The Evolution of the Right to Choose

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Women have been using abortion as a means to control their pregnancy and reproductive health for almost as long as pregnancy has existed-- the earliest written record of an abortion is more than 4,000 years old (Klabusich). In the United States of America, abortion is still a highly controversial topic and can be found at the center of many debates, even at the national level in the most recent presidential election. In fact, the United States is one of the few developed nations in which the question of abortion has not been answered-- meaning, the United States is one of few first-world countries, if not the only first-world country, that still debates abortion. This issue is one that divides Americans greatly, and thus it is important to understand the issue in its entirety: including where it stems from, what has happened to it throughout the course of history, and where it seems likely to go in the future.

In the United States, abortion was widely practiced up until about 1880, when most states passed legislation banning it except for to save the life of the mother (OBOS Abortion Contributors). Before this point, abortion was most frequently treated like other business of women, such as pregnancy were: left in the care of caregivers such as midwives. Over fifty years- from around the mid eighteen-twenties to the eighteen-eighties, abortion would transition from being a conversation between a woman and her doctor to being something that was criminalized in most states. This change made sense in its time period: while the reasons for the legislation varied from state to state, the anti-abortion movement was largely a backlash against change that was taking place in the form of the growing movements for women's suffrage and birth control. In this way, it can be argued that the anti-abortion movement emerged as an effort to control women; an adverse reaction to movements for women's empowerment in an effort to keep them confined into their more traditional roles as child-bearers and homemakers.

Restricting midwife-preformed abortion was also helpful to the male-dominated medical profession because it brought more business to them. Outlawing abortion was also helpful in reversing the declining birth rate among women from Northern-European backgrounds in the late 1800s, who were under-reproducing compared to immigrants. After these laws were passed, the ability of a woman to get an abortion depended largely on her class, be that distinction drawn from race, wealth, location, or other factors. As a result of these difficulties, women turned to abortions that were unsafe and could lead to complications such as infertility, chronic illness and pain, or even death. These dangers led to movements to promote safer abortions, which would eventually evolve into the "pro-choice" movement of today.

However, these movements would not truly pick up until the mid-to-late twentieth century, meaning that for close to 100 years abortion was outlawed except for when multiple physicians agreed it was necessary in order to preserve the life of the mother. Pro-choice movements were aided by the 1965 Griswold v Connecticut ruling, which through penumbras created by the first, third, fourth, and ninth amendments established a "right to privacy" between married couples that would in a later case be extended to the individual. The Warren Court ruled seven to two in favor of Griswold, a women who was employed by Planned Parenthood who gave information about contraceptives to a married couple, and struck down a Connecticut statute which criminalized any medical treatment or counseling of someone who was married if the purpose of that treatment or counseling was to prevent conception (381 U.S. 479). Griswold v Connecticut was a significant step towards liberalizing women's healthcare, and this ruling would be quoted in the process of establishing the "right to life" framework in which abortion should be a private conversation between a woman and her doctor-- not a public conversation

between a woman and the government. This shift makes sense in its time period: “reading between the lines” of the Constitution as was necessary to establish these penumbras, or “zones”, which means the Constitution was being liberally interpreted. At the time of this decision, the political culture of America was increasingly liberal: the nineteen sixties are remembered as being a time of immense liberal change, all the way through the seventies and into the eighties.

In 1967 Dr. Leon Belous was convicted for referring a woman named Cheryl to an illegal abortionist, after Cheryl had said she would otherwise go to Tijuana, where Belous had studied abortion clinics and knew their dangers. Belous referred Cheryl to a man who legally practiced medicine in Mexico, but was not licensed in California (71 Cal.2d 954). These actions lead one to believe that Belous was genuinely just acting in the best interest of his patient, who had indicated that she would be taking matters into her own hand. As one who had taken the Hippocratic oath, he must have felt that he had a duty to protect his patient-- even from herself. The case was taken to the California Supreme Court, where this was Belous’ defense-- he gave out the phone number of one he knew to be a competent doctor in order to protect his patient.

The statute Belous was convicted under had been largely unchanged since it was enacted in 1850-- meaning the statute was not amended to keep with the times and instead remained stagnant, falling out of touch with the increasingly changing society that existed in the nineteen sixties and seventies. Thus, the court took significant issue with the “necessary to preserve” clause of the statute, which was meant to allow for exceptions to the abortion ban in the cases where carrying the pregnancy to term would have resulted in the death of the mother. They stated that “dictionary definitions and judicial interpretation fail to provide a clear meaning for the words, ‘necessary’ or ‘preserve’” (71 Cal.2d 954), and in turn ruled the following:

Surely, the abortion statute (Pen. Code, § 274) does not mean by the words 'unless the same is necessary to preserve her life' that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise certain in order to justify him in affording present relief.

This language would become very important because it laid a path to legal abortion in the United States: the peril against a woman's life no longer had to be imminent to warrant an abortion. In addition, the right to privacy as established in Griswold v Connecticut (1965) was cited, stating that the "fundamental right of the woman to choose whether to bear children" followed from this newly established constitutional protection. (71 Cal.2d 954) This decision was important because in it, the California Supreme Court supported the right to choose. California is thought to be one of the most liberal states in the union, so it would follow that it would be them to make one of the first steps in opening up a legal pathway to universal abortion.

However, the struggle between pro-life and pro-choice was still prominent-- though the country was moving in an overall liberal direction, there was still conservative backlash. In 1970, an abortion activist and doctor Jane Hodgson was convicted in Minnesota for performing an abortion on a twenty-three year old woman. The judge in her case refused to submit the case to the state supreme court, so the ruling held. Later that year, Hawaii would follow by allowing abortions performed before twenty weeks thereby repealing its former criminal abortion laws, with New York doing the same shortly after (Chicago Tribune). In 1971, the 1873 Comstock Act, which prohibited the circulation of information regarding abortion, was repealed. While state laws that banned contraception remained, this was another significant step on the path to the

legalization of abortion. At this point in time, conditional abortion (abortion under certain circumstances) is allowed in fourteen states with four guaranteeing a women the choice of pregnancy termination. Later this year, the abortion debate would culminate in a case that was thought to put an end to the abortion debate, as so many countries had already done.

"Jane Roe", a privacy-protecting alias for Norma McCorvey, was an unmarried pregnant woman in Texas who wanted to terminate her pregnancy. Whereas Texas only allowed for abortion in order to save the life of the mother, Roe was forced to sue and then to appeal her case all the way to the Supreme Court. Because of technical errors, this case would be argued twice: once on December 13, 1971 and again on October 11, 1972. In January of 1973, the court would rule that a woman's right to an abortion *was* covered under the right to privacy, for which precedent was set in Griswold v Connecticut under the fourteenth amendment, and as a result would strike down Texas' abortion statute *in toto* for being in direct conflict with this right. The court ruled that during the first trimester, women had complete autonomy over their pregnancy. In the second trimester, the court allows some reasonable restrictions on abortion, while in the third trimester abortion could be outright banned. Essentially, the closer the pregnancy was to being carried to term and the more viable the fetus, the more the government's right to protect life begins to outweigh the individual's-- in this case, the mother's-- right to privacy (410 U.S. 113 (1973).

To this day, Roe v Wade is cited as one of the most important cases, if not the singular most important case, in American history as it relates to Abortion Law. This is because of the precedent it sets: for the first time in American history, abortion was a constitutionally protected right. While before the early 1800s abortion was not prohibited, this was derived from the fact

that most turned a blind eye to it, not that it had any actual legal protection. For the first time in American history, a woman's right to choose had legal standing. Roe v Wade was decided by the transitional Burger Court, which is so labeled because it was more conservative than its predecessor, the liberal Warren Court, but less conservative than its successor, the Rehnquist court. While the Burger court interpreted amendments more strictly than its liberal predecessor, it did not overturn any of the Warren court's liberal decision and clearly, in the case of Roe v Wade, made some liberal decisions of their own. Though some could argue that protecting individual rights *is* indeed a conservative viewpoint, the decision in Roe v Wade would, by most, be considered liberal because of the traditional divide of the pro-choice movement being leftist driven while the pro-life movement is considered a right wing view.

Roe v Wade would not ultimately end the abortion debate-- as is evidenced by the fact that a popular political platform is to run on the basis of the repeal of Roe v Wade. This controversy is not anything new, as the case was received with split reactions even in its time. In fact, Roe v Wade would have several legal suits following it to clarify some points it made, such as the idea that "some limitations" could be placed on second-trimester abortions. How far could these limitations go? This question is answered in several cases, including Webster v Reproductive Health Services and Planned Parenthood v Casey. Webster v Reproductive Health Services was in response to a series of Missouri legislation which placed restrictions on abortion based upon the premise that "life begins at conception" and as such, public facilities and personnel were not to be used in any abortions, except those that were necessary to save the life of the mother, that encouraging or providing counseling on abortions was prohibited, and that physicians had to perform viability tests upon anything above and including the twentieth week

of pregnancy (492 U.S. 490 (1989)). The Supreme Court reversed the lower courts' rulings by upholding the statutes for several reasons. To begin with, the preamble of the statutes posed no constitutional question. Secondly, the Due Process Clause does not require the states to take part in abortions and thus, prohibiting state personnel and facilities from dealing in abortion would not be unconstitutional. In fact, by this point in time the 1976 Hyde Amendment had already banned the use of federal dollars in subsidizing abortions that were unnecessary to save the life of the mother, an amendment which had been upheld in the Supreme Court case Harris v McRae (1980). Webster v Reproductive Health Services also upheld the counseling provisions, citing that there was no evident constitutional conflict, and the viability testing requirements, ruling that the state interest in protecting life could exist before the viability point (492 U.S. 490 (1989)). While these are clearly significant steps back for the pro-abortion movements, the court maintained that it was not revisiting the essential portions of the Roe v Wade decision.

In Planned Parenthood v Casey, a new standard, the undue burden standard, is applied as a way of "reconciling the State's interest with the woman's constitutionally protected liberty (505 U.S. 833 (1992)). Since the standard used is one of undue burden, it means the issue of abortion is being judged off of the idea of "rational basis", which is the lowest form of the three "strict scrutiny" standards and requires the government's infringement of a right to relate only rationally to a government interest. In addition, the burden of proof lies on the individual-- not the state-- making it even harder for an individual to win a suit that is judged at this level. Thus, the idea of abortion being judged using "undue burden" and "rational basis" effectively further downgrades the issue and lessens its protections.

A Pennsylvania statute imposed several restrictions on abortion, such as requiring women to undertake a twenty four hour waiting period, to prove informed consent, to show evidence of an attempt to notify the husband, and minors were required to get parental consent before the procedure. However, there was a prior decision, Bellotti v Baird (1981), which provided a legal loophole by ruling that minors could petition the court in order to get an abortion without parental consent. Planned Parenthood v Casey got particularly complicated within the court with the bench being severely divided: the court would ask itself whether or not each of these state interests and regulations placed an "undue burden" on the mother, or a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (505 U.S. 833 (1992)). The court would decide that the husband notification requirement would fail the undue burden test because of the danger for the mother it had in its potential to produce. The other requirements-- informed consent, a twenty four hour waiting period, and for minors to gain parental consent unless otherwise ruled by a court of law-- were all upheld by this decision.

This decision is very complex, but makes sense in its time-- as does the Webster decision. The Rehnquist court is remembered for its conservatism, so it is in accordance with this fact that it would be his court to downgrade the protections abortion had under the law without outright reversing the Roe v Wade decision. Because the contention between pro-life and pro-choice groups was and is still so strong, and because Rehnquist did not hold an ultra-conservative majority at this point in time, his court would have been unable to reverse the decision entirely-- instead, the conservative justices on Rehnquist's court just chipped away at rights and pushed the limits of the Roe ruling in favor of the anti-abortion movement.

In 2007, the court would maintain its conservative direction in Gonzales v Carhart by upholding a 2003 ban of "Partial Birth Abortion", for which the technical medical name was "D&X" or "dilation and extraction", and which was the common process by which late-term abortions were carried out. The court reasoned that the Act was neither unconstitutionally vague nor overbroad, and did not impose an undue burden on the decision to obtain an abortion. The court also reasserted its power on the medical profession by saying that "Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." (550 U.S. 124 (2007)), meaning that "medical uncertainty" is not a valid enough reason to refrain from omitting a health exception because it would give the medical profession an overabundance of power by making it too difficult to legislatively regulate medicine. It is important to remember that this case was extremely politically charged and was passed through a Republican congressional majority, to a Republican president, to the current Roberts court, which is generally thought to be even more conservative than its preceding Rehnquist court.

However, in 2016 the Roberts court, who had of course changed slightly over the nine years between the two cases and with the death of Antonin Scalia had only eight justices, struck down several restrictions that a Texas statute had placed on abortion, such as the requirement that abortion centers comply with standards for ambulatory surgical centers and that any physician who was to perform an abortion would have to have admitting privileges within a 30 mile radius of where the abortion was performed. The court applied the "substantial burden" test, and decided that these laws did not aid their medical benefits as strongly as they imposed upon a woman's constitutional right to have an abortion, meaning that they failed the undue burden

standard by resulting in significant obstacles between a woman and her choice to get an abortion. The Court's transition back to the left falls into accordance with its makeup. During the time of this ruling, Congress was gridlocked and refusing to appoint Merrick Garland, who was nominated by the Democratic President Obama in the wake of Justice Scalia's death.

While the court has not made any significant rulings on abortion since then, the abortion debate is still alive and well. In the 2016 election, it was one of the major dividing factors between not only Democratic nominee Hillary Clinton and Republican nominee Donald Trump but between the nation itself. While the court was seemingly reversing its former conservative tendencies in the Hellerstedt decision, with the transition from the Democratic Obama administration to the Republican Trump administration and the appointment of conservative Neil M. Gorsuch tipping the Court back to a conservative majority, it is safe to assume that should the Supreme Court find itself faced with any constitutional questions regarding abortion, they will be inclined to rule conservatively.

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