Abortion: The Clash Between Life and Liberty

An Honors Thesis

by

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Purpose of Thesis

There is no expressed right to privacy mentioned in the Constitution, yet the Supreme Court ruled in 1973 that there is an inherent, fundamental right to private choices and decisions. Roe v. Wade was the landmark case that brought abortion rights to the attention of the United States people. This thesis will examine the reasoning of the Court in 1973 and the philosophies of the Court that have followed in subsequent cases. Where in the Constitution did the majority Justices find the right to privacy to secure for women the right to terminate a pregnancy?

The right to privacy will be analyzed using the Ninth and Fourteenth Amendments in particular. This paper will also examine the course that abortion rights have taken over the last 23 years, and try to predict what the future of Roe might be. This paper will outline the effects of Roe v. Wade paying particular attention to the realization that this impact is still being felt even today.
Abortion is perhaps one of the most divisive issues of our time. To many, abortion is the inhumane slaughter of innocent victims, yet others believe that it says something significant about our basic values of liberty, reproductive autonomy, and the freedom of women. Now, twenty-three years after the rendering of Roe v. Wade, the issue still remains a bitter contest between those who are too innocent to defend themselves and the women who want to decide the outcome of their pregnancy.

Ronald Dworkin, legal scholar, has said, "No judicial decision in our time has aroused as much sustained public outrage, emotion, and physical violence as Roe v. Wade." The abortion problem is perhaps nothing more than a conflict of power. Because it involves health, religion, morals, philosophy, politics, and legal issues, abortion is a complex issue.

With the decision in Roe v. Wade, the Supreme Court Justices recognized a right not specifically enumerated in the Constitution. They resolved the constitutional questions raised by abortion, among them the inherent right to privacy, relying on the Fourteenth Amendment's Due Process Clause. The Court announced that a woman had a constitutional right to terminate her pregnancy, even though it was not an expressed right. What follows is an examination of Roe v. Wade and the aftermath of that fateful decision.

The famous case of Roe v. Wade was first brought to the
attention of the criminal justice system when a pregnant woman
decided to challenge a Texas statute forbidding abortion. Norma
McCorvey, who used the pseudonym Jane Roe, claimed that on one
summer evening in 1969, while walking home from work, she was
gang raped by three men and two women and left alongside the
road. Several weeks later, Norma was further distressed when
she found out the attack had resulted in a pregnancy. Not
wanting to bear a child conceived in such violence, she decided
that an abortion would be her best option.

Texas law, however, made it a crime to perform an abortion,
except where it was procured or attempted by medical advice
for the purpose of saving the mother's life. Enacted in 1854,
the statute was designed to protect women from a medical
procedure that resulted in destruction of the fetus and death
to nearly one-half of the pregnant women who underwent the
operation.²

The irony of this entire lawsuit is that Norma McCorvey
herself did not actually set out to challenge or change Texas
law. Sarah Weddington and Linda Coffee, two graduates of the
University of Texas Law School, were the lawyers who represented
Norma in the nearly four year journey to the Supreme Court.
Upon graduating from law school, one of their major legal
obstacles to tackle was the Texas statute that forbade abortion.

These two young, ambitious lawyers were involved in the
women's movement, and together, they theorized that the best
way to fight for a woman's right to obtain an abortion was to
find a woman affected by the law and challenge the legal blockade in court. The two women had all the arguments outlined and the lawsuit completely organized. All they lacked was a valid plaintiff.

When McCorvey became pregnant with her third child, the Roe infant, she tried to obtain an abortion, only to be informed by the obstetrician who delivered her latter two children, that she could not legally have such a procedure performed in Texas since her life was not in jeopardy. Upon contacting a lawyer about adoption procedures, she was informed of Weddington and Coffee's plans. After a brief meeting with the two women, McCorvey agreed to be the plaintiff that they so desperately needed.

Jane Roe argued that the Texas statute was a violation of her right to privacy. She contended that her right was rooted in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Based on that right to privacy, she had a legal interest in deciding whether or not to terminate her pregnancy.

Henry Wade, the Dallas District Attorney who fought the lawsuit against Jane Roe, argued that the state of Texas had an interest in protecting both the pregnant woman's health and human life from the moment of conception. The Texas legislature believed that abortion was a crime, which seemed to be a general consensus among many other states as well. Protecting the health and welfare of the afore-mentioned individuals included regulating doctors, medical facilities, and procedures. Roe
argued for an unconditional right to terminate a pregnancy; Wade, an unconditional right to protect human life.

Roe v. Wade was first heard in a federal court in Texas, and was then directly appealed to the Supreme Court. While waiting for the appeal to be heard, Henry Wade temporarily outlawed abortion, except those procedures allowed under law to protect a mother's health. Any doctor that performed an abortion would be arrested. However, it did not directly affect Norma McCorvey, because her pregnancy had already progressed beyond the time limit allowed to terminate a pregnancy.

On December 13, 1971, Sarah Weddington argued Jane Roe's case in front of the Supreme Court. However, two of the seats were empty, and the Justices opted to have the case reargued for them, which was considered to be a rather unusual practice. On October 11, 1972, after President Nixon filled the vacancies, all nine Justices heard the case in its entirety, and on January 22, 1973, the United States Supreme Court handed down its landmark decision that centered around the right to choose (Roe) and the right of an unborn fetus (Wade).

The majority opinion was written by Harry Blackmun with Justices Brennan, Burger, Douglass, Marshall, Powell, and Stewart concurring. The majority side concluded that the argument over the abortion issue was strictly a question of its constitutionality. Two basic questions needed to be addressed. The first was whether or not the Constitution was deficient on issues pertaining to women, and specifically abortion rights,
and the second was the belief that women had an inalienable constitutional right to procure an abortion.

The United States' Constitution has such broad interpretations that the definition of law depends on personal beliefs and feelings. The Court believed that the Texas statute was overly broad, because the law equated life at conception with life immediately before birth. Jane Roe challenged the Texas statute based on her constitutional rights expressed in several Amendments. The Fourth Amendment states that the "rights of the people to be secure in their person shall not be violated," and the Ninth Amendment stipulates that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Jane Roe argued that the Ninth Amendment's reservation of rights to people included the right to privacy that allowed a woman to make the abortion decision free from state interference.

The Court, however, relied almost exclusively on the Fourteenth Amendment to determine the right to privacy. They ruled that the Texas statute was violative of the Due Process Clause of the said Amendment, because it exempted from criminality only a life-saving procedure without regard to the stage of a woman's pregnancy. It also failed to recognize the importance of other interests involved. Without making a distinction between abortions performed early in pregnancy verses those performed much later, the statute could not survive the constitutional attack made upon it.
Although the majority side supported a woman's right to obtain an abortion, they also reasoned that it was not an absolute right. The state had a right to protect life, but only after a certain point. After that pre-determined point, the state had the right to forbid abortion altogether. The result was a trimester framework. In the first trimester, the woman has the right to make private medical decisions with her doctor without interference from the state. The two individuals have the freedom to determine whether or not to terminate the pregnancy. During the second trimester, the state's interest in protecting the health of the woman reaches a compelling point and the state can regulate abortion procedures in ways that are reasonably related to maternal health. The state had a reasonable interest in preserving and protecting the health of the mother, whether she be a resident or non-resident seeking medical consultation and treatment. They could reasonably regulate the qualifications of the doctors, licensure of the clinics, and licensure of the doctors performing the abortions. The state can ban abortions altogether, except for those necessary to save the life or health of the mother, during the final trimester.

The question posed to the Court was when the compelling point of the state's important and legitimate interest began. They were forced to address the difficult question of when life began. If the medical profession was unable to arrive at a consensus of when life began, then the Court could not speculate
either. Therefore, viability was said to be sometime after
the first trimester, as most medical personnel agreed that
viability began somewhere around 28 weeks.

Viability had a huge impact on the decision, because when
"viability and thus humanness was realized, then the fetus'
liberty preservation became more superior to a woman's right
to choose abortion."³ Thus, once the fetus achieved personhood,
the woman could no longer harm a fetus who had an equal interest
in liberty. When person is mentioned in the Constitution, it
refers to those already born. Therefore, the question of when
a fetus has life is disputed and unanswered. If the point of
viability was determined by the medical field, then it eliminated
moral and religious judgment, and allowed the Court to choose
a point where the woman's right to privacy ended and the fetus'
right to life began.

Justice Stewart, in a concurring opinion, wrote that three
key questions had to be addressed: did a woman have the right
to procure an abortion, was the termination of a pregnancy a
decision between a woman and her doctor, or the state, and when
does the unborn fetus acquire rights? Stewart believed that
the Justices had adequately addressed all three points, and
therefore, felt that the Roe decision was constitutionally sound.

The dissenting opinion was authored by Justice Rehnquist,
and Justice White joined him in his beliefs. Rehnquist based
his dissent on the basic theory that the Fourteenth Amendment
was not written to guarantee citizens inalienable rights.
Abortion laws in the United States date back to 1821, when Connecticut became the first state to initiate criminal penalties for procuring an abortion. When the Fourteenth Amendment was adopted in 1868, 36 states and territories already had statutes forbidding abortion. Most of these laws were very similar to the Texas statute challenged in Roe v. Wade. The Texas law, enacted in 1854, had already been in effect for over a decade when the Amendment was passed.

Perhaps the irony of the majority using the Fourteenth Amendment is the fact that no one questioned the legality of the Texas statute, or others, when the Fourteenth Amendment became part of the Constitution. Therefore, it is apparent that the drafters of the Amendment had no intention of withdrawing power from the states.

In rendering its decision, the Court had to find a right that was basically completely unknown to the drafters of the Constitution and the Fourteenth Amendment. The majority opinion never considered the fact that the power to legislate with respect to abortion must not be taken away from the individual states.

Rehnquist stated, "Liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law." The decision of the Court departed from the basic premise that the judicial branch should never "formulate a rule of constitutional law that is broader than is required by the precise facts to which it is to be applied." The Court simply
fashioned a new constitutional right based on the power they hold to interpret the Constitution and apply those beliefs to laws being challenged.

According to Rehnquist, the Texas statute was a "rational relation to a valid state objective," which is the standard measurement of whether a social or economical law is constitutional. Therefore, the dissenting Justices argued that although the Fourteenth Amendment did restrict the states from legislating laws that violated individuals' liberties, the Texas statute did not particularly violate the latter Amendment, because abortion was still allowed for those women whose life was in danger.

If the statute was able to pass the test employed by the Court for social laws, then the decision of its validity should be left to the legislative branch. The Texas legislature believed that the asserted right to terminate a pregnancy was not so rooted in the traditions and conscience of the people to be ranked as fundamental. If so many other states had similar laws in effect at the time of this legal challenging by Jane Roe, then perhaps that tells the Court that abortion is not as widely accepted as Roe would have us believe.

The dissenting side also found fault with the rationalization that the Texas statute was invalid for the first trimester, then at later periods in a woman's pregnancy, the state may enact the same laws that the Court found unconstitutional. Justices Rehnquist and White believed that
if the Texas statute truly was an abridgment of women's rights, then the entire law must be found unconstitutional for all periods of pregnancy. A law is either constitutional or unconstitutional as a whole.

Prior to the rendering of the Roe decision, there were an estimated 750,000 illegal abortions performed annually in the United States. The illegality of these procedures produced very unsanitary and unsafe conditions for women who sought such medical advice. In Roe v. Wade, Texas' major concern was to protect the pregnant woman by restraining her from submitting to a procedure that placed her life in serious jeopardy. When the actual statute was enacted, the abortion procedure was hazardous, because antiseptic techniques were not employed until the turn of the century. Many medical personnel considered the procedure unsafe until the introduction of antibiotics in the 1940's.

Technological advances challenged the Court to re-evaluate the abortion question. Laws banning such procedures became a major issue when medical technology made it safer for the mother to have and live through an abortion. Only when advances in the medical field made abortion a realistic alternative to carrying a pregnancy to term did the mother's right to reproductive autonomy and an unborn child's right to life become an issue of legality.

Roe v. Wade was a class-action law suit that represented the interests of many women, not just the principal parties.
listed in the actual court docket. It allowed a woman to challenge a criminal law without the risk of being prosecuted. Perhaps most importantly, it sought orders enjoining further enforcement of the law if the Texas statute was found to be unconstitutional.

The changing requirements of society and the vagueness of the Constitution forced the Court to take an earnest look at the abortion laws of this nation and determine the legality of such laws. The ideal situation would be to live in a society where minor and unmarried women do not engage in sex, and there are no unwanted pregnancies. Fifty-four percent of annual pregnancies are unwanted or unintended, and 47% of those will end in abortion.\(^8\) It is rather obvious that an ideal world did not exist in 1973, and it does not exist today.

Had the Court refused to hear \textit{Roe v. Wade}, fifty state legislatures would decide the fate of women and unborn children. With shifting political majorities, the right to change laws with each new influx of representatives could severely hinder the rights of either party. The blame or credit for state laws would rest with one or both houses of the legislature. Most notable would be the inconsistency in protecting either set of rights.

\textit{Roe v. Wade} was herald as being the solution to a difficult problem. It was believed to be the cure-all for the abortion dilemma. However, it only added fuel to the fire. The abortion controversy is far from being settled. Most would agree that
a solution is nearly impossible because of the emotional elements involved. The competing interests must be willing to compromise and put aside their absolute beliefs, whether they be concretely rational or absolutely unfounded. Negotiation and mediation are the keys to reaching this compromise. However, with a lack of consensus on the abortion issue, the abortion compromise seems somewhat unlikely.

The members of the pro-life movement firmly believe that an abortion performed for any reason is an ultimate immorality against nature. They want to see access to abortion completely forbidden. This can only be accomplished through either a direct reversal of Roe v. Wade or a congressional action designed to limit abortion procedures. They want life to be recognized from conception, when the fetus is still coined a zygote, or mass of cells. If the fetus were given personhood from this very early stage, then the Fourteenth Amendment would protect the rights of the fetus.

The pro-life movement realizes that overturning Roe is a complex task. Since the overruling is difficult to obtain, they have shifted their focus in recent years to reducing the access women have to abortion. They argue for parental and spousal consent, adoption promotion, waiting periods, and the prohibition of public moneys financing abortion procedures.

The basic argument of those supporting life is that in order for a woman to exercise her right of liberty, she must destroy a developing fetus and human life potentiality. They
cannot support a woman's right to abort a fetus when the fetus has inalienable rights, also.

The pro-choice movement pushes for unrestricted access to legal abortion. They support public financing of such procedures, and frequently lobby for health insurance companies to cover the cost of abortions. They stipulate that the right to terminate a pregnancy is a private matter and a private choice. It does not belong on the government agenda anymore than other medical procedures that people may view as unnecessary or unwise.

The majority of American people are somewhere in the middle of the continuum. To say that there is blanket support for either opinion would be wrong. The abortion debate carries a moral and legal paradox. For instance, many may believe that abortion is murder, but they still support a woman's right to decide what is best for her. The freedom to make our own decisions and the value placed on human life are two complex and indisputable values that most Americans cherish. That complexity is what makes the abortion decision so difficult.

Some reason that the abortion decision is not a political question, but rather a feeling about life, procreation, and survival of our species. It is a social and private phenomenon encompassing all aspects of human thought. The answer is not easy.

Political experts argue that if so many Americans truly are on middle ground, why can the government not create a policy
that is both pro-choice and anti-abortion? The experts offer two possible explanations. One is that the politicians do not want to be forced to make a decision and risk the backlash from their constituents, and the other is that the two absolute interests are too large to fight. The polarity of the interest groups allows the opinions on abortion to be heard loud and clear in the continuing debate.

One cannot state that the pro-choice movement is winning the war. *Roe v. Wade* was initially a victory for those who supported the woman's right to obtain an abortion, but recent cases presented to the Court have begun to erode the safety net that *Roe* supplied to women.

In the twenty-three years following the landmark decision, there have been twenty-one cases presented to the Court. What follows are the nine most significant cases challenging the original judgment of *Roe v. Wade*.

One of the first major Supreme Court cases that followed the rendering of the *Roe* decision was *Planned Parenthood of Central Missouri v. Danforth*. The case was decided on July 1, 1976. There were three areas of the law that all nine Justices concurred on, but on several other aspects of the same statute, the Court was split by a 5-4 vote. Those Justices on the majority side included Brennan, Stewart, Marshall, Blackmun, and Powell. Those dissenting included Burger, White, Rehnquist, and Stevens.

The case was first presented in a federal district court
when two physicians who actually performed abortions challenged the Missouri abortion laws. They contended that these statutes, enacted in 1974, were too restrictive in nature, and the restrictions imposed upon the medical field severely limited the quality of medical care that women were receiving.

The two plaintiffs proposed that four provisions of the law in particular violated the constitutional rights of both the doctors performing the abortions and the women receiving the services. These rights included the following: the right of a physician to practice medicine in the way he felt was proper to insure quality care; the right of female patients to decide whether or not to bear children; the right of a doctor and his patient to determine the best medical treatment for each individual case; and the right of females to decide whether or not to terminate a pregnancy.

The first right mentioned, that of a physician providing good, quality medical care, was said to be compromised by the Missouri law that stated a woman must certify in writing that she gave her consent for an abortion to be performed, and that she fully understood the procedure and its consequential risks, before any such procedure was procured. She also must attest that the decision was made freely and was not a result of coercion. The Supreme Court concurred on this decision. All Justices believed that the decision to abort was both important and stressful, and that making sure a woman was thinking
rationally and with full knowledge of the procedure was a legitimate stipulation of performing such a medical procedure. Another unanimous ruling in this area concerned the right of the state to maintain confidential health profiles of all women seeking abortions. The Court believed that if the records were kept confidential, then a woman's privacy was not being compromised. The records could serve as valuable resources for the medical field, and could perhaps make doctors more aware of the procedures and the subsequent dangers. The records could only be considered unconstitutional if they impeded the abortion procedure itself.

The decision of a woman to terminate her pregnancy was the third right said to be violated by the statute that necessitated the signature of the spouse for married women seeking an abortion. On this particular topic, the Court disagreed by a 5-4 majority. Justice Blackmun, who authored the majority opinion, claimed that although the Court was aware of the importance of the marital relationship and the realization that abortion can have profound effects on the future of such relationships, nothing in the Constitution grants the states the right to give the unilateral decision-making to the husband. If disagreement should occur between the husband and wife over whether or not to terminate the pregnancy, then the husband prevails in the decision. Since the woman is responsible for bearing the child, then she is immediately affected by her husband's refusal to sign consent forms.
Justice White, who was among those dissenting, believed that the interest of the husband could not simply be extinguished because the wife decided that she wants to terminate a pregnancy that was conceived in the bond of marriage. He reasoned that the mother's decision to terminate was no more valuable than a father's choice to allow a pregnancy to proceed. Justice White recognized this spousal right when he stated, "A father's interest in having a child may be unmatched by any other interest in his life."\(^9\)

The third right that the plaintiffs were concerned with was the outlawing of the saline amniocentesis method of aborting a fetus. The legislature found this particular method to be detrimental to the mother's health, and they forbade such a procedure to be used after the first twelve weeks of pregnancy. Saline amniocentesis is a technique where the amniotic fluid is withdrawn and replaced by a saline solution that kills the fetus and induces labor in the mother. The Court ruled in favor of the plaintiffs. They agreed that if this particular method of aborting a fetus was recognized as valid and safe within the medical community, then the Court could only go by what those trained professionals believed. They also legitimized the procedure by stating that other methods may not be readily available to women, and that by prohibiting a medically accepted method, while allowing more dangerous techniques to be used, the life of the mother could possibly be placed in jeopardy.

The fourth right that drew fire from the plaintiffs was
the requirement of minor children to obtain the permission of either one of their parents before a physician could procure an abortion. On this subject, as well, the Court was once again split down the middle. The majority side stipulated such a requirement violated Roe, because it gave a third party a veto in the abortion decision. They argued that constitutional rights do not mature over time, and that when a female turns eighteen, she does not suddenly possess the right to terminate a pregnancy. The restriction would obviously do nothing to strengthen the family unit. If there was disagreement between the parent and the minor child, then the controversy would only add fuel to the fire that began when the parent first found out about the minor's pregnancy. Justice Blackmun argued that "any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to become pregnant." The dissenting Justices supported the chronological requirement. They indicated that the states have traditionally tried to protect children from making immature decisions. It should be no different in this case. Justice Stevens wrote that a minor child may be unable to foresee future consequences. Laws in effect at the time forbade children from buying pornographic material and tobacco products, or viewing adult films. Yet, the Justices on the majority side claimed that the minor could obtain an abortion without parental consent. The dissenting Justices were boggled by that decision.
If one argues that having an abortion is truly an important decision, then that only intensifies the state's interest in seeing that the abortion is carefully monitored. Blackmun argued that no parent-child relationship was so corroded that the parent would further his or her own interest over the best interest of the minor child.

In 1977, the Court was petitioned to evaluate once again the constitutionality of state laws that seemed to compromise a woman's ability to obtain an abortion. The issue was whether or not a state could refuse to extend Medicaid coverage for non-therapeutic abortions. *Beal v. Doe* challenged the Pennsylvania law that allowed the state to refuse to pay for an abortion simply because an indigent woman on public assistance requested to have such a procedure performed.

On June 20, 1977, the Court released its opinion on the case. The Court, by a 6-3 majority, voted to uphold the Pennsylvania law. Those voting with the majority included Justices Burger, Stewart, White, Powell, Rehnquist, and Stevens. Justices Brennan, Marshall, and Blackmun cast the dissenting votes.

The majority claimed that nothing in the statute suggested that states were required to fund every medical procedure or treatment. The Court believed that if Pennsylvania funded all necessary or life-threatening procedures, then it was reasonable to assume they had the right to prohibit state moneys being funneled into unnecessary but desirable medical procedures.
The Medicaid restriction in no way violated a woman's right or ability to obtain an abortion. The statute simply exempted the state from funding such a procedure. The Constitution cannot possibly solve every social problem or question that arises. Title XIX, which allows for public assistance programs such as Medicaid, was passed in 1965. The Department of Health, Education, and Welfare, which is responsible for seeing that the law is implemented properly, stated that while Title XIX certainly allowed for state moneys to finance an abortion, it did not mandate that each state fund such a procedure. It was a choice to be made by each independent state. Since the initial funding of Title XIX was established through a congressional act, then the state reserves the right to choose which procedures they will or will not fund.

The Court ruled that since abortion was illegal in 1965 when the bill was passed, then their belief was that Congress really had no intention of making states offer abortions under Medicaid coverage. Therefore, the Pennsylvania law was constitutional as it stood.

Justice Brennan, one of the dissenting Justices, argued that pregnancy is a medical condition, and with the exception of the emotional and moral components, abortion and childbirth were simply two alternative methods of dealing with pregnancy. He expressed concern over the fact that there is a far greater expense incurred when a woman delivers a child and remains on public assistance than when an abortion is performed. Therefore,
the law prohibiting Medicaid from paying for an abortion just results in costing the taxpayers more in the end.

Justice Brennan argued that even though abortion was not legal when Title XIX was passed, nothing in the statute purports that payment only be made on procedures that were indeed legal in 1965. He also argued that if the state was truly concerned with the welfare of its people, then it should elect to fund abortions. Indigent women would have children simply because they could not afford to have an abortion. Justice Marshall reasoned that such a restriction encouraged women to carry their pregnancy to full term, which was nothing more than a moral imposition by the lawmakers. This particular regulation prevented women from obtaining safe and legal abortions, which was the backbone of Roe v. Wade. It basically left the women with two choices. One was to obtain a much less expensive illegal abortion, which could severely hinder her health. The other was to have the child and thwart her chances of ever escaping the vicious cycle of poverty.

The dissenters recognized that indigence was an important factor to consider in this case, and the Court must be responsible for enforcing the Constitution for the poor and powerless people of the country. Justice Blackmun insisted that individual legislators in respective states would not endorse abortion funding under the Medicaid program because of the controversy surrounding the topic itself. No politician would want to create a stir when it was safer and easier just
remain silent. Thus, the cancer of poverty would only continue to grow.

Another 1977 case was argued and simultaneously decided with Beal v. Doe because of the similarity in their disputed points. Poelker v. Doe questioned the constitutionality of state laws that allowed the exclusion of abortion services from publicly financed hospitals. The Justices predictably voted by a 6-3 majority, just as they did in Beal v. Doe.

The majority opinion voted to allow the law to stand, as they believed that the Constitution did not forbid a hospital from expressing a preference for natural childbirth over abortion. It related directly to Beal v. Doe because of the pressing question of indigence. Those six Justices argued that although they were aware of the poor women's plight, the state was well within its constitutional boundaries to limit the locations where an abortion could be performed. They reiterated that it was difficult not to feel some compassion for the indigent women, but the Constitution is not a cure-all for every social, economical, or moral problem.

The dissenting Justices argued that such a statute limited the number of doctors who could or would perform abortive procedures. Also, there were certain risks that could occur outside of a hospital setting that might endanger the life of the mother. The Justices also noted that many rural areas may only have a public hospital, and those women residing in such areas would be forced to travel to a clinic in another part
of the state. The dilemma of traveling presented an undue burden, as expenses could be rather costly. Once again, the indigent women would have no choice but to have the child, simply because they could not afford to travel.

To say that the law was constitutional violated two basic guidelines established by the Court in the Roe decision. The first of these was protecting the mother's health, obviously endangered by abortions not being performed in the safest settings possible, and the second was the undue burden test, where traveling presented a problem for all women seeking such a procedure. Based on the violations of these two key issues, the dissenting side could not uphold the statute.

In 1983, three corporations operating abortion clinics in Ohio and a doctor performing the abortions challenged the city of Akron and three public officials on provisions of a city ordinance. In this particular case, City of Akron v. Akron Center for Reproductive Health, Inc., the plaintiffs contended that several portions of the city ordinance violated the rights of women who attempted to obtain an abortion in their clinics. The case was argued before the Supreme Court on December 30, 1982, and the Court reached a 6-3 decision on June 15, 1983.

The first point to be decided was whether or not the city could demand that all second-trimester abortions be performed in a hospital. Justices Burger, Brennan, Marshall, Blackmun, Powell, and Stevens were those voting with the majority. They stipulated that although Roe established that a state's interest
becomes compelling at the end of the first trimester, it was not reasonable to assume that the state may impose any regulation it wished after the initial twelve weeks. The interest of the state must remain within the guideline of being of significant importance to preserving maternal health. If the laws enacted by particular cities or states were either too restrictive or too burdensome, then the Court had the right to establish them as invalid.

The Court believed that the Akron ordinance placed an undue burden on women, because of the extra expenses that could be incurred by being admitted to a hospital. They also contended that traveling could limit a woman's ability to have such a procedure performed. Justice Powell wrote that forcing a woman to visit a hospital for such a procedure was an unreasonable infringement upon her constitutional right to obtain an abortion.

The Court also reasoned that the safety of second-trimester abortions had increased dramatically. The method most commonly used was D and E, dilation and evacuation. It was considered among the medical community to be the safest method used for post-first-trimester abortions. It could be safely performed between twelve weeks and sixteen weeks on an outpatient basis. Both the APHA (American Public Health Association) and the ACOG (American College of Gynecologists) no longer suggested that second-trimester abortions be performed in a hospital setting. For this reason, the Court ruled that the majority consensus
of the medical field was the most reliable information they had available to them.

When the Court decided Roe in 1973, they agreed that hospitalization was indeed necessary for any post-first-trimester abortion performed. But, technology had advanced greatly, and in the 1980's, the general consensus among the medical community was that the procedure was safe enough to be performed in a clinical setting.

Justice Sandra Day O'Connor authored the dissenting opinion and was joined in her reasoning by Justices White and Rehnquist. They argued that one should perhaps ignore the trimester framework when establishing the point at which the state's interest becomes compelling. Instead, the Court should apply the "unduly burdensome" test to determine if a woman's ability to obtain a safe, legal abortion was being compromised. The Akron ordinance was rationally related to ensuring the health and welfare of its citizens, and that was the guideline established in Roe.

Regardless of advances in modern medical technology, it was crucial to remember that the procedure performed after the first trimester remained more hazardous, expensive, and emotional than those performed in the early stages of pregnancy. For these reasons, the city of Akron had a legitimate interest in requiring that all second-trimester abortions be performed in a hospital.

The second point of dispute in Akron v. Akron was the issue
of informed consent. The ordinance stated that the woman must be orally informed by her doctor of several key issues. These included: the status of her pregnancy, development of the fetus, date of viability, physical and emotional complications of abortions, a list of agencies to provide her with information about adoption, abortion, and natural childbirth, the particular method of abortion to be employed, and the consequential risks associated with such a procedure.

In Planned Parenthood of Central Missouri v. Danforth, the Court established that a law requiring the consent of a woman prior to abortion was constitutional. The clinic could give information about the procedure to be used and the subsequent consequences, but any more information than that severely compromised a woman's right to obtain an abortion free of state interference. The state did not have the right to decide what information a woman received. That was the primary responsibility of the physician performing the abortion. Supplying more information greatly influenced a woman's decision to either have an abortion or elect to carry the pregnancy to term.

The ordinance also contained three highly disputed points. The first of these required that the physician inform the patient of the potential human life that had been present since conception. This was inconsistent with Roe v. Wade, because the state could not adopt a theory of life related to providing abortions for women. The second issue in dispute was the doctor
describing the anatomy and physical characteristics of the fetus, which called for speculation on the part of the physician. And, the last issue was describing the abortion as a major surgical procedure, which entailed a doctor telling his patient about the particular horrors of such a procedure.

The majority opinion stated that a law could not mandate what a doctor must tell his patients. It is left to the physician to decide what the patient needs to know with relevance to her particular case.

The dissenters believed that the mandated counseling placed no limitations on obtaining an abortion. The city of Akron was simply trying to ensure that the procedure was performed after a woman had all of the relevant information presented to her by the attending physician. It had no effect on her right to privacy, and therefore, the Court could not establish that any fundamental, constitutional rights had been violated.

The Court was also asked to evaluate the mandatory 24-hour waiting period established as a safeguard for those women who were unsure of their decision. The majority argued that such a waiting period did not improve the safety of the procedure, and that making women wait for an abortion created an undue burden. The city could not ensure that the woman was receiving better counseling due to the waiting period, either.

Justice O'Connor wrote that since the waiting period did not apply to those cases deemed as medical emergencies, then there was no endangering of the mother's health. The additional
costs, if they even existed, were very minimal. The waiting period did not compromise a woman's ability to obtain an abortion. The state was simply protecting the health and welfare of the mother and the potential human life, which was a major point decided in Roe. Asking a woman to return the next day to obtain an abortion was a small price to pay compared to what could happen if the woman engaged in a procedure hastily or recklessly. Justice O'Connor stated, "The waiting period is not a great consequence to impose when one considers that the procedure involves the purposeful termination of potential life."11

The last issue debated by the Court was once again the issue of parental consent when a minor wished to obtain an abortion. The Court ruled that the ordinance was invalid because it placed all minors in the same category. It refused to take into consideration the fact that many minors were capable of making informed decisions. The option of proving their maturity must be available.

As in earlier cases, those dissenting argued that there was no reason to assume that a parent did not have a valid interest in their minor daughter's activities. If the minor opted to present her case before a court, then the judge would be asked to make a decision based on the minor's maturity. There was no reason to assume that a court would be consistent or fair. Therefore, the court system should refrain from making
such decisions, and leave that portion of the law to the legislature.

Argued and decided simultaneously with City of Akron v. Akron Center for Reproductive Health was the case of Simopoulos v. Virginia. This case immediately followed Akron on the court docket for November 30, 1982. The question was whether or not Virginia's mandatory hospitalization requirement for second-trimester abortions was constitutional.

Chris Simopoulos, a physician who performed abortions in a private clinic, was indicted for unlawfully performing an abortion during the second trimester outside of a licensed hospital. He administered a saline solution to a patient, and the woman was told to return home and await labor. When the contractions began, she was to return to either the clinic or the local hospital, where the fetus could be delivered. She opted to rent a motel room instead, and the police later found the fetus in a trashcan in the room's bathroom. After an extensive investigation, Simopoulos was charged with breaking the Virginia law that mandated second-trimester abortions be performed in a state licensed hospital.

Simopoulos argued that the prohibition of non-hospital second-trimester abortions imposed an unconstitutional burden on the right to privacy said to be possessed by his female patients. He also contended that a misunderstanding between him and his patient about her returning to his clinic was not a legitimate reason to file charges against him or his practice.
The state of Virginia believed that its hospitalization requirement differed significantly from that imposed in Akron, and that the statute reasonably promoted the state's interest. The law basically stated that second-trimester abortions must be performed in a hospital licensed by the State Department of Health. The definition of a hospital was broad enough to include outpatient clinics. The Department of Health's Rules and Regulations for the Licensure of Outpatient Hospitals defined outpatient hospitals as "institutions which primarily provide facilities for the performance of surgical procedures on an outpatient basis." The Virginia law allowed any clinic or hospital licensed by the state to perform second-trimester abortions. Under this law, an abortion clinic would certainly fit the description necessary to obtain a license.

Justices Burger, Brennan, Marshall, Blackmun, Powell, White, Rehnquist, and O'Connor reasoned that Simopoulos v. Virginia differed from Akron because it did not require a full-service hospital. Any clinic, including the one employing Simopoulos, could qualify for licensing and be a "hospital". Thus, the Akron decision did not apply here. Licensing allowed a state to oversee the abortion procedure, and one could legitimately argue that monitoring a clinic's procedures protected a mother's health. The state had a legitimate interest in regulating abortion and setting forth certain standards. Justice Powell wrote:

Virginia's regulations are compatible with accepted medical standards governing second-trimester abortions. Ambulatory care facilities providing abortions should meet the same standards of care as those recommended
for other surgical procedures performed in the physician's office and outpatient clinic or the freestanding and hospital-based ambulatory setting.\textsuperscript{13}

The Virginia law seemed to be consistent with modern accepted medical standards. The American Public Health Association recommended that post-first-trimester abortions be performed in a state-approved surgical facility, and therefore, the law was adequately protecting the maternal health of its residents. Although the law was somewhat restrictive, there was no reason to assume that it was unconstitutional.

Justice Stevens was the lone dissenter. He believed that the 1975 Amendment enacted to prohibit the performance of second-trimester abortions in facilities not licensed by the state suggested that the Virginia General Assembly did not want to make any more concessions than necessary to comply with the \textit{Roe} ruling in 1973. He contended that the state could limit the number of "clinics" that could perform these abortive procedures simply by refusing to license them. In 1977, the state of Virginia reported that of its 26 licenses issued by the State Department of Health, all of them were full-service hospitals with acute-care facilities.\textsuperscript{14} Stevens also argued that the Court should not interpret state law when assuming that a hospital equaled a clinic. The ruling of \textit{Akron} should apply, since the same principles were at play.

The year 1983 proved to be rather busy for the Court in terms of abortions cases argued before them. \textit{Planned Parenthood Association of Kansas City, Missouri v. Ashcroft}, \textit{Attorney
General of Missouri was similar to City of Akron v. Akron Center for Reproductive Health, Inc. and Simopoulos v. Virginia because it presented a question as to the validity of state statutes or local ordinances regulating the performance of abortions.

Planned Parenthood of Kansas City, two physicians who performed abortions, and an abortion clinic were the plaintiffs in this case. They challenged the Court to rule the Missouri law unconstitutional on three key points.

The first of these was that any abortion performed after twelve weeks must be performed in a hospital. Relying on their ruling in Akron, the Court once again invalidated the state statute because it "unreasonably infringed upon a woman's constitutional right to obtain an abortion."15

The second hotly debated issue was the requirement that a "representative sample of tissue removed at the time of the abortion be submitted to a board of eligible or certified pathologists."16 Missouri law stipulated that "all tissue surgically removed, with the exception of tonsils, adenoids, hernial sacs, and prepucses, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital."17 The law also required the pathologist to file a copy of the tissue report with the state health board and the abortion clinic that provided the services.

The majority ruled that the statute was legal because questions still remained as to the long-range complications of abortions and the effect on future pregnancies. The report
was relevant to medical experience and judgment, also. In *Danforth*, an earlier case, the Court ruled that certain recordkeeping requirements were legal as long as they did not impede the abortion. Based on that previous ruling, the Court stated that there was no insignificant burden placed on the woman by the state requiring a report.

The dissenters agreed that although the pathology report may be useful and necessary in some cases, it presented an undue burden to a woman for several reasons. The first of these was that the exam had to be performed by a "board eligible or certified pathologist," rather than the attending physician. Thus, the decision now involved more than the woman and her doctor. The minority argued that it was more reasonable to have the doctor examine the removed tissue and order a pathologist's report if he detected any abnormalities in the tissue. The ACOG (American College of Gynecologists) did not recommend an exam in every abortion case; therefore, the medical community was not supporting such a law.

The second obstacle was the additional cost of the abortion. Estimates place the pathology report somewhere around $40. To impose this additional cost on women seeking such a procedure would severely limit those who could afford an abortion. It could possibly outprice abortion for the indigent or the unemployed.

The last issue to be decided by the Court was the requirement that a second physician be in attendance during
a postviability abortion procedure, to insure that the fetus was given adequate attention. Missouri law forbade the use of abortion procedures fatal to the fetus unless alternative procedures posed a greater risk to the health of the mother. It required the physician to take all reasonable steps to insure that the health and life of the fetus were preserved. The second physician, by law, was responsible for "taking control of and providing immediate medical care for a child born as a result of an abortion."\textsuperscript{18}

The Court upheld the law stating that the first physician's primary concern would be the life and health of the mother. The state was not unreasonable in assuming that during an abortion, the attention and skills of the doctor would be focused on the woman. Viable fetuses would therefore be in immediate and grave danger because of the status of premature birth.

The second physician could assist in the procedure and then give immediate attention to the child. Although preserving the fetus may not always be possible, the state could provide a safeguard to those fetuses who did survive the abortion.

Those dissenting reasoned that the method most commonly used, D and E, left no possibility of the fetus surviving. Therefore, the act was superfluous. It imposed a burden on women in cases "where the burden was not justified by any possibility of the survival of the fetus."\textsuperscript{19} With the exception of emergency cases, the method would already be determined by the time the abortion took place. If the D and E was indeed
chosen, then there was no need for a second physician to be present.

Three years after the avalanche of the 1983 abortion cases, the Court was asked to make yet another abortion decision. By 1986, there was a new conservative ideology ushered in during the Reagan Administration. It was common knowledge that the Court was looking for a test case to try out the new ideology. Many felt that Thornburgh, Governor v. American College of Obstetricians and Gynecologists was the case that might just overturn the Roe decision.

The plaintiffs included a number of physicians, the American College of Obstetricians and Gynecologists, and clinics performing abortions. They challenged the collective Pennsylvania abortion laws known as the Abortion Control Act. What resulted was one of the "most angrily and hotly debated Supreme Court sessions in history."20

The first issue to be debated was the influencing of informed consent. The Abortion Control Act required that every woman seeking an abortion be given state-mandated information 24 hours before the procedure is performed. That information included: the physician's name, the warnings that emotional or physical trauma might occur, the risks associated with abortions, the age of the fetus, and the medical dangers of carrying the fetus to term. Information must also include the anatomical and physical descriptions of the fetus at two week increments from conception to birth.
The majority side ruled that this section of the law was unconstitutional. The state of Pennsylvania did not impose these requirements on other medical procedures. By singling out abortion procedures, it was obvious that the state's real intention was to deter women from having abortions. Informed consent was legal, but attempting to influence the woman's decision with literature was not. In brief, they argued that the statute was unconstitutional for two basic reasons. One, the information required was designed not to "inform the woman's consent but rather to withhold it all together."\textsuperscript{21} The second reason that the law was unfounded was because it failed to lend discretion to the physician as to what material his patient needed. This imposition on the doctor presented an "uncomfortable and undesired straight jacket."\textsuperscript{22}

Those dissenting argued that a physician would normally inform his patient of any hazards associated with a medical procedure before he attempted to perform the surgery. It was their belief that the physician would be protected from malpractice suits and the patient would be aware of the probable dangers. By requiring the distribution of such material, both the physician and the patient benefit. If the majority contended that abortion was treated differently than other surgical procedures, the dissenters agreed that was substantiated by the fact that abortion was irreversible and was one of the few procedures that was not performed to save a life.

In many previous cases, the Court ruled that recordkeeping
was constitutional because it furthered medical knowledge and protected the health of the mother by increasing the safety of the abortion procedure. However, the Pennsylvania law failed to protect the privacy of the woman, because the records were kept on public file, and anyone had access to copies of these records.

The Court ruled that the state had an ulterior motive. By making the records accessible to the general public, women would be more reluctant to have an abortion. The provision does not require that a woman's name be placed on the report, but the scope of other information reported would certainly reveal her identity. Even though the abortion procedure might be an unpopular choice, the woman still had the right to engage in such activity without public scrutiny. Justice Blackmun stated:

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision— with the guidance of her physician and within the limits specified in Roe— whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.22

In his dissenting argument, Justice White stated, "abortion is a matter of public interest and debate, and the collection and dissemination of demographic information concerning abortions is clearly a legitimate goal of public policy."23 Although the reports were fairly lengthy, there was no reason to assume that they imposed an undue burden on
women seeking abortions. Therefore, the reports were constitutional.

The third question to be answered was whether or not the law that required a second physician to be present at all postviability abortions was legal. First, it demanded that doctors exercise that degree of care "which such person would exercise in order to preserve the life and health of any unborn child intended to be born and not aborted." Second, it required that the abortion method chosen be one that would provide the best opportunity for the unborn child to survive, unless it presented a medical risk to the mother.

The Court ruled that the law was unconstitutional, because it required a trade-off between the life of the mother and the possibility of fetus survival. It also failed to make the maternal health the first and foremost consideration.

The Abortion Control Act required that a second physician be in attendance during postviability abortions, when it was likely that the fetus might survive. In Planned Parenthood v. Ashcroft, the Court ruled that such a law was constitutional. Now, three years later, the Court ruled the same statute in another state unconstitutional. They reasoned that the Pennsylvania law differed slightly, because it did not provide for an emergency situation in the event that the mother's pregnancy became life-threatening. For this reason, the law was not flexible enough to accommodate crisis situations.

Those dissenting found fault with the majority's opinion
that the Pennsylvania law's vagueness rendered the requirement of a second physician unconstitutional. Because of the faulty construction of the Pennsylvania law, there is the possibility of broad interpretation. However, the exemption of a defense for those abortions performed when the mother's life was in danger should be covered by the fact that the doctor did everything necessary to save the life and health of the mother. They contended that the Court's rejection of this law was another example of "linguistic nit-picking."^25

Those dissenting believed that Roe v. Wade had departed from the proper understanding of the Constitution, and within time, the Court would need to re-evaluate the issue and overrule the Roe decision. The next case presented a dilemma to the pro-choice movement. Webster v. Reproductive Services was believed to be the most serious threat to legalized abortions since the ruling of Roe v. Wade.

Dawn Johnsen, litigation director for the National Abortion Rights League commented, "The threat to safe and legal abortions has never been greater since Roe was decided than it is today."^26 Webster was a case in which the Court had been to asked to overrule Roe v. Wade, or at least uphold some very burdensome restrictions on a woman's access to abortions.

In June, 1986, the Governor of Missouri signed into law an act requiring that prior to performing an abortion on a woman believed to be twenty or more weeks pregnant, the doctor must determine if the fetus was viable by performing certain tests
to determine the gestational age, weight, and lung maturity of the fetus. The act also prohibited the use of public employees and facilities in performing or assisting in abortions not necessary to save the mother's life. It also prohibited the use of public funds for the purpose of "encouraging or counseling a woman to have an abortion."27

In July, 1986, five healthcare professionals and two corporations brought forth this class action to challenge the Missouri statute. They wanted the Court to address three key issues: the prohibition of the use of public facilities or employees to perform abortions, the prohibition of public funding for counseling, and the requirement that physicians conduct viability tests prior to performing abortions.

Previous rulings had resulted in the Court finding that fetal testing was unconstitutional because it encroached on a woman's right to privacy and a doctor's medical knowledge. However, in this 1989 decision, the Court found Missouri's statute to be reasonable in ensuring that abortions were not performed on viable fetuses. Many argued that viability could not possibly begin at twenty weeks, but the Court believed that there could be a possible four week discrepancy in gestational age, and by using twenty weeks as the point of testing, the risk of aborting a viable fetus was minimized.

The Court also seemed to reject the trimester framework established in Roe. Nowhere in the Constitution are trimester or viability mentioned. Therefore, the intricacy of abortion
laws has been complex. The Opinion of the Court, read by Chief Justice Rehnquist, stated:

At the center of our jurisprudence system is an important element known as stare decisis, which means that most litigations are decided based on knowledge acquired from a previous case that set some sort of legal precedent. But, stare decisis has a lesser impact on cases that involve constitutional questions, where, besides Congress, this Court is the only body able to make needed changes.

Justice Blackmun, in his dissent, argued that the fetal testing only increased the cost of the abortion and posed additional health risks to the mother. He stipulated that the mandated tests required physicians to undertake procedures such as amniocentesis, where the mother and the fetus could be harmed. Abandoning the Roe trimester framework was a mistake. In Planned Parenthood v. Danforth, the Court ruled that determining viability should be left to the doctor performing the abortion. If the Court chooses to not take a stand on the time of viability, then the Court should not establish the 20 week testing as valid.

The next areas of concern were the sections of the law that made it unlawful for a public employee to perform an abortion and unlawful for a public facility to be used for the purpose of performing an abortion. The majority held that even though the Fourteenth Amendment's Due Process Clause may entitle a woman to have an abortion, nothing forces the state to cover the cost of such a procedure.

The choice of the state to prefer natural childbirth over abortion in no way affects a woman's ability to have an abortion.
Indigence may make it difficult for a woman to have an abortion if there is no public money allotted for such a procedure, but the Constitution in no way creates a right for poor women to have the abortion financed through public funds.

Justice Blackmun, in his dissenting opinion, discussed how Missouri prohibiting the use of public facilities for the performance of abortions went far beyond just offering incentives for choosing natural childbirth. Missouri has used its economic power and control to discourage its citizens from exercising their Constitutional rights. By refusing to allow abortions to be performed in public facilities, Missouri has left pregnant women with fewer choices and in some cases, not much of a choice at all.

On June 29, 1992, the Court handed down its decision in Planned Parenthood of Southeastern Pennsylvania v. Casey. The largest issue presented to the Court was whether or not to overturn the ruling of Roe v. Wade. The Court did, however, reaffirm the essential holding of Roe: a woman had a right to abortion before viability without interference from the state, the state had a right to limit or prohibit abortion after viability if the law contained exceptions for saving the mother's life, and the state had a legitimate interest in protecting the maternal health of its residents.

At issue in this case was once again the Pennsylvania Abortion Control Act, as amended in 1988 and 1989. The Act required the following: that a woman seeking an abortion give
her informed consent prior to the abortion, for a minor to obtain an abortion, she must have parental consent, unless there has been a judicial bypass, a married woman must attest that her husband knows about the termination, and the facility performing the abortion must report certain information.

The majority side rejected the trimester framework established in Roe v. Wade. In order to promote the state's interest in potential life and the central rights recognized in Roe, the Court decided to apply the undue burden standard instead of the trimester standard.

The Court ruled that obtaining informed consent was legal, and as long as the information presented to the woman was truthful and not misleading, then the state could present such materials.

The Court also ruled on the issue of spousal consent. They agreed that the spousal notification requirement was likely to prevent a significant number of women from obtaining abortions. Because the Court cannot possibly predict the circumstances surrounding the cases of every woman seeking abortions, it was better to rule the section invalid.

The majority side upheld the requirement that a minor must obtain parental consent. They contended that the minor would benefit from consultation with their parents, who had the minor's best interest at heart.

The Court also upheld the reporting requirement. For every abortion performed, a report must be filed with the health
department stating: the physician, the facility, the woman's age, the number of previous pregnancies and abortions, gestational age of aborted fetus, type of procedure performed, date of abortion, medical complications, and marital status of woman. The requirement was reasonably related to maternal health. The information proved to be vital to the medical field. The reports presented no obstacle to obtaining an abortion. Therefore, the requirement was constitutional.

Justices Rehnquist, White, Scalia, and Thomas were in the minority opinion. They refused to abandon the Roe trimester framework. They reasoned that the undue burden standard was overly broad and each case would be subjected to interpretation by the Court. Under Roe, many of these requirements were unconstitutional, but under the undue burden standard, the laws were suddenly legal. The minority side did not agree with this new measurement of legality. They believed that the standards established in Roe should continue to govern abortion cases.

Many challenges have been made to the Roe v. Wade decision, but the basic structure remains firm. Much of this stability is attributed to the philosophical balance of the Court, which has remained relatively constant over the years. Today, however, we have begun to see a more fundamental, conservative shift in the Court's ideology. Such a shift could have a profound effect on future challenges of current abortion laws.

The Supreme Court has an immense impact on every aspect of life. It is their responsibility to translate social and
political issues into constitutional issues or questions. They alone have the power to change the law of this land while interpreting and applying the Constitution to all relevant cases.

In order to effectively rule on major decisions, the Justices must disassociate themselves from the issue at hand. They must apply objective standards in arriving at their decisions. However, it is difficult for anyone to totally ignore their feelings, beliefs, and thoughts on abortion. Harry Blackmun has said:

One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes towards life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.29

In order for the Court to rule on an issue, the case must first be brought to the attention of the judicial branch. Once the Court is petitioned to hear a case, the ruling stands until a future case arises that challenges the previous decision. It is rather obvious, then, that the Court does indeed have the final say in many constitutional matters. Justice Robert Jackson perhaps best summarized the purpose of the Court when he said, "We are not final because we are infallible, but we are infallible because we are final."30 Whether America agrees with the rationalization of the Court in abortion matters or not, the decisions still stand.

The inherent right to privacy is in the Constitution...isn't it? In 1973, and most recently in 1992, the Court ruled that there was indeed a right to privacy to secure for women a greater
measure of reproductive autonomy, including the right to terminate a pregnancy. This recognition of even our most personal and important rights was not inevitable.

The right to reproductive freedom is expressed nowhere in the Constitution's text, yet seven Justices envisioned the ban on abortion as a violation of the due process of law. This right to privacy is grounded on the notion that although family privacy, autonomy, reproductive freedom, and marital choice are never mentioned in the Constitution either, they are inherent rights possessed by American people.

The Ninth Amendment does not create rights. Rather, its interpretational value allows the courts to find rights that are not there. However, to say that unenumerated rights deserve attention only when a majority of people think those rights should be protected makes them insignificant. The Bill of Rights is not and shall not be construed as an exhaustive list of personal liberties. What it fails to expressly state must also be interpreted and applied to relevant cases. It invites the Justices to expand on the ideas of our forefathers.

The Constitution is a compromise of values. In order to assert some rights, others must be sacrificed. As a pregnancy progresses, a woman's reproductive freedom decreases and the unborn child's right to life increases. The resolution is difficult because the fetus and the woman both have claims to constitutional protection. One must remember that the law does not compel people to sacrifice their bodies to keep others alive,
not even their own offspring. A woman cannot be considered a "voluntary incubator".31

The immediate effect of Roe v. Wade was to outlaw all state laws that forbade abortion during the first trimester. By doing so, it opened itself up to a hotly debated issue that is sure to remain on the court agenda for some time.

In 1976, the Hyde Amendment was introduced in Congress. It was designed to prohibit Medicaid from funding abortions. Congress had the power to prohibit the use of federal funds to reimburse indigent women for elective abortions under the Medicaid program. However, the woman who chose natural childbirth would be financially covered under this Amendment. In 1980, the Congress amended this act to include emergency abortion funding for pregnancy resulting from rape or incest or where the mother's life was in danger. This Amendment was the direct result of several cases decided by the Court that upheld a state's right to refuse to fund abortions under Title XIX.

The recent push for a Freedom of Choice Act came about because of the Webster and Casey decisions. The two most recent cases allowed a greater state restriction of abortion and related services. The Supreme Court was only one vote away from overturning Roe. As long as a rational basis existed for the law, then the Court ruled that the restriction could be imposed. It indirectly placed Roe in danger.

The Freedom of Choice Act is a political maneuver, not
legislative. Although each introduction of the bill brings the Congress closer to passing it, the act is not a permanent piece of legislation yet. Perhaps that is because the threat of overruling Roe seems less likely with a democratic president.

The Freedom of Choice Act will not bring closure to the abortion issue. It will more than likely just fuel the fire that is already burning. It is designed to resolve the clash between the two polar opinions by balancing and blending together the key interests of both pro-life and pro-choice with constitutionally sound compromise.

Abortion rights continue to be determined more by political power than by constitutional principle. The Casey decision in 1992 reflected the effort by pro-life forces to elect officials who were profoundly anti-abortion who would appoint Justices who were opposed to abortion. However, all efforts were minimal when Bill Clinton became the 42nd President of the United States. With a pro-choice presidency and pro-choice Congressional majorities, the legislation has been mainly pro-choice well, and more than likely, will continue to be so.

The abortion debate has not reached a peaceful solution. There is no indication that Americans have found a common ground. Instead, the power seems to be shifting, decided by the make-up of Congress and the Court.

There is not much room for compromise in the abortion debate. The pro-life movement refuses to accept the fact that a woman's claim to reproductive freedom is a serious matter.
The pro-choice movement refuses to consider that abortion is indeed the deliberate taking of human life. Perhaps we can change the adversarial manner of the abortion debate if pro-lifers would accept some abortion rights and pro-choicers would accept some restrictions on abortion rights. Only when each side begins to listen to one another can the abortion conflict begin to be resolved. After all, as Stephen Stills said, "Nobody's right if everybody's wrong".
Notes


13. Harrison, p. 130.


15. Harrison, p. 110.


18. Drucker, p. 103.


22. Harrison, p. 146.
24. Harrison, p. 146.
25. Drucker, p. 139.
27. Drucker, p. 164.


