

IS THERE "LIFE" (OR "CHOICE") AFTER ROE?

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"Eventually, *Roe v. Wade* will fall," predicts Senator John P. East. One need not side with the Senator from North Carolina's view of things in order to sense that *Roe* may be in trouble.¹ Everywhere you turn, the air is thick with talk of abortion. This Term, the Justice Department asked the Supreme Court to overrule the landmark precedent. Likewise, eighty-two members of Congress have filed a separate brief urging the Justices to move away from the holding. On the other side, Harvard Law Professor Laurence Tribe, speaking on behalf of eighty-one other members of Congress, has filed counter papers intended to buttress the abortion right. And a noteworthy brief has been filed on behalf of the National Abortion Rights Action League, asking the Court to sensitize itself to "the realities of abortion in women's lives."²

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1. Virtually every conservative cannon is trained on the *Roe* landmark. One Reagan appointment to the Supreme Court could dramatically change current abortion policies. Already, there are three nearly certain votes to overrule *Roe*: Justices White, Rehnquist, and O'Connor. Chief Justice Burger is a likely ally even though he cast a vote for the original opinion. See B. WOODWARD & S. ARMSTRONG, *THE BRETHERN* 165-89, 229-40 (1979). Since then, his voting record has been, with a few curious exceptions, hostile to *Roe*. Recently, former Solicitor General Rex Lee told an audience of lawyers that in his opinion the Chief Justice could certainly change his *Roe* vote given the right opportunity. Rex Lee, Remarks at U.S. Law Week's Constitutional Law Conference (Sept. 14, 1985). If Justice Powell were to retire before the November 1986 elections, *Roe's* future might well be in serious jeopardy. If, however, the Democrats were to regain control of the Senate in 1986, then *perhaps* a newly composed Committee on the Judiciary would reject even a qualified Reagan appointee. For an insightful and provocative introduction to this imagined state of affairs, see L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985).

2. The authors of this brief, Ms. Lynn M. Paltrow and Ms. Lynn I. Miller, have prepared in an artful way a document that weaves law and human experience together. That is, "[i]n addition to presenting social science and medical data *Amici* present excerpts from some of the thousands of letters received in response to the national campaign 'Abortion Rights: Silent No More.'" Amicus Brief on Behalf of National Abortion Rights League at 5, *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 45 (1985). The authors add: "while these letters do not constitute sworn testimony or record evidence, they do provide an invaluable source of information about the lives of women who chose to have an abortion." *Id.* at 8. Quite apart from the quality of the brief, I wonder about the propriety and prudence of the tack taken. First, note that the Paltrow-Miller brief, unlike the Brandeis

I do not wish to enter the thicket of the debate over whether *Roe* should be overruled. That is a topic for another occasion.³ Rather, my purpose in this paper is to ask: what would happen if *Roe v. Wade* were overturned? By defining the issue solely in terms of whether *Roe* was correctly decided, both sides have neglected an all-important political question: what would happen in a post-*Roe* world if the Constitution did not shield women seeking abortions? Should the abortion controversy ever move from the judicial to the legislative chambers, the probable scenarios could bring unexpected victories and losses for both sides. I want to move away from the impassioned rhetoric that has so long impeded reasoned debate on the topic. My aim is to urge partisans to consider the implications of their positions. In order to do this I shall start with *Roe's* demise (for better or worse) as a given and proceed from there to several possible state and federal legislative, judicial, and political scenarios. What follows is no more than a sketch, but one that may prompt partisans to pause, if only to reflect upon the prudence of their respective positions.

THE STATE LEGISLATIVE SCENARIO

In their rush to overrule *Roe*, its critics seem oblivious to the obvious: once the abortion right is stripped of its federal constitutional cloak, "pro-choice" defenders will apply pressure on legislators with all the fervor of a martyr's cause. Just as *Roe* was the catalyst of a "pro-life" movement,⁴ so too could its demise carry the "pro-choice" movement to the zenith of its political power.⁵

If *Roe* should topple, there would be an immediate flurry of lobbying in the statehouses of this land. Most likely, neither side would be pleased by the predictable outcome: a patchwork quilt of

brief, comes to the court in an amicus capacity. Second, the evidence introduced is admittedly outside of the record and was presented for the first time when the case reached the Supreme Court. Third, one reason, though not necessarily the paramount one, for presenting this new evidence is to influence the Court in a way that the law cannot. Fourth, this entire enterprise is directed to an issue not properly before the Court. If this practice, however well executed, is to be encouraged, why shouldn't "pro-life" advocates have an equal opportunity to "sensitize" the Court by introducing their own testimonial letters accompanied by stills from the movie "The Silent Scream"? Moreover, once permitted this practice could just as well be extended to other classes of cases. Is that a salutary course for the law to take?

3. Despite all of the controversy generated by the Justice Department's involvement in the 1985-86 abortion cases, it is highly unlikely that the Burger Court as presently constituted will retreat from the core right recognized in *Roe*.

4. See K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 137-57 (1984) ("What neither the Court nor anyone else anticipated was that the *Roe* decision would mobilize a new and much stronger opposition to abortion reform").

5. See Grossman, *Abortion and Economic Crisis* in *WHEN BIOLOGY BECAME DESTINY: WOMEN IN WEIMAR AND NAZI GERMANY* 68, 70, 74 (R. Bridenthal ed. 1984) (describing public turmoil following passage of anti-abortion laws).

laws that made "murder" or "choice" permissible in some jurisdictions but not in others. The result could be one similar to the laws that prevailed in the states on the eve of *Roe*.

In 1972 four states in one way or another allowed for certain types of abortion on request. Some fifteen others (including California, Kansas, and North Carolina) had laws that basically permitted abortion if a woman's physician determined that the continuance of pregnancy would gravely impair the physical or mental health of the mother or that the child might be born with a grave physical defect.⁶ Abortion was also allowed if the pregnancy was the result of rape (forcible or statutory) or incest. Thus, more than a third of the states permitted abortions that were objectionable to the "pro-life" advocates of the 1980's. (Bear in mind the significance of liberal residency requirements in states with liberal abortion policies. For example, during oral argument in *Roe*, counsel for the appellant stated: "[T]here have been something like 1,600 Texas women who have gone to New York City alone for abortions in the first nine months of 1971."⁷) The remainder of the states had laws that would strike post-*Roe* feminists as unacceptably restrictive.

THE FEDERAL LEGISLATIVE SCENARIO

Dissatisfied with uneven success in the states, opponents of abortion might turn to Congress. In the national legislative arena,

6. Even after *Roe*, would a state be prohibited from enacting and enforcing a criminal law that had enhanced penalties for any woman who took illegal drugs, such as cocaine, during pregnancy? Would the state have a constitutionally sufficient interest in preventing birth defects? See Chasnoff, *Cocaine Use in Pregnancy*, 11 *NEW ENG. J. MED.*, Sept. 12, 1985, at 313. A strong case could be made defending the constitutionality of such laws. If so, can the right vouchsafed in *Roe* be said to be absolute even during the first trimester? See generally Parness, *The Duty To Prevent Handicaps: Laws Promoting the Prevention of Handicaps to Newborns*, 5 *W. NEW ENG. L. REV.* 431 (1983).

7. If *Roe* were overruled and Texas reinstated its previous anti-abortion law, would it be possible for state lawmakers to enact a valid law penalizing or restricting the option of Texas residents to secure abortions in another state? What if Texas declared fetuses older than six weeks to be "persons" entitled to protection under the state constitution and state laws? (Assume as well that the Supreme Court never ruled on the personhood question.) Under such circumstances, could a state law then survive a federal constitutional challenge? Could the state in the interests of the fetus enjoin a pregnant woman from leaving Texas for the purpose of obtaining an abortion in another jurisdiction? Could it penalize a woman in some criminal or civil way upon her return?

I suspect that the lawful power of any state to act in such a manner is at best questionable. I raise the question primarily to demonstrate the lengths to which some lawmakers might possibly go in order to prevent their own citizens from obtaining abortions elsewhere once abortion is made illegal in one's home state. See generally Findlay, *Criminal Liability for Complicity in Abortions Committed Outside Ireland*, 15 *IRISH JURIST* 88 (1980); Comment, *The Right To Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, 1984 *B.Y.U. L. REV.* 371, 383 (proposal to extend criminal jurisdiction for abortions abroad and to enjoin women from leaving Ireland for abortions, measure failed).

neither side could easily win a satisfactory victory. Since 1973, Congress has been reluctant to do much more than pass a variety of abortion funding restrictions. These fiscal restraints on *Roe*, even when tied to righteous rhetoric, are poor indicators of congressional behavior concerning the substance of the right to an abortion. Since *Roe* was handed down, reports the Alan Guttmacher Institute, some 217 anti-abortion constitutional amendments have been proposed in the House and Senate as of the end of the 1984 legislative year. All went nowhere, even after President-elect Reagan's 1980 plea to Congress to "pass a constitutional amendment to protect the rights of all innocent human life." Similarly, nearly all statutory attempts to undermine *Roe*, other than fiscal ones, have met the fate that tabled the controversial "Human Life Statute."

What, then, would Congress be apt to do when pressed to enact abortion legislation? Attempting to compromise, legislators might outlaw abortion subject to some important exceptions. For example, one exception might leave the abortion decision to a woman and her doctor during the first trimester of pregnancy, with restrictions thereafter. Congress might also restrict abortions for minors. By casting the general law in anti-abortion terms (an appeal to principle) subject to exceptions (a concession to pragmatism), federal lawmakers might be in a better position to accommodate ideological differences.

Whatever path Congress might elect to travel, legal problems would persist. This is because it is questionable whether Congress has the constitutional authority to enact a national abortion statute. In this regard, at least three scenarios are worth considering.

First, Congress might rest its authority to enact federal abortion laws on the fourteenth amendment, claiming that it was protecting the lives and liberty of fetuses. The rub, of course, is that Congress would first have to define a fetus as a person within the meaning of the fourteenth amendment. In the first instance, that would be a political problem. Ultimately, the issue would be tested in the courts. Moreover, there would be the nagging "state action" problem. That is, if there were a national prohibition against any or certain abortions, how would any state be violating the fourteenth amendment in a situation where a woman went to a *private* physician for an abortion?

Alternatively, Congress could contend that its authority to create national abortion laws stems from its duty to protect what *it* deems to be the constitutional reproductive liberties of women. That, however, would be difficult to sell to a Court that had previ-

ously overruled *Roe*.⁸ A more cautious Congress, left with some leeway by a future Court, might decide to "entice" the states to accept national norms by threatening to withhold funds for one or another federally subsidized state program. Of course, Congress might resort to hinging its power on what Gerald Gunther has, in another context, labeled a "tenuously related commerce clause" theory. That is, building on the precedent of the 1964 Civil Rights Act, Congress could, to quote Gunther again, construct an "artificial commerce facade." Thus, legislators might pass a law that provides that no drugs or instruments sold or transported in interstate commerce may be used to perform abortions. A future Court, nevertheless, might not allow Congress the same measure of constitutional latitude previously extended in cases such as *Katzenbach v. McClung*.

STATE AND FEDERAL COURT SCENARIOS

Moving away from the state and federal legislatures, two other possible scenarios test the imagination. Failing, to whatever extent, at the local and national levels, a new generation of anti-abortionists could resort to what was once unthinkable: petitioning a court for relief. A "pro-choice" statute, they would argue, should be struck down on the ground that it violates constitutionally protected fetal rights. (That was the approach taken in 1974 by the Christian Democrats in West Germany.) Stranger still, imagine "pro-choice" backers arguing in favor of judicial deference to the legislative will. "Pro-choice" defenders might themselves turn again to the courts for help even after *Roe*'s demise. For example, they might ask a state court to strike down an anti-abortion statute on *state* constitutional grounds.⁹ If a state tribunal, such as the Montana¹⁰ or Louisiana¹¹ Supreme Court, were to set aside an anti-abortion law because it violated a woman's state constitutional privacy right, the

8. In saying this I am not unmindful of what the Court said in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). I am equally aware of the gloss the Court has painted on the precedent. See generally G. GUNTHER, *CONSTITUTIONAL LAW* 952-71 (11th ed. 1985). See also Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona*, 52 S. CAL. L. REV. 1, 6 n.21 (1978). *Morgan* and its progeny might thus be construed so as to permit Congress to find some type of abortion right in the Constitution that an anti-*Roe* court had previously ruled did not exist in the same document. Though possible, I do not find such a scenario likely.

9. Already, the decisions of the Massachusetts, New Jersey, and California high courts can be read to establish a state constitutional right to abortion which would survive *Roe*'s demise. See *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981).

10. See MONT. CONST. art. II, § 10 (right of privacy guarantee).

11. See LA. CONST. art. I, § 5 (right of privacy guarantee).

only remaining federal "pro-life" judicial option would be to urge the United States Supreme Court to hold that the federal Constitution somehow protects the life of a fetus, the laws of Congress and the states notwithstanding.

Perhaps in the end this anticipated swirl of state and federal action would place the abortion issue back in the laps of nine life-tenured federal Justices. If so, the Court would be forced to face the formidable question: Are fetuses persons in the legal sense that they are entitled to the basic safeguards provided by the supreme law of the land? If the Court were to answer that question in the affirmative, such a ruling would place the abortion question beyond lawmakers' reach. Only a constitutional amendment could then revive the right cherished by many feminists.

The current abortion debate is clouded to the point that it has produced a myopic view of what might happen if *Roe* were overruled. In the midst of it all, critics and defenders of *Roe* continue to await its possible downfall with anticipated elation or despair. All the while, one side has not anticipated the losses that might accompany "victory," while the other has not anticipated the victories that might accompany a "loss."¹²

12. This phrase is one that I have altered and adapted for my purposes. See L. STRAUSS, *LIBERALISM: ANCIENT AND MODERN* 223 (1968).

The current abortion controversy can be seen as an instructive lesson in constitutional law and politics. The debate can be understood in terms of what President Reagan has called the tension between the "sanctity of life ethic" and the "quality of life ethic." R. REAGAN, *ABORTION AND THE CONSCIENCE OF THE NATION* 34 (1984). In the course of the debate both sides invoke the Constitution in a way that leaves the impression that it "cannot be objectively deduced or passively discerned in a viewpoint-free way." L. TRIBE, *CONSTITUTIONAL CHOICES* 26 (1985) (addressing "fundamental constitutional norms" generally). That is, so the argument runs, "the Constitution cannot itself dictate, in a manner that frees its users of responsibility for choice, how it is to be approached." *Id.* If so, and if only for the sake of discussion, one can agree with Laurence Tribe and at the same time maintain that people of conscience, indeed reasonable people, might make constitutional choices different from the ones that he and Justice Blackmun would have the nation live by. See, e.g., Nakell, *The Right to Life*, 11 *HUMAN LIFE REV.*, Fall 1985, at 54 ("pro-life" position advanced by active ACLU member); Hentoff, *A Heretic in the ACLU*, 11 *HUMAN LIFE REV.*, Fall 1985, at 101 (well-known civil libertarian defending "pro-life" stance). In this regard, it is also well to remember that in 1975 the West German Constitutional Court ruled 6-2 that the protections of its supreme law extended as well to the unborn. Is all of this but another way of questioning the wisdom of casting the abortion debate in its present constitutional mold? See G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 95-96 (1985) (noting how *Roe* made constitutional outsiders of those who subscribe to the "pro-life" ethic). Perhaps the answer to this question has less to do with the Court making constitutional choices than with setting the groundwork for others to make certain choices.