. Although neither Obama nor McCain wish to overrule *Roe v. Wade* (as they both believe this step would lead to more illegal abortions); Obama is clearly pro-choice oriented, whereas McCain's views are strictly pro-life. Obama believes that common grounds can be found with regards to achieving equilibrium between pro-life and pro-choice decisions. On the other hand, McCain's goal is to make *Roe* decision irrelevant as in his opinion, abortions may not be needed anymore. In addition, as he claims that he will nominate justices based on their experience and those who share his values, we may see interesting development of this highly-charged issue.⁸ Only time will show what the future brings and what other consequences discussed cases will have on the society.

APPENDIX

Amendment I – Freedom of Religion, Press, Expression. Ratified 15.12.1791

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV – Search and Seizure. Ratified 15.12.1791

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V – Trial and Punishment, Compensation for Takings. Ratified 15.12.1791

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

Amendment VIII – Cruel and Unusual punishment. Ratified 15.12.1791

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment IX – Construction of Constitution. Ratified 15.12.1791

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIII – Slavery abolished. Ratified 6.12.1865

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV – Citizenship rights. Ratified 9.7.1868

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

ENDNOTES

INTRODUCTION

1. Opinion of Justice Louis Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928).
2. *Olmstead v. United States*, 277 U.S. 438 (1928).
3. For full text of specific amendments see Appendix.
4. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
5. *Gonzales v. Carhart*, 550 U.S. ____ (2007).
6. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
7. *Roe v. Wade*, 410 U.S. 113 (1973).
8. *Doe v. Bolton*, 410 U.S. 179 (1973).
9. *Carey v. Population Services International*, 431 U.S. 678 (1977).
10. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).
11. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
12. Full text of Partial-Birth Abortion Ban Law (2003) can be found in US Government Printing Office http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ105.108.pdf, or http://www.nrlc.org/abortion/pba/partial_birth_abortion_Ban_act_final_language.htm (both accessed 9.8.2008).
13. Most publications examine specific court cases, with regards to birth control or homosexual rights, and notes that these cases were decided on the basis of privacy. My aim is to analyse how this concept of privacy changed and also how

- the points of view of those, who had to decide them varied during forty years of history of modern right to privacy controversy.
14. Lecture of PhDr. Vladimír Dančišin, PhD., Checks and Balances , 28th September 2004, University of Prešov, Slovakia.
 15. Ibid., Lectures 28th September 2004 – 16th May 2005.
 16. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
 17. Rubinfeld, pp. 740 – 741.
 18. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).
 19. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).
 20. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law...” U.S. Constitution, Amendment XIV, § 1.
 21. *Meyer v. Nebraska*, 262 U.S. 390 (1923) – the Supreme Court struck down a state law that prohibited the teaching of German and other foreign languages to children until the ninth grade.
 22. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) – the Supreme Court applied the principles of *Meyer* to strike down an Oregon law that compelled all children to attend public schools.
 23. Rubinfeld, p. 743. Cases, which cited *Meyer* and *Pierce* are e.g., *Bowers v. Harwick*, 478 U.S. 186, 190 (1986); *Carey v. Population Services International*, 431 U.S. 678, 685 (1977); *Roe v. Wade*, 410 U.S. 113, 152 – 153 (1973).
 24. Opinion of Justice Douglas in *Griswold v. Connecticut* (1965).
 25. *Loving v. Virginia*, 388 U.S. 1 (1967).
 26. According to Rubinfeld, p. 745.

27. Stanley v. Georgia, 394 U.S. 557 (1969).
28. Opinion of Justice Marshall in Stanley v. Georgia (1969).
29. Brown v. Board of Education, 347 U.S. 483 (1954).
30. Kelley v. Johnson, 425 U.S. 238 (1976).
31. Bowers v. Hardwick, 478 U.S. 186 (1986).
32. Lawrence v. Texas, 539 U.S. 558 (2003).
33. Hodgson v. Minnesota, 497 U.S. 417 (1990).
34. Ohio v. Akron Center, 497 U.S. 502 (1990).
35. Stenberg v. Carhart, 530 U.S. 914 (2000).
36. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990).
37. Washington v. Glucksberg, 521 U.S. 702 (1997).
38. Vacco v. Quill, 521 U.S. 793 (1997).
39. In <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/righttodie.htm>,
accessed 15.7.2008.

**I. THE RIGHT TO PRIVACY AND THE BATTLE FOR BIRTH
CONTROL: *GRISWOLD V. CONNECTICUT (1965)* AND
*EISENSTADT V. BAIRD (1972)***

1. Strum, p. 90.
2. In <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/comstock.html>,
accessed on 2.1.2007.
3. The Comstock Act, (ch. 258 17 Stat. 598 enacted 1873).
4. In <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/comstock.html>,

- accessed on 2.1.2007.
5. In <http://www.msu.edu/course/mc/112/1920s/Sanger/Information.html>, accessed on 2.1.2007.
 6. Ibid. Accessed on 2.1.2007.
 7. 19 U.S.C. § 1202 – 1681. Hull, p. 68: Section 305(a) of the Tariff Act of 1930... provides that: “All persons are prohibited from importing into the United States from any foreign country any article whatever for the prevention conception or for causing unlawful abortion.”
 8. United States v. One Package of Japanese Pessaries, 86 F. 2d 737 (2nd Cir. 1936).
 9. Strum, p. 91.
 10. Poe v. Ullman, 367 U.S. 497 (1961).
 11. As cited in Bodenhamer and Ely, eds., p. 32.
 12. Cushman, ed., p. 184.
 13. Ibid. P. 92.
 14. Opinion of Justice William O. Douglas in Griswold v. Connecticut, 381 U.S. 479 (1965). See Shattuck, p. 106; Strum, p. 92; Rubin, p. 123; Cary and Peratis, p. 182; Swisher, p. 189; Hull, Hoffer and Hoffer, p. 80.
 15. Strum, p. 92.
 16. Opinion of Justice Arthur Goldberg in Griswold v. Connecticut, 381 U.S. 479 (1965). See Shattuck, pp. 106 – 107; Hull, Hoffer and Hoffer, pp. 80 – 83.
 17. In Strum, p. 92. See also Shattuck, pp. 107 – 108.
 18. Janda, Berry, Goldman and Huff, p. 508.
 19. Opinion of Justice Hugo Black in Griswold v. Connecticut, 381 U.S. 479 (1965).

- See Shattuck, pp. 108 – 109.
20. Ibid.
 21. Janda, Berry, Goldman and Huff, p. 508.
 22. Ibid. P. 509.
 23. Opinion of Justice Brennan in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See Cary and Peratis, p. 183 and Shattuck, pp. 113 – 114.
 24. Kuzma, in <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/birth-control-access-prevention/contraception-law-6528.htm>, Contraception and the Law, Cindy Kuzma. Accessed on 21.1.2007.
 25. According to Etzioni, pp. 192 – 193.

II. PANDORA’S BOX OPENED: *ROE V. WADE (1973) AND DOE V. BOLTON (1973)*

1. Alstyne, p. 1679.
2. Friedman, pp. 229 – 230.
3. Ibid. P. 230.
4. Hull, Hoffer and Hoffer, p. 40.
5. Ibid. P. 40.
6. Ibid. P. 40.
7. Craig and O’Brian, p. 12: The Texas abortion law had been adopted in 1854. As incorporated in that state’s penal code, it forbade any person from performing an abortion except for “the purpose of saving the life of the mother.” It also made performing an abortion a criminal offence, punishable by up to ten years in

- prison. Notably the law did not ban or criminalise a woman's self-abortion.
8. Hull, Hoffer and Hoffer, p. 40.
 9. Ibid. P. 101.
 10. Ibid. P. 110.
 11. In Hull, Hoffer and Hoffer, p. 110; see also Shattuck, p. 122; Rubin, p. 131.
 12. Rubin, pp. 131, 138 – 139.
 13. Opinion of Justice Blackmun in *Roe v. Wade*, 410 U.S. 113 (1973). See Hull, Hoffer and Hoffer, p. 153; Shattuck, pp. 123; Rubin, p. 132.
 14. Ibid.
 15. Opinion of Justice Rehnquist in *Roe v. Wade*, 410 U.S. 113 (1973). See Hull, Hoffer and Hoffer, p. 158; Rubin, p. 133; Shattuck, pp. 126 – 127.
 16. Opinion of Justice White in *Doe v. Bolton*, 410 U.S. 179 (1973). See Hull, Hoffer and Hoffer, pp. 163 – 164.

III. THE POST-ROE SITUATION

1. Hull, Hoffer and Hoffer, p. 166.
2. Ibid. P. 167.
3. Ibid. Pp. 171 – 205.
4. Strum, p. 97.
5. Hull, Hoffer and Hoffer, p. 207.
6. Janda, Berry, Goldman, Huff, p. 509.
7. Hull, Hoffer and Hoffer, pp. 207 – 208.
8. Ibid. P. 208.

9. Janda, Berry, Goldman, Huff, p. 510.
10. Hull, Hoffer and Hoffer, p. 247.
11. Ibid. P. 248.
12. Ibid. P. 250.
13. Ibid. P. 268.
14. Ibid. P. 249.
15. According to definition in The Merck Manual of Medical Information, p. 1031:
“...During partial-birth abortion fetal material is evacuated through cervix into the birth canal before curettage; the most common type of abortion performed is suction-aspiration abortion which consists of a vacuum tube inserted into the uterus; others consist of what is known as “D&E” (dilation and evacuation), which is usually used during the second trimester and dilates the cervix and removes some fetal material with non-vacuum instruments and in some cases uses curettage inside the uterus so that fetal material can be evacuated; or “D&X” (dilation and extraction) type of abortion, which rather than commencing curettage inside of the uterus, extract part of the foetus first and then begins the process of disassemblage.”
16. In Hull, Hoffer and Hoffer, p. 275 and Cushman, ed., p. 201.
17. Hull, Hoffer and Hoffer, p. 280.
18. Opinion of Justice Ginsburg in *Gonzales v. Carhart*, 550 U.S. ____ (2007).
19. Ibid.
20. Hull, Hoffer and Hoffer, pp. 292 – 293.
21. According to Hull, Hoffer and Hoffer, p. 291.

22. Hull, Hoffer and Hoffer, p. 293.
23. “South Dakota Women’s Health and Human Life Protection Act (HB 1215), Signed into Law by South Dakota Gov. Mike Rounds” in <http://news.findlaw.com/cnn/docs/abortion/sdabortionlaw06.html>, accessed on 21.4.2007.

CONCLUSION

1. Hull, Hoffer and Hoffer, p. 335.
2. Ibid. Pp. 336 – 337.
3. See Tribe, pp. 80 – 86, Etzioni, pp. 200 - 207 and Morgan, p. 1731.
4. As quoted in Etzioni, p. 202.
5. Hull, Hoffer and Hoffer, p. 334.
6. Tribe, p. 80.
7. Tribe, p. 80 and Morgan, p. 1748.
8. In http://www.ontheissues.org/2008/John_McCain_Abortion.htm and http://www.ontheissues.org/Social/Barack_Obama_Abortion.htm, both accessed 7.9.2008.

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