

Cheryl Deutsch

WSTU 199

Prof. Deitch

15 December 2005

Reassessing Precedent: Reproductive Rights,  
the Supreme Court, and the Rhetoric of Privacy and Choice

**Introduction: Samuel A. Alito, Jr. and a return to precedent**

A recent New York Times article on President George W. Bush's Supreme Court nominee began with this: "Dancing a fine line in the Senate, Judge Samuel A. Alito Jr. spent Tuesday courting both opponents and supporters of abortion rights with careful remarks about legal precedent. Judging by senators' reactions, he managed to make headway with both sides" (Stolberg and Kirkpatrick). At a point when the Court is in transition and abortion figures prominently in the debate surrounding Court nominees, a statement such as this demands closer scrutiny by feminists and reproductive rights advocates. While analysis of Alito's political maneuverings – his adeptness at "dancing a fine line" – might be interesting, there is more in this statement that should worry abortion rights advocates. During his recent nomination process, for example, Chief Justice John G. Roberts' suave legal confidence impressed senators on both sides of the aisle and therefore received much media attention and praise. He also spoke of respect for precedent and was nominated by a margin of 78-22. What is needed, therefore, is not only an analysis of Alito's political and judicial personality, but an analysis of what these precedents really mean to him and the senators who will be deciding his nomination. A closer look reveals the insufficiency and tenuous inconclusiveness of those precedents that seem fundamental to the feminist and reproductive rights' movements.

This essay will examine the legal precedents upholding the rights to privacy and abortion with the intention of problematizing feminists' simplistic defense of the Supreme Court's 1973 decision in *Roe v. Wade*. I will analyze the significant precedent-setting cases of the 1960's and 1970's, specifically: *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), *Roe v. Wade* (1973), and the suite of cases in 1977 which restricted Medicaid funding for abortion. If Alito can "make headway with both sides" in discussions of legal precedent, then a second look at these precedents is in order. Such a task, I think, should not be left just to scholars of law; those of us demonstrating in front of the Supreme Court building should take an honest look at the decisions we are unequivocally defending. In order to mount a successful opposition to anti-abortion nominees, a reassessment of precedent must also be used to inform the rhetoric of feminist activists. This essay will also discuss the rhetoric of choice espoused by feminists and reproductive rights advocates after the decisions of the 1970's and how this rhetoric has changed.

In light of an acknowledged backlash against feminism, as well as feminist criticisms of the pro-choice movement such as those of the legal scholar Dorothy Roberts, this period of transition in the Supreme Court offers an important opportunity for feminists and reproductive rights advocates to reassess not only the precedents they are (increasingly unsuccessfully, some might say) defending, but also the direction of their activism in general. Dorothy Roberts criticizes the limited nature of choice rhetoric and advocates a platform of access to comprehensive reproductive healthcare for all as an alternative. This is not a new demand, but one that was popular in the 1970's. The Supreme Court's decisions in *Maher v. Roe*, *Beal v. Doe*, and *Poelkner v. Doe* in 1977, which denied that states have a financial obligation to provide comprehensive reproductive healthcare via Medicaid, struck a blow to this feminist ideal. The movement has seemed to be on the defensive ever since; defending *Roe* without the political

momentum to advocate for any new legal rights. The argument I will make here is that, based on a review of Court opinions, a legal argument of privacy rights is inherently limiting. While many organizations have and continue to support the *right* to comprehensive reproductive healthcare for all, the nature of the *legal* arguments is such that this rights rhetoric never makes its way into the Supreme Court. I conclude this essay with a hopeful alternative and a healthy challenge to the direction of the current feminist and reproductive rights movements.

### **The limitations of choice**

Dorothy Roberts' *Killing the Black Body* addresses the problems associated with framing reproductive liberty as a negative rather than a positive right. Allowing reproductive liberty to be framed as a negative right (i.e. the government does not have the right to interfere in a woman's reproductive decisions) does nothing to address the context in which Black women live and make reproductive decisions. Because Black women are more likely than white women to live in poverty, on welfare, and/or suffer from racist misinformation and lack of information, they do not have the "choices" available to white middle-class women, for example, who benefit from reproductive liberty being defined as a private affair. "The abstract freedom to choose," writes Roberts, "is of meager value without meaningful options from which to choose and the ability to effectuate one's choice. The traditional concept of liberty makes the false presumption that the right to choose is contained entirely within the individual and not circumscribed by the material conditions of the individual's life" (309). In reducing reproductive liberty to a negative right, a matter of privacy, the government is in fact excused from assisting those who otherwise lack access to all of the information and services necessary to make informed and healthy reproductive decisions.

As I have already stated, feminists and reproductive rights advocates of the 1970's supported the *right* to comprehensive reproductive healthcare for all. The Supreme Court cases which paved the way for such reproductive rights as contraception and abortion, however, were premised on the notion of a right to privacy. As Roberts makes clear, choice is limited when couched in terms of privacy. So, how did the movement go from demands for universal access to comprehensive reproductive healthcare to criticisms such as those of Roberts? No doubt, a number of factors are at play, but a revision of those Supreme Court cases may give clues as to the change in the movement's rhetoric. I will not attempt to prove causation, but a correlation between the legal arguments being made by Supreme Court justices and a change in the movement's rhetoric is worthy of attention. In analyzing these arguments, I explore how the rulings are insufficient victories in the cause for which Roberts has never stopped fighting.

### **Reassessing precedent**

The Constitution does not designate a right to privacy. The concept of such a right first arose in 1890 in an article written by Samuel Warren and Louis Brandeis in the Harvard Law Review entitled "The Right to Privacy." Justice Brandeis later developed this concept in his 1928 dissent in *Olmstead v. United States*. "The makers of our Constitution," he wrote, "conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men" (qtd. 381 U.S. 479). This statement was then quoted by Justice Douglas writing the opinion of the Court in its 1965 ruling *Griswold v. Connecticut*. Thus, Douglas declared: "the right of privacy is a fundamental personal right" (381 U.S. 479). This precedent then forever linked the right of privacy with reproductive rights.

*Griswold v. Connecticut* concerned physicians of Planned Parenthood who were convicted as accessories for giving advice on and prescribing contraceptives under a Connecticut law that made it illegal for any person to use a contraceptive drug. While this case established the right of privacy in striking down that Connecticut law, what is lacking in the opinion of the Court is any argument for the positive right to contraceptives. Such an argument only comes in Justice Stewart's dissenting opinion, and thus the right to privacy and the right to contraceptives are, from the beginning, mutually exclusive arguments.

In the opinion of the Court, Justice Douglas argues that "the First Amendment has a penumbra where privacy is protected from governmental intrusion." The Third, Fourth, Fifth, and Ninth Amendments, he argues, also "create zones of privacy." While Douglas describes the prospect of police searches of couples' bedrooms as "repulsive," his justification for striking down the Connecticut law is that "in forbidding the use of contraceptives rather than regulating their manufacture or sale ... [the law] sweeps unnecessarily broadly" (381 U.S. 479). Thus, he neither argues for a fundamental right to contraceptive use nor does he argue that states could not, theoretically, prevent the sale or manufacture of contraceptives. Furthermore, the privacy addressed in this argument is that of the married couple, not the individual or the woman, because the majority opinion, asserting that the right to privacy exists within the "penumbra" of First Amendment rights, is based on the notion of marriage as a certain constitutionally protected association. In his concurring opinion, Justice White argues that while the State's stated purpose for the law (to discourage promiscuity) may be legitimate, to this end the law is ineffective. So while Justice White supports the right of privacy, he also thinks the State has a legitimate claim to regulating the sexual activity of its citizenry.

It is only in a dissenting opinion, made by Justice Stewart, that a “right to choose” argument is made. Except for his possible limitation of such choice to married couples, his argument seems to address the positive right advocated by Roberts:

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. (381 U.S. 479)

While he hints that the Connecticut law is “asinine,” Stewart does not support a right of privacy in the Constitution, and he does not find the law unconstitutional. Rather, it is a matter better left up to the legislature; “that is the constitutional way to take this law off the books” (381 U.S. 479). It is important that Stewart makes a claim for a positive right to comprehensive reproductive healthcare outside of the realm of the right of privacy; it is also significant that this claim is made as an aside rather than as an argument in the case at hand. In light of the limitations of the opinion of the Court written by Justice Douglas, and given the limitations of the arguments made in subsequent cases (to be discussed below), Stewart’s counsel that issues of reproductive rights should be dealt with in the legislatures rather than the courts serves as a forewarning to feminists and reproductive rights advocates that their cause(s) will not be sufficiently secured in the legal arguments of the courts. This comment also indicates that the purview, and therefore, the arguments of the courts are not the same as that of the legislatures.

The 1972 Supreme Court ruling in *Eisenstadt v. Baird* extended the right of privacy from married couples to unmarried individuals. The case concerned the arrest and conviction of a prominent abortion and reproductive rights advocate, William Baird, for distributing

contraceptive foam to a woman after a lecture he gave on contraception and overpopulation. The Massachusetts law under which he was arrested made it illegal for anyone to distribute contraceptives, except for licensed doctors and pharmacists prescribing contraceptives to married persons. While this case, like *Griswold v. Connecticut* is touted as a victory for reproductive rights, it is important to take note of the context in which Baird's arrest took place. He was giving a speech at Boston University on contraception and overpopulation, two topics he spoke about often. While Baird may be an admirable activist, given the history of eugenicist and pseudo-eugenicist policies of sterilization and coerced contraception aimed at minority and poor women, as described by Dorothy Roberts, we must acknowledge the possibly problematic bent of Baird's activism that linked poverty and overpopulation with abortion and contraception.

Analyzing amicus curiae submitted by reproductive rights organizations can give some insight into the goals of those organizations and, with analysis of the Court's opinion, the extent to which the Court's ruling can be considered a victory. In the case of *Eisenstadt v. Baird*, while the Court ruled in favor of the Planned Parenthood Federation of America, Inc., a review of this organization's amicus brief reveals that the Court failed to argue on many of the most important points asserted by Planned Parenthood. Most importantly, the Court fails to uphold the rights defined by Planned Parenthood as fundamental. Planned Parenthood, in its amicus brief, expresses the fundamentality of the rights asserted in the case, "i.e., to medical services and to make one's own decisions as to procreation" (Brief 13). As in *Griswold*, what is *not argued* in this case is as important (for us today) as what *is* argued.

As in *Griswold*, the fundamental right to contraception is not argued in the opinion of the Court; rather, the issue is quite overtly avoided. Justice Brennan, writing the opinion of the Court and building off of *Griswold*, argues that the Fourteenth Amendment prevents differential

treatment of married and unmarried couples. Reminiscent of Douglas' argument in *Griswold*, which left open the potential right of states to intervene in the sexual activity of their citizenry, Brennan acknowledges that while the State's intention of discouraging premarital and extramarital affairs is legitimate, the Massachusetts law in question is not intended to do so. Brennan acknowledges the Court of Appeals' statement that the Massachusetts law "conflicts with fundamental human rights" and responds by saying: "We need not and do not, however, decide that important question in this case" (405 U.S. 438). Thus, the issue of a positive right to contraception is avoided. While the right to contraception is not a fundamental right, Brennan argues that the law must treat all equally; thus, the right of privacy is extended from the marital couple to individuals, whether married or not. It is important to note that in extending equal treatment under the law to include unmarried individuals, there is no discussion of equal access for poor individuals; this concept will be revisited in 1977 in *Maher v. Roe*, and the outcome is unfortunate.

I do not mean to diminish the importance of this case in paving the way for reproductive rights. Brennan explicitly links the right of privacy to "matters so fundamentally affecting a person as the decision whether to bear or beget a child," and this statement will be used to justify the Court's ruling in *Roe v. Wade* (405 U.S. 438). It is important to acknowledge the case's insufficiency, however; and this requires an analysis of what is avoided in the arguments of the justices. As in the opinion of the Court, the concurring and dissenting opinions avoid the issue of a fundamental right to contraception. Justice Douglas, concurring, argues solely on the basis of Baird's First Amendment right to free speech; the woman could have simply handed the contraceptive back to him. Justices White and Blackmun, also concurring, argue that marital status was not at issue in the case (in fact, we do not know the marital status of the woman

involved), but rather there is no reason an unlicensed person should not be able to distribute medicine that does not require a prescription. Justice Burger, dissenting, argues that the case is simply about dispensing medicines without a license, and that excusing Baird is to invite a return to “curbstone quacks” and “medicine men” that pass out anything on the street. Thus, while the Court mostly upholds Planned Parenthood’s assertion that “the right to determine whether or not to procreate is a fundamental right under established constitutional principles,” Planned Parenthood’s similar assertion of the fundamentality of the right “to medical services” is overtly and tellingly avoided (Brief 10, 13).

The case of *Roe v. Wade* extended “the right to determine whether or not to procreate” to include abortion. Again, however, the right to abortion is not a fundamental right in itself, but a right associated with the right to privacy. While the decision in *Roe v. Wade* is a victory for feminists and reproductive rights advocates, it is noteworthy that the majority of the Court’s decision is spent qualifying its determination that “this right of privacy ... is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” (410 U.S. 113). Justice Blackmun, in the opinion of the Court, is clear in stating that the right to abortion is not an absolute right: “We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation” (410 U.S. 113). Here we see the recurring theme that the State does have an implied right to intervene in the sexual and procreative practices of its citizens.

In qualifying abortion within the right to privacy, the Court argues that a woman is not alone in her bodily decisions. First of all, as we have seen, the state does have a legitimate claim to regulate the practice of abortion. Second, the right to privacy does not explicitly imply total bodily autonomy. Blackmun writes: “it is not clear to us that the claim asserted by some amici

that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions" (410 U.S. 113). Finally, while the Court does state that "the word 'person' does not include the unborn," it argues that "the pregnant woman cannot be isolated in her privacy" (410 U.S. 113). Thus, the State has a right to greater interference after the first trimester of pregnancy. This, the Court reasons, is for the sake of women's health, as with the regulation of other medical procedures.

Justice Rehnquist's dissent is important in that his arguments will reappear in later Court decisions limiting abortion. He dissents on the argument that abortion, as a medical procedure, is not a private affair. "A transaction resulting in an operation such as this," he writes, "is not 'private' in the ordinary usage of that word" (410 U.S. 113). In addition, Rehnquist asserts a strict interpretation of Constitutional rights: "liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law" (410 U.S. 113). This is to say that the Fourteenth Amendment does not protect those rights enumerated and implied in the Bill of Rights *absolutely*, but that they simply cannot be infringed without due process of law. Thus, Rehnquist's argument paves the way for regulation of abortions by state legislatures. This deference to lawmakers, who have the power to both grant and limit Constitutional rights so long as they do so without violating the Constitution itself, is reminiscent of Justice Stewart's dissenting opinion in *Griswold v. Connecticut*. It was here that Stewart argued against a right to privacy, and for the positive right to contraceptives for all. He argued that "the constitutional way to take [the Connecticut] law off the books" was through the legislature (381 U.S. 479). All this is to say that while *Roe* did establish the right to abortion, it did so within the right of privacy, and as such it is not an absolute right. The opinion of the Court, in qualifying its decision, and Rehnquist's dissent paved the way for the regulation of abortion by state legislatures

and later Court decisions that deny abortion as a positive right; one that states may not simply abridge, but must endow.

*Roe v. Wade* was a landmark victory for feminists and reproductive rights advocates, but its success was short-lived in some ways. The momentum of the reproductive rights cause in the courts can be said to have peaked with *Roe*; it was this decision that roused a countermovement, and by 1977 a suite of cases severely curtailed the availability of abortion for poor women. The cause of reproductive rights and abortion has been a battle ever since; while subsequent court cases have reaffirmed the Court's decision in *Roe*, legislators and court nominees are increasingly tested against their support of or opposition to abortion.

Three cases in 1977 seized upon the openings left by the Court's decision in *Roe v. Wade*. These cases – *Beal v. Doe*, *Maher v. Roe*, and *Poelkner v. Doe* – took advantage of the Court's failure to make abortion an absolute right and therefore excused states from having to make abortion universally available. *Maher v. Roe*, for example, concerned two poor women challenging a Connecticut welfare policy that restricted Medicaid funding for abortions only to those deemed medically necessary. The Court addressed the issue of whether or not the State's provision of Medicaid for the expenses associated with childbirth, but not for nontherapeutic abortions, posed an unconstitutional restriction of a woman's right to privacy, and thus her decision "whether or not to terminate her pregnancy" (410 U.S. 113). The District Court, hearing this case, asserted a positive right to Medicaid-funded abortions: it held that "the Social Security Act not only allowed state funding of nontherapeutic abortions but also required it" (432 U.S. 464). The Supreme Court, however, decided against the indigent appellees.

The decision of the Court relies on the lack of economic rights enumerated in the Constitution. In this case, it is the State's right to choose whether or not to provide Medicaid

funding that triumphs over poor women's (limited) right to choose to have an abortion. The Court is clear in repeating the limitations of *Roe*:

Roe did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds. (432 U.S. 464)

Thus, the Court returns to a theme we have seen in all of the cases concerning the right to privacy; that the State does have an interest in the regulation of its citizens' procreation, and that it can enforce such "value judgments" through the allocation of Medicaid funding. Abortion is not a positive right for which provisions must be made but a negative right that simply cannot be breached. What constitutes such a breach, however, is determined by the Court: "the State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there" (432 U.S. 464). Thus, *influence* is not necessarily *interference*. "There is a basic difference," writes Powell, "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy" (432 U.S. 464). Returning to the arguments of Dorothy Roberts, this decision means that the "value judgments" of the State fall on the backs of poor women, while those not dependent on Medicaid are free to choose unrestrained by economics.

What should be most worrisome about this Court decision for feminists, reproductive rights advocates, as well as welfare rights activists, is the Court's refusal to acknowledge a

State's responsibility to the poor. On the contrary, the Court repeatedly argues that the State does not have any obligation to alleviate poverty or to make provision for women whose choices are limited by poverty. Justice Powell, in the opinion of the Court, writes: "this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis" (432 U.S. 464). Poverty, therefore, is not sufficient evidence of discrimination. Furthermore, Powell argues that "the Constitution does not provide judicial remedies for every social and economic ill" (432 U.S. 464). As an alternative, he argues that the legislature is the "appropriate forum" for addressing the issue of Medicaid funding for nontherapeutic abortions (432 U.S. 464).

Justice Marshall, dissenting in all three of the 1977 cases, stresses the consequences of such financially-blind Court decisions. He rejects that the plight of poor women is only within the purview of legislatures; rather, he argues that passing such issues off to the legislatures is a direct attempt to limit abortion. "Why should any politician incur the demonstrated wrath and noise of the abortion opponents," asks Marshall, "when mere silence and nonactivity accomplish the results the opponents want" (432 U.S. 454)? Given the proven wisdom of this comment, feminists and reproductive rights advocates should heed these words. It should not simply be opponents of abortion who demonstrate wrath and noise; abortion rights advocates must also break the silence of political complacency and compliance to demonstrate wrath and noise when legislators are silent on issues of poor women's rights.

Feminists and reproductive rights advocates must also heed Marshall's words concerning the consequences of the Court's decision: "There is another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force

that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us” (432 U.S. 454). Whatever our opinions on the potential of the Constitution for serving economic justice, the fact remains that the decisions of 1977 established an onerous precedent. Because the Court is not likely to change its opinions of economic rights enumerated in the Constitution anytime soon, feminists and reproductive rights advocates must occupy ourselves with demanding such rights in the legislatures.

### **A rhetoric of rights**

As we have seen, the Supreme Court’s decisions were insufficient victories for the cause of women’s rights, reproductive rights, and economic rights. As evidence of Alito’s opposition to *Roe v. Wade* becomes apparent (“Alito File Shows Strategy to Curb Abortion Ruling,” *New York Times*, 1 Dec 2005), feminists and reproductive rights advocates should not only be cautious about what rhetoric we use to oppose him, but should prepare ourselves for his appointment. Ideally, the rhetoric used to oppose Alito will also serve to restore popular support for abortion rights. As we shall see, this has not been the case with past Supreme Court nominations. While the legal arguments being made in the Court throughout the 1970’s increasingly diverged from asserting the positive right to abortion, the rhetoric of the feminist and reproductive rights movements also changed. We can learn from our mistakes, and a review of feminist and reproductive rights rhetoric from the 1970’s can inform the rhetoric we use to oppose Alito and demand expanded reproductive rights. Without amending the Constitution (an option which should not be ruled out altogether), there may not be an adequate legal argument to support the positive right to abortion, but this should not deter feminists and reproductive rights advocates from waging such rights claims in our popular rhetoric.

Suzanne Staggenborg's *The Pro-Choice Movement* offers an insightful history of the early development of the movement and its rhetoric in the 1960's and '70's. As Staggenborg notes, until *Roe v. Wade* the pro-choice movement was a rather ad hoc movement piggybacking off of the women's liberation and population movements (5). Demands for abortion rights were really initiated as a non-grassroots movement of medical professionals and institutions seeking reform, and only later repeal, of abortion laws (Staggenborg 15). It became a grassroots movement as it was picked up by activists of other causes of the 1960's. The National Organization for Women (NOW) endorsed repeal of existing abortion laws at its second national convention in 1967, but the organization's own newness precluded substantial involvement at the national level. Neither NOW nor NARAL (then, the National Association for Repeal of Abortion Laws) comprised a large grassroots presence, "but they could compensate for their organizational deficits," writes Staggenborg, "by joining forces with the grass-roots activists who were part of the cycle of protest under way in the 1960s" (27). The movement was thus considerably decentralized in its early years, and national organizers had little influence over diverse local activities (Staggenborg 29).

In these early years, the pro-choice movement was characterized by a consistent attempt to mainstream the cause, as well as conflicts with the more radical goals of women's liberationists as they became involved. Local organizations such as Illinois Citizens for the Medical Control of Abortion and Dallas Committee to Study Abortion, Staggenborg demonstrates, sought to appeal to "the professional interests of doctors" and present the repeal of abortion in a nonconfrontational manner (31). These organizations highlight the separation of the reproductive rights movement from that of women's liberation at the time. The ICMCA, for example, "did not attempt to link its demand for repeal to a broader set of issues such as

women's rights. ICMCA leaders were very careful to present legalized abortion as a change that would be an extension of existing contraceptive practices, which had gained widespread acceptances, rather than a radical social change" (Staggenborg 31-2). This conflict between mainstreaming abortion and contextualizing abortion rights within broader political demands is a theme that will persist throughout the history of the pro-choice movement.

The decentralization and factionalism of the movement at this time are indicative of the absence of any strong opposition. The amicus briefs filed on behalf of Roe in 1973 not only outnumbered those in opposition, but were strategically organized by a coalition of organizations. It was not until *Roe v. Wade* that an anti-abortion opposition consolidated itself. This, in turn, required that the pro-choice movement consolidate itself, but differences within "the movement" persisted. In general, according to Staggenborg, single-issue organizations such as NARAL and ICMCA were willing to make concessions that women's lib organizations were not. While ICMCA, for example, was willing to compromise with legislators in order to pass reform measures, many feminists demanded "free abortion on demand," which ICMCA members saw as "harmful to their own attempts to present the issue in a nonthreatening manner" (Staggenborg 40). One activist of the Chicago Women's Liberation Union, a more radical feminist organization, described the CWLU's refusal to compromise in this way: "We wanted a situation where abortion was not only available on demand but ultimately where we had a health care system which did not allow profiteering on people's abortions, etc., etc., so it was couched in terms which would set up a debate which would allow all of these issues which we thought were consciousness raising to be elaborated" (Staggenborg 46). Thus, unlike the single-issue ICMCA, the CWLU chose a rhetoric that facilitated discussion of comprehensive healthcare and other issues of women's rights. Eventually NARAL, a single-issue organization, adopted some

of the more confrontational tactics of women's liberation to attract a grassroots following of women's lib activists (Staggenborg 51).

Early in the pro-choice movement we can also see the beginnings of a debate over where the greatest potential lay for feminist and abortion rights demands. At least one NOW national organizer, as pointed out by Staggenborg, advocated the legislative route:

It can be strongly argued that our most likely avenue for *actively* shaping as *we* wish – and winning – is the tough, square, old legislative route. ... Ongoing, broad-based citizen action can achieve legislative change; after filing, court cases are finally in the hands of lawyers, and plaintiffs are relatively passive and powerless. We can never formulate judicial decisions, and even the most favorable tend to be ambiguous, narrow in scope, and avoid women's rights; also, the US Supreme Court has taken a distinct rightward turn lately. But we *can* draft our own repeal legislation quite precisely, and actively seek out legislative sponsorship of what *we want*. (quoted Staggenborg 41)

Thus, this activist viewed the Court as a distinctly undemocratic venue for political demands.

Given the current ideological make-up of the Supreme Court, I agree that feminists and reproductive rights advocates need to return to “the tough, square, old legislative route” to demand expanded reproductive rights.

Rickie Solinger, in *Beggars and Choosers*, analyzes the rhetoric of choice espoused by feminists and reproductive rights advocates after *Roe v. Wade*. According to Solinger, a rhetoric of rights predominated before *Roe*, while the rhetoric of choice can be traced to Justice Blackmun's frequent reference to “this choice” in his opinion of the Court in *Roe v. Wade* (5). Solinger is critical of this “rights-lite” language. If a right is a privilege or benefit that does not require special resources to exercise, like voting rights, reasons Solinger, the rhetoric of choice is

more and more linked to the possession of such resources (6). She further criticizes the euphemistic “right to choose:” “it impossibly mixes ‘right,’ a privilege to which one is justly entitled, and ‘choice,’ the privilege to exercise discrimination in the marketplace among several options, *if* one has the wherewithal to enter the marketplace to begin with” (7). This line of argument harkens back to that of Dorothy Roberts, in which “the abstract freedom to choose is of meager value without meaningful options from which to choose and the ability to effectuate one's choice” (309). In this sense, according to Solinger, the rhetoric of feminists and reproductive rights advocates has, since *Roe*, reduced abortion “from women’s right to consumer privilege” (8). As we have seen in the Court, an argument in which reproductive rights do not stand on their own will result in insufficient protections.

While *Roe v. Wade* did not establish an absolute right to abortion, it was only subsequent Court cases that fully enumerated the limitations of that right. At the same time, the rhetoric of feminists and reproductive rights advocates changed. Right after the 1973 decision in *Roe*, the courts upheld state policies in which nontherapeutic abortions were covered under Medicaid (Solinger 12). The cases of 1977, however, excused the State from any financial obligations to fund abortion and clearly articulated that there is no right to welfare. In its 1980 decision in *Harris v. McRae*, the Supreme Court reiterated that *Roe* had not established an absolute right to abortion, but merely freedom from interference in that decision. This leaves poor women with very little choice, yet feminists increasingly relied on a terminology of choice. As Solinger argues, constitutional rights should not be denied to people because they are poor. Public defenders, for example, help poor people exercise their rights, but there is no precedent that requires this assistance in healthcare (Solinger 18). While the Court had never spoken of

abortion in terms of an absolute right, the changing rhetoric of feminists and reproductive rights advocates meant the disappearance of any rhetoric of rights.

As Solinger points out, the disappearance of rights rhetoric brings into question the values of the movement itself. ““Choice,”” she writes, “turned out to be a term and an idea that reflected and foreshadowed the commodification of reproduction and a new, hard set of financial qualifications for motherhood” (35). It shifts the focus from that of abortion to that of personal desire and, as Dorothy Roberts similarly argues, choice “ignores the relationship between some women’s resource-full choice making and others’ choicelessness” (Solinger 33). Abortion as a right is also evaded, argues Solinger, when the rhetoric of choice relies on the specter of the back alley abortionist. When feminists and reproductive rights advocates defend abortion laws based on the potential consequences of their repeal rather than on their own merit, choice becomes a matter of “protection, not the guarantee of rights” (Solinger 62). This argument also contributes to images of female victimization. Furthermore, when we argue that protection is needed, the right to an abortion is reduced to a matter of consumer protection; that a woman should be able to “purchase good service when she goes out to buy an abortion” (Solinger 64). The danger of arguing for abortion as anything other than a positive right is that which has occurred in the Court; abortion becomes a secondary right, vulnerable to regulation and lack of funding. Poor women suffer the most from such rhetoric.

William Saletan, in *Bearing Right: How Conservatives Won the Abortion War*, offers interesting commentary on the reproductive rights rhetoric of Robert Bork’s nomination to the Supreme Court in 1987. While the defeat of Bork’s nomination is considered a victory for abortion rights advocates, Saletan’s analysis exposes the consequences of using private choice in popular rhetoric. Specifically, he traces the decision-making process of NARAL and its

president, Kate Michelman. NARAL launched a successful opposition to Bork based on rhetoric culled in Southern focus groups.

Faced with the prospective judicial nominee, Robert Bork, NARAL hired pollsters and consultants to devise a winning rhetoric. The consultants found that focus group participants in Arkansas and Alabama responded better to a rhetoric of choice and freedom from government interference than to a rhetoric of abortion rights. As Saletan notes, this opposition to government interference also expressed itself in support for segregation (32). Furthermore, antigovernment privacy rights rhetoric had been used by opponents of marital rape legislation. “This cornerstone of conservatism,” writes Saletan, “that the government should stay out of family matters – had long served Michelman’s enemies. Now it would serve her” (36). NARAL plucked this avoidance of abortion rights rhetoric, in favor of abortion as a secondary right within privacy, straight from the insufficient victories in the Supreme Court. As I stated in my introduction and which we have seen in analysis of Supreme Court decisions, a legal argument of privacy rights is inherently limiting. When these inadequate arguments are then used in popular rhetoric, the fundamentality of reproductive rights suffers. While it may be fruitless to speculate “what could have been” had NARAL come to a different conclusion, I find it to be a useful exercise; therefore, I will offer in my conclusion an alternative history of Robert Bork’s nomination that can inform our rhetoric today.

Michelman herself, like Dorothy Roberts, is a staunch supporter of the right to comprehensive reproductive healthcare. She was a welfare mother, and she has a proven record of advocating such positive rights (Saletan 35). At the time of Bork’s nomination, furthermore, NARAL was planning a campaign to expand women’s healthcare rights (Saletan 42). In 1987 Michelman was faced with a tough decision, however. NARAL had utilized a rhetoric of

definitive abortion rights during the recent nomination processes of Justices Rehnquist and Scalia, and they were both confirmed by huge margins. Based on the results of the focus groups, therefore, NARAL utilized a rhetoric of privacy rights to oppose Robert Bork.

Bork opposed both the decision in *Roe* and that in *Griswold*, which upheld the right of married couples to contraception. He disagreed that the Constitution granted a right to privacy. As Saletan notes, “his judicial quarrel wasn’t with abortion but with the underlying doctrine of privacy” (45). NARAL used this position to appeal to the Arkansans and Alabamans of America who opposed an intrusive government. The rhetoric of abortion rights definitively became one of private choice. The Leadership Conference on Civil Rights also adopted choice rhetoric and opposed Bork based on his views on privacy so as to downplay the contested issue of abortion rights.

The debate over *Roe v. Wade* became not whether abortion was right or wrong, but “who should decide” (Saletan 41)? Such an anti-government rhetoric is highly problematic given past feminist and reproductive rights initiatives to expand the role of government in providing public assistance. Saletan argues that “equating liberty’s expansion with government’s contraction” trapped abortion rights advocates in the conservative rhetoric of President Reagan. Such rhetoric is exclusionary. As Saletan notes, “by defining ‘we’ as the alternative to ‘the government,’ Michelman, like Reagan, was obscuring the plight of people who needed public assistance to exercise their rights” (44). This rhetoric contributed to a mentality that also rejects government-funded abortions. While Bork’s nomination was defeated, the rhetorical shift that this victory required perhaps sacrificed the future of abortion rights. Saletan’s analysis of the abortion debate in the wake of Bork’s defeat is alarming:

In Washington, enemies of abortion rights were plotting not to thwart the ascent of privacy but to commandeer it. ... White House aides talked about shaping a national consensus in favor of the private right to abortion but against public aid for it. "People have a right to drive, but the government does not provide them with automobiles," reasoned a White House strategy memo. ... Only years later would pro-choice advocates realize that rallying support for privacy has been the easy part. *Privacy* was a popular word because it was empty. It could be filled with whatever the speaker or the listener valued. (56)

### **Conclusion: a new nominee and a return to the grassroots**

What are we to make of Saletan's argument that privacy is an empty word? As Dorothy Roberts and Rickie Solinger argue, choice also seems to be an empty word. Yet NARAL's website encourages us to "Stop Anti-Choice Alito" by sending an e-mail to our senators ("Help"). The drafted letter argues that Alito has "spent years working to dismantle fundamental protections guaranteed under *Roe v. Wade*. If Alito replaces Justice Sandra Day O'Connor, the Court will shift in a direction that jeopardizes the fundamental values of freedom and privacy that a vast majority of Americans want protected" ("Help"). As we have seen, *Roe v. Wade* established very few "fundamental protections," and later cases took advantage of *Roe*'s inconclusiveness to limit abortion's accessibility. Furthermore, the "fundamental values of freedom and privacy" mentioned in this letter are highly problematic considering many women's dependence on government assistance.

This essay has attempted to problematize feminists and reproductive rights advocates' unquestioning defense of *Roe v. Wade*. A review of relevant Supreme Court cases has revealed

the inadequacies of those decisions which uphold the right to privacy and upon which reproductive rights depend. The right to abortion has never been absolute. On the contrary, decisions of the late 1970's excused the states of any obligation to uphold abortion as a positive right that requires state funding. To argue that *Roe v. Wade* established "fundamental protections" is misleading; it also smacks of the back alley abortionist argument criticized by Rickie Solinger as positing abortion rights as a consumer protection. Also in this essay I have attempted to problematize the rhetoric of abortion rights used by feminists and reproductive rights advocates. Abortion should not be a matter of protection, as NARAL implies, but a right. The danger of arguing for abortion as anything other than a positive right is that which has occurred in the Court; abortion becomes a secondary right, vulnerable to regulation and lack of funding.

Saletan's analysis of Robert Bork's nomination demonstrates the consequences of changing the rhetoric of reproductive rights in order to reflect the values that "a vast majority of Americans want protected." What if the vast majority of Americans do not support the right to abortion? In that case, arguing for freedom and privacy will never change their minds. So we must ask ourselves: what are we really fighting for? Rather than changing our rhetoric, reproductive rights advocates must change people's minds. This will require a return to the grassroots. The Constitution does not enumerate the positive right to abortion, and this cannot be changed without amending the Constitution. Those who make legal arguments for the right to abortion are therefore left to dance a fine line (like Alito in his meetings with senators) in the Supreme Court. People's opinions, on the other hand, can be amended fairly easily. What if NARAL, instead of hiring pollsters and consultants, hired organizers to build a grassroots movement of activists willing to go door-to-door confronting people about abortion rights? If

NARAL had focused its energies in this way in 1987, perhaps Robert Bork would be sitting on the Supreme Court, but perhaps we would not be faced with the prospect of Samuel Alito today. Perhaps the “vast majority of Americans” would support the positive right to comprehensive reproductive healthcare, rather than simply the empty values of privacy and choice.

## Works Cited

*Beal v. Doe*, 432 U.S. 454 (1977).

Brief of the Planned Parenthood Federation of America, Inc. as amicus curiae supporting appellee, *Eisenstadt v. Baird*, 405 U.S. 438.

*Eisenstadt v. Baird*, 405 U.S. 438 (1972).

*Griswold v. Connecticut*, 381 U.S. 479 (1965).

“Help save the Supreme Court from President Bush: Tell your senators to oppose anti-choice Samuel Alito!” Choose Justice. NARAL Pro-Choice America. 14 Dec. 2005 <<http://www.naral.org/>>.

Kirkpatrick, David D. “Alito File Shows Strategy to Curb Abortion Ruling.” New York Times 1 Dec. 2005 <<http://www.nytimes.com/2005/12/01/politics/politicsspecial1/01confirm.html>>.

Roberts, Dorothy. Killing the Black Body: Race, Reproduction, and the Meaning of Liberty. New York: Pantheon, 1997.

Saletan, William. Bearing Right: How Conservatives Won the Abortion War. Berkeley: U of California Press, 2003.

Solinger, Rickie. Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion, and Welfare in the United States. New York: Hill and Wang, 2001.

Staggenborg, Suzanne. The Pro-Choice Movement: Organization and Activism in the Abortion Conflict. New York: Oxford U Press, 1991.

Stolberg, Sheryl Gay and Kirkpatrick, David D. “Designee Woos Senators on Both Sides of Abortion Debate.” New York Times 9 Nov. 2005 <<http://www.nytimes.com/2005/11/09/politics/politicsspecial1/09confirm.html>>.