

## **Roe v. Wade: The Aftermath of one of the Most Controversial Supreme Court Decisions**

*by: Rachel Oehlke*

### Introduction

In 1973, a landmark Supreme Court decision was handed down that brought about a debate that has lasted nearly thirty years. The decision was *Roe v. Wade*. The impact is immeasurable. The controversy has sparked debate in presidential elections, churches, schools, and around the family dinner table. Subsequent Supreme Court decisions have added more fuel to the fire. They have upheld the central holding in *Roe*, but have given states nearly unlimited power to regulate abortions. The possibility of overturning *Roe* has grown even stronger with the presidency of George W. Bush. He is conservative on the issue of abortion, and has made it known that if given the chance he will promote individuals to the High Court that will fulfill his agenda.

### Jane Roe

Jane Roe's real name was Norma McCorvey. She had one child by the time she was sixteen years old, and had been married and divorced within a year. She claimed that she was raped by three men and became pregnant, and she did not want to have the child. Her pregnancy led to one of the most controversial decisions the Supreme Court has ever handed down.<sup>1</sup> She wanted an abortion, but it was illegal in Texas. She did find a doctor who was willing to do the procedure, but she could not afford the \$650 fee. When she challenged the statute she went under the pseudonym Jane Roe to protect her other child. Fifteen years after the decision was handed down, McCorvey admitted that she was not raped; rather, she simply got pregnant by accident and was embarrassed and scared. Many people were shocked by this revelation, but today's society treats unwed mothers differently than it did when she got pregnant in 1969.<sup>2</sup>

### The Case

Sarah Weddington argued on behalf of Jane Roe. Her central argument was that a fetus was not a person with rights under the United States Constitution. During oral arguments, the court asked if the fetus was found to be a constitutional person, would there be a case, and Weddington conceded that there would not. She felt that it was the duty of the Court to determine whether a fetus was a constitutional person. If it was not, then Jane Roe, by way of her right to privacy, could terminate the pregnancy.<sup>3</sup> The Court had already recognized a right of privacy in cases such as *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Stanley v. Georgia*.

Robert Flowers represented the state of Texas. His argument was that, upon conception, the fetus becomes a person with all rights granted under the Constitution, including the right to life guaranteed in the Fourteenth Amendment's Due Process Clause. Just as Weddington's case would have been non-existent had the Court ruled a fetus was a

person, Flowers's case would have been non-existent if the Court had ruled it was not a person. Flowers believed that it should be left to state legislatures to decide whether a fetus was a person. The states should be able to pass statutes that are based on medical testimony as to whether a fetus is a person.<sup>4</sup>

Oral arguments seemed to line up the same as the ultimate decision with Blackmun J., Stewart J., Douglas J., Powell J., Marshall J., and Brennan J. in the majority to overturn the Texas statute, and Burger C.J., Rehnquist J. and White J. dissenting. Burger later switched to the majority after conference. The Justices seemed to be looking for some proof, one way or another, that a fetus was a person. If it was not then the right of privacy could be used, but if it was that person is entitled to constitutional protection.

## The Decision

Justice Blackmun wrote the opinion of the Court. The opinion stated that a right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>5</sup> They did, however, recognize the state's power to regulate in some instances.

A state may properly assert important interests in safe guarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.<sup>6</sup>

The Court determined that, although not clearly defined in the Constitution, a person, as it is referred to in the Constitution, is one that has already been born. They left the determination of whether a fetus was a person to "medicine, philosophy, and theology"<sup>7</sup> to come to a consensus. They determined that the state does have an obligation to protect the pregnant woman, and at some point to protect the "potentiality of human life."<sup>8</sup>

Justice Blackmun set up a trimester framework to determine when there was a compelling state interest. The state could not regulate a woman's decision to have an abortion during her first trimester. During the second trimester, the state had a compelling interest in protecting the health of the mother, and they could pass regulations to secure the mother's health. During the third trimester, the state's interest became compelling because this was the time that the fetus became viable. Abortions could be regulated or prevented except when the mother's life was at risk.<sup>9</sup>

Justice Stewart and Justice Douglas concurred. Justice Stewart found privacy to be an implicit liberty protected by the Due Process Clause of the Fourteenth Amendment. He found the objectives of the state, to protect the mother and the potential human life, to be valid, but thought that the Texas statute was overly broad and therefore unconstitutional. Justice Douglas uses the Ninth Amendment to justify his argument. He feels that there are several unenumerated rights that came under the Ninth Amendment and they include the "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."<sup>10</sup> These are fundamental rights and there must be a compelling state interest in regulating these rights. Justice White and Justice Rehnquist dissented. Justice Rehnquist joined part of Justice White's dissent. They found no Constitutional right to privacy, and they thought that the Court has overused its power of judicial review. Justice Rehnquist went on to say that he finds a compelling state interest in preventing a woman from having an abortion. He

believed that it was not the intent of the framers of the Fourteenth Amendment to allow women to have abortions by way of the Due Process Clause.<sup>11</sup>

The Due Process Clause and its implicit inclusion of a right to privacy has been used in several other cases. In a 1965 case, *Griswold v. Connecticut*, the Supreme Court found a Connecticut law that banned the use of contraceptives by anyone to be unconstitutional. The Court said that a married couple, in the privacy of their bedroom has the right to decide whether to procreate.<sup>12</sup> In a 1969 case, *Stanley v. Georgia*, the Supreme Court found that one's home and the viewing of pornographic materials in one's home are privacy issues that should not be subject to state regulations.<sup>13</sup> In 1972, the *Griswold* decision was expanded to include unmarried couples in *Eisenstadt v. Baird*.<sup>14</sup> These decisions provided stepping-stones for *Roe*. The right of privacy in one's home and the right of privacy concerning the use of contraceptives is just one step away from the right of privacy concerning procreation after conception.

### The Reaction of the People

The immediate reaction of the pro-life groups was to work to get the decision overturned and they expected that to happen rather quickly. They wanted to get a Human Life Amendment passed that would end abortion, but they realized that it would be nearly impossible to get the requisite two-thirds majority in Congress. Their central argument was that the fetus was indeed a person, and that has been proven through medical technology.<sup>15</sup> To them, abortion is murder. They believe *Roe v. Wade* to be the equivalent to *Dred Scott*. The decision did not end the debate for people it only made it more controversial. "Scores of 'right to life' groups, composed of passionately committed people, sprang up in what some of their leaders call the 'the greatest grass-roots political movement since abolition.'"<sup>16</sup> The large makeup of these pro-life groups come from Christian organizations. The official position of the Catholic Church and the vast majority of all Christian denominations is that abortion is morally unacceptable in all circumstances and should be made illegal.

Right to life groups made significant progress when the conservative Ronald Reagan took the presidency. He promised anti-abortion measures and vowed to get *Roe* overturned. In 1982, it became apparent that getting the pro-life agenda through the legislature would be more difficult than anyone had thought. Two factions grew with different ideas on how to get their agenda through. One favored a Constitutional amendment, which was sponsored by Senator Orrin Hatch that would allow states and the federal government to ban abortions. The other faction wanted a "Human Life Bill." Senator Jesse Helms sponsored this bill. It would have written into law that human life began at conception, thus making *Roe* void. The bill failed, and the amendment was never brought up because if a simple majority could not be garnered then two-thirds majority would never be gotten.<sup>17</sup> Pro-choice advocates "imply that life has meaning as long as it constitutes a conscious and rational existence."<sup>18</sup> A fetus is not a person according to *Roe*; therefore, it cannot make rational decisions. Many pro-choice advocates felt *Roe* actually impeded on their decision to end a pregnancy because it allowed the state to regulate under certain conditions and circumstances.<sup>19</sup> Just as the pro-life advocates sought help through the legislature, so did the pro-choice advocates. President Clinton tried to get the Freedom of Choice Act passed without success. This act would essentially have prevented any further

challenge to Roe.<sup>20</sup>

Now there are even more controversies in the already complicated abortion debate. A pill was developed in France called RU486 that would safely terminate a pregnancy without a surgical procedure. The drug would truly allow a woman's privacy to be protected.<sup>21</sup> They could take the pill in the privacy of their own home. It had not been implemented in the United States at the time this book was published because the company that developed the pill avoided political controversy, which it faced in America from the pro-life groups that were lobbying their Congressmen to outlaw the drug in this country.<sup>22</sup>

### Subsequent Decisions of the Court

In the first major decision on abortion the court made following Roe, it upheld its central holding. *Planned Parenthood of Pennsylvania v. Casey* in 1992 was a plurality decision with the opinion of the Court written by O'Connor J., Souter J., and Kennedy J. They overturned Roe's trimester framework, saying that the state did have a compelling interest pre-viability. The state can promote and protect the potential life provided it does not place an undue burden on the woman.<sup>23</sup> An undue burden is defined as "its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."<sup>24</sup>

Decisions following *Casey* defined more specifically what an undue burden is. In *Stenberg v. Carhart*, the Court ruled that a Nebraska law that outlawed partial birth abortions lacked an exception where medical judgement determined that it was in the best interest of the mother to terminate the pregnancy.<sup>25</sup> In *Planned Parenthood of Missouri v. Danforth*, the Court ruled that a state may require a woman to give written consent to have an abortion performed. It must be a voluntary decision and she must be informed of the risks and benefits of the procedure.<sup>26</sup> In *Webster v. Reproductive Health Services*, the Court determined that the state may not determine the viability of a fetus, but the state may require that the physician do tests to determine if the fetus is viable.<sup>27</sup> In *Harris v. McCrae*, the Court determined that the government does not have to fund abortions even if they are medically necessary.<sup>28</sup> Although significantly narrowing Roe, the Court has not been successful in trying to overturn it despite a conservative majority on the bench at this time.

### The Abortion Fight Now

The question of whether these subsequent cases have been victories or defeats for the pro-life and the pro-choice movements can best be answered by statistics. From 1973 to 1983, an estimated thirteen million abortions were performed. In 1973, about 744,600 abortions were performed, and that number jumped to 1.55 million in 1980. One in four pregnancies ended in abortion.<sup>29</sup> By the 1990s, abortion rates declined dramatically. Young women were choosing to keep their babies, fewer doctors and hospitals were performing abortions, and those that did had to go through "an array of logistical and economic hurdles that state lawmakers are putting in their path."<sup>30</sup>

It seems despite the undue burden principle put forth in *Casey*, women simply do not want to hurdle the obstacles to get an abortion, and this deters them from doing so. The decline looks like a victory for the pro-life groups, but as one activist puts it, "the fundamental

right to abortion in the United States remains solid, but the climate is still hostile.”<sup>31</sup> The only true defeat for the pro-choice advocates would be a complete overturning of *Roe v. Wade*. Is that looming on the horizon?

### The Current Court

Will the Presidency of George W. Bush change the make-up of the Court in a way that will forever change the battle over abortion? Every president with the exception of Carter has selected at least one member to the Supreme Court. In his two terms, President Clinton selected two justices. More than likely, President Bush will select at least one, possible two in his first term in office. As it stands now, the court lines up with Chief Justice Rehnquist, Justice Scalia, and Justice Thomas being overwhelmingly pro-life. Justices Stevens, Souter, Ginsburg, and Breyer are pro-choice. Justices Kennedy and O’Conner are the swing votes. Neither one wants to fully overturn *Roe*. Justice Stevens is the oldest Justice and Chief Justice Rehnquist and Justice O’Conner have mentioned retirement. If Bush fills all these positions, that gives the pro-life side a five to four advantage. The possibility is there that within the next few years a conservative majority on the Court could overturn *Roe*. Will the thirty-year anniversary bring a case that will overturn it? If President Bush succeeds in his promise to get it overturned it will happen, the only question is when.

### Conclusions

Ronald Dworkin wrote a book entitled *Life’s Dominion* that put forth a thesis about the true abortion argument. His theory was that people are not really pro-life because they believe that a fetus has some rational right to live, rather they believe in the intrinsic value of the fetus, and feel that terminating a pregnancy will violate that intrinsic value. People who are pro-choice believe that, yes, the fetus does have intrinsic value, but that value does not outweigh the value of the mother, who must bear the child, raise the child, and possibly suffer great hardships for making the decision to keep the child. It is not about killing a rational human being, it is about making the decision of who’s intrinsic value is more important, that of the fetus or that of the mother.<sup>32</sup>

This is a compelling argument that gives a new outlook to the abortion debate. Someone who is pro-choice is not trying to kill a baby; he or she is simply trying to preserve the intrinsic value of the mother. The same applies to the people who are pro-life. They are not radical, right wing, conservatives who are trying to impose their moral values on society as a whole. Dworkin’s theory is that everyone fits into one of these two categories. Elections are won or lost on the sole issue of abortion, in some instances. Women are competing against women to get their voices heard. They are not working with each other to resolve the main issue, and that issue is not the moral right or wrong involving abortion, the issue is whether an unborn fetus’ intrinsic value outweighs that of the mother.<sup>33</sup>

Some people view the whole debate as a privacy issue that the government should have no part in at all. This is probably true to some degree, but it is important to have safe medical facilities where the abortions can be performed and trained doctors to do them. It is possible with the development of RU486 for a woman to, in essence, have an abortion

in her bathroom, without the invasion of privacy that going to a hospital, meeting with a doctor and a counselor causes. Others argue that if a woman believes that what she is doing is okay then there should be no need for privacy when she is getting the abortion. This argument is valid to a degree, but someone could need bypass surgery done, and would like it done privately. This need for privacy does not imply shame for the need for the surgery, it simply implies that the individual prefers to have his or her medical treatments kept private.

Whether it is a privacy issue to pro-create has been debated long before Roe. Birth control was a highly debated issue in the early 1900s. An activist named Margaret Sanger stepped up to help the women in her city have access to contraceptives. She set up a clinic to distribute them and counsel women who just could not handle the burden of another child. Her clinic, although illegal and controversial, provided poor women with access to contraceptives. They avoided the hardships of enduring another pregnancy, hardships that were physical, emotional, and monetary. They also avoided the need to go through the dangerous abortion procedure. Many of the women who would beg for her help prior to the opening of her clinic felt that the wealthy were able to get methods of contraception while the poor were brought down even further by not being able to control their own bodies. Young mothers would beg for any alternative to becoming pregnant, and no one was able to aid them legally.<sup>34</sup>

Margaret Sanger made a great contribution to the women's movement because she allowed women to have a say in what their bodies would go through. This movement was just one more step on the path for legalized abortions. For the federal government or a state to tell a woman that she does not have the power to control her own body and determine whether she wants to get pregnant is absurd, as was determined in *Griswold v Connecticut* and *Eisenstadt v Baird*. These cases allowed women, both married and unmarried, to use contraceptives in order to prevent an unwanted pregnancy.<sup>35</sup>

The abortion issue may never end, even with the impending overturning of Roe. If it is overturned, the issue will still come up with pro-choice groups angry at the decision and pro-life groups defending it. If there is an end to the debate, it is nowhere in sight. Abortions have been performed long before they were ever made legal, and they will be performed long after they are made illegal. Women have always had to make the difficult decision of whether to terminate a pregnancy, and legal or not, that decision is not any easier. In the interest of safety for women, having a legal abortion is better as opposed to getting a "package deal to New York. For one flat fee, women remember, they could buy air fare, an appointment for a 'procedure', and a ticket to a Broadway show."<sup>36</sup> Society has moved past this since Roe, but the possibility looms in the future to return to these kinds of backroom medical practices.

## Notes

1 Bill Peterson, Fred Barbash, and Christine Russell, "After Roe v. Wade: 10 Years' Conflict Over Abortion," *Washington Post*, 23 January 1983, sec. A1.

2 Jesse Choper., et al, *The American Constitution: Cases-Comments-Questions*, vol. 9 of *American Casebook Series* (Minnesota: West Group, 2001), 462.

3 *Ibid.*, 461.

4 *Ibid.*

5 Roe v. Wade, 410 U.S. 113, 93 S.Ct. (1973) As found in Choper, 464.  
6 Ibid.  
7 Ibid.  
8 Ibid., 465.  
9 Gary Goodpaster, Constitutional Law, vol. 4 of Casenote Legal Education Series (California Casenote Publishing Co., Inc., 2000), sec. 7 p. 8.  
10 As found in Choper, 467.  
11 Ibid., 468-9.  
12 Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. (1965) As found in Choper, 450.  
13 Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. (1969) As found in Choper, 458.  
14 Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. (1972) As found in Choper, 458.  
15 J.C. Willke, (1997 July), 25 Years of Loving Them Both (On-Line), Available World Wide Web: URL: [http://www.abortionfacts.com/dr\\_willke/connetor\\_july\\_97.asp#1](http://www.abortionfacts.com/dr_willke/connetor_july_97.asp#1).  
16 Peterson.  
17 Ibid.  
18 James Davidson Hunter, Before the Shooting Begins: Searching for Democracy in America's Culture War, (New York: The Free Press, 1994), 16.  
19 Ibid., 17.  
20 Peterson.  
21 Lawrence Lader, RU486: The Pill That Could End the Abortion Wars and Why American Women Don't Have It, (Massachusetts: Addison-Wesley Publishing Company, Inc. 1991), 65.  
22 Ibid., 78.  
23 Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833, 112 S.Ct. (1992) As found in Goodpaster, sec. 7 p. 9.  
24 Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833, 112 S.Ct. (1992) As found in Choper, 487-8.  
25 Stenberg v. Carhart, 530 U.S. 914, 120 S.Ct. (2000)As found in Goodpaster, sec 7. p. 10.  
26 Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. (1976)As found in Goodpaster, sec. 7. p. 10.  
27 Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. (1989) As found in Goodpaster, sec 7. p. 13.  
28 Harris v. McCrae 448 U.S. 297, 100 S.Ct. (1980) As found in Goodpaster, sec 7. p. 13.  
29 Peterson.  
30 Amy Goldstein, "Legal Procedure, Hostile Climate; 25 Years After Roe v. Wade, Obstacles to Abortion are Increasing," Washington Post, 22 January 1998, sec A.  
31 Ibid.  
32 Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom, (New York: Vintage Books, 1993).  
33 Ibid.  
34 Margaret Sanger, "My Fight For Birth Control," in America First Hand: Readings From Reconstruction to the Present, ed. Robert D. Marcus and David Bruner (Boston: Bedford/St. Martin, 2001), 194-200.

35 Ibid.

36 Goldstein.