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Abortion: Justice O'Connor's Opinions

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Summary

In 1992, the U.S. Supreme Court, led by Justices O'Connor, Kennedy, and Souter, adopted a new standard for reviewing the constitutionality of restrictions on abortion. Under the new standard, a reviewing court would consider whether an abortion restriction has the effect of imposing an "undue burden" on a woman's right to obtain an abortion. This report will examine Justice O'Connor's notable opinions on abortion, and explore her role in the development of the undue burden standard.

In 1992, the U.S. Supreme Court, led by Justices O'Connor, Kennedy, and Souter, adopted a new standard for reviewing the constitutionality of restrictions on abortion. Under the new standard, a reviewing court would consider whether an abortion restriction has the effect of imposing an "undue burden" on a woman's right to obtain an abortion. Although the new standard was not formally adopted by the Court until 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice O'Connor's opinions on abortion prior to *Casey* had already expressed dissatisfaction with the trimester framework established in *Roe v. Wade*, and an interest in considering abortion restrictions based on whether they imposed an undue burden on the right to obtain an abortion. This report will examine Justice O'Connor's notable opinions on abortion, and explore her role in the development of the undue burden standard.

Justice O'Connor first addressed the legitimacy of abortion restrictions in *City of Akron v. Akron Center for Reproductive Health*, a case involving five provisions of an Akron, Ohio ordinance that regulated the performance of abortions.[1] The five provisions imposed various restrictions on abortion, including a parental consent requirement for unemancipated minors, and a requirement that all abortions performed after the first trimester be performed in a hospital. The Court determined by a 6-3 vote that the five provisions of the ordinance were unconstitutional. After reaffirming its decision in *Roe*, the Court indicated that the five provisions did not comply with that decision and the trimester framework articulated in that case.[2]

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[1] 462 U.S. 416 (1983).

[2] For a discussion of *Roe v. Wade* and the trimester framework, see CRS Issue Brief IB95095, (continued...)

Justice O'Connor wrote the dissenting opinion in *City of Akron*. In her dissent, Justice O'Connor maintained that the trimester framework established in *Roe* was unworkable. She explained that technological advances not only made abortions more safe, but also blurred the line between permissible and impermissible regulations of abortion:

> Just as improvements in medical technology inevitably will move forward the point at which the State may regulate for reasons of maternal health, different technological improvements will move backward the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother.[3]

Justice O'Connor maintained that the trimester framework, which used the end of the first trimester and viability as reference points for regulation, was inappropriate because of decreased medical risks and earlier fetal viability. As medical risks associated with various abortion procedures decreased, it would seem that restrictions on abortion to preserve maternal health would probably not be imposed at the end of the first trimester, but rather, at a later time in a woman's pregnancy, closer to childbirth. In addition, under the trimester framework, earlier fetal viability would mean that restrictions on abortion to protect potential life could be imposed early in a woman's pregnancy. Justice O'Connor concluded that "[t]he *Roe* framework, then, is clearly on a collision course with itself."[4]

Justice O'Connor also noted that adherence to *Roe*'s trimester framework was inconsistent with the Court's more recent abortion decisions. In *Maher v. Roe* and *Harris v. McRae*, the Court appeared to recognize that an undue burden standard should be used to review restrictions on abortion.[5] For example, in *McRae*, the Court stated: "The doctrine of *Roe v. Wade* . . . 'protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.'"[6] Justice O'Connor maintained that "this 'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved."[7]

Justice O'Connor reiterated her support for the undue burden standard in her concurring opinion in *Webster v. Reproductive Health Services*.[8] *Webster* involved four sections of a Missouri statute that imposed various restrictions on the performance of abortions, including a prohibition on the use of public facilities or employees to perform

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[2] (...continued)
Abortion: Legislative Response, by Karen J. Lewis and (name redacted).

[3] *City of Akron*, 462 U.S. at 456-57.

[4] *City of Akron*, 462 U.S. at 458.

[5] *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

[6] *McRae*, 448 U.S. at 314 (quoting *Maher*, 432 U.S. at 473-74).

[7] *City of Akron*, 462 U.S. at 453.

[8] 492 U.S. 490 (1989).

abortions, and a prohibition on public funding for abortion counseling. Justice O'Connor joined four other justices to uphold the four sections of the Missouri statute.

The five justices in the majority wrote three separate opinions that concurred in the judgment, but expressed differing views on *Roe* and the trimester framework. While Justice O'Connor discussed eliminating the trimester framework and applying the undue burden standard, Chief Justice Rehnquist and Justices White and Kennedy discussed another standard for reviewing restrictions on abortion.[9] They maintained that restrictions should be evaluated on the basis of whether they "permissibly further" the State's interest in protecting potential human life.[10] The fifth member of the majority, Justice Scalia, contemplated the overruling of *Roe* in its entirety.[11]

Despite the justices' three opinions, it was clear that the idea of using a different standard to evaluate restrictions on abortion was not held by Justice O'Connor alone. In fact, just three years after *Webster*, the Court adopted the undue burden standard in *Casey*.[12] *Casey* was decided by a vote of 5-4. In a joint opinion, Justices O'Connor, Kennedy, and Souter expressed a refusal to overrule *Roe*, and discussed why it was important to follow precedent: "The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."[13]

The Court stated clearly that it was reaffirming *Roe*'s essential holding, and identified the holding's three parts.[14] First, a woman has a right to choose to have an abortion prior to viability without undue interference from the State. Second, the State has a right to restrict abortions after viability so long as the regulation provides an exception for pregnancies which endanger a woman's life or health. Third, the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.

In affirming only the essential holding of *Roe*, the Court rejected the trimester framework articulated in that case. In its place, the Court adopted the undue burden standard for reviewing restrictions on abortion. The Court explained that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[15]

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[9] *Webster*, 492 U.S. at 499.

[10] *Webster*, 492 U.S. at 519-20.

[11] *Webster*, 492 U.S. at 532.

[12] 505 U.S. 833 (1992).

[13] *Id*. at 856. Justices O'Connor, Kennedy, and Souter were joined, in part, by Justices Stevens and Blackmun.

[14] *Casey*, 505 U.S. at 846.

[15] *Casey*, 505 U.S. at 878.

Applying the new standard to the Pennsylvania abortion restrictions at issue in the case, the Court determined that the provisions of the Pennsylvania Abortion Control Act imposing a mandatory waiting period, and requiring the patient's informed consent, the consent of one parent if the patient is a minor, and certain recordkeeping and reporting by facilities that provide abortion services did not impose an undue burden. However, a fifth provision requiring spousal notification did not survive the undue burden test. The Court reasoned that such a requirement placed a substantial obstacle in the path of a woman seeking an abortion because fear of spousal abuse could inhibit the abortion decision altogether.

In 2000, the undue burden standard was applied in *Stenberg v. Carhart*, a case involving the constitutionality of Nebraska's "partial-birth" abortion ban statute.[16] *Stenberg* was the Court's first substantive abortion case following *Casey*. In *Stenberg*, the Court determined by a 5-4 vote that the Nebraska statute was unconstitutional because it failed to include an exception to protect the health of the mother, and because the language defining the prohibited abortion procedure was too vague.[17] Although *Roe* indicated that an abortion regulation must include an exception where it is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," the Nebraska statute did not include such a health exception.[18] Nebraska claimed that a health exception was unnecessary because safe alternatives to the partial-birth abortion procedure remained available to women. While the Court conceded that the actual need for the partial-birth abortion procedure was uncertain, it recognized that the procedure could be safer in certain circumstances, and maintained that a ban on the procedure without a health exception created a significant health risk.[19]

In addition, the Court maintained that the language of the Nebraska statute could be interpreted to prohibit not just the dilation and extraction (D&X) abortion procedure, the procedure commonly associated with partial-birth abortion, but the dilation and evacuation (D&E) procedure that is the most common abortion procedure during the second trimester of pregnancy.[20] The Court believed that the statute was likely to prompt those who perform the D&E procedure to stop because of fear of prosecution and conviction. The result would be the imposition of an undue burden on a woman's ability to have an abortion.

Justice O'Connor wrote a concurring opinion in *Stenberg*. In her concurrence, she maintained that the Nebraska statute should be invalidated because of its failure to include a health exception, and because of the undue burden that would be imposed as a result of the statute's broad definition for the banned procedure. However, Justice O'Connor suggested that other state statutes that prohibited partial-birth abortions could possibly

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[16] 530 U.S. 914 (2000).

[17] For additional discussion of *Stenberg v. Carhart* and "partial-birth" abortion, see CRS Report RL30415, *Partial-Birth Abortion: Recent Developments in the Law*, by (name redacted).

[18] *Stenberg*, 530 U.S. at 930.

[19] *Stenberg*, 530 U.S. at 932.

[20] *See* Shimabukuro, *supra* note 17, for additional discussion of the dilation and extraction (D & X) and dilation and evacuation (D & E) procedures.

withstand a constitutional challenge.[21] Citing the partial-birth abortion statutes of Kansas, Utah, and Montana, Justice O'Connor contended that a statute that was narrowly tailored to prohibit only the D & X procedure could be upheld.[22] Justice O'Connor observed: "If Nebraska's statute limited its application to the D & X procedure and included an exception for the life and health of the mother, the question presented would be quite different from the one we faced today."[23]

Questions about the future of the undue burden standard seem likely following the announcement of Justice O'Connor's retirement. Chief Justice Rehnquist's dissent in *Casey*, joined by Justices Scalia and Thomas, criticized the undue burden standard and declared that it was "not built to last."[24] Chief Justice Rehnquist maintained that the standard was based on a judge's subjective determinations to a greater degree than the trimester framework.[25] In his dissent in *Stenberg*, Justice Scalia affirmed his belief that the standard was "'hopelessly unworkable in practice.'"[26] While it appears unlikely that the Court would return to a standard like the trimester framework, it is not entirely certain what a new standard would consider to determine whether a restriction on abortion is permissible.

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[21] *Stenberg*, 530 U.S. at 950.

[22] *Id.*

[23] *Id.* Supreme Court consideration of another case involving partial-birth abortion is expected. The federal Partial-Birth Abortion Ban Act has been challenged on grounds similar to those argued in *Stenberg*. For additional information about the cases challenging the Partial-Birth Abortion Ban Act, *see* Shimabukuro, *supra* note 17.

[24] *Casey*, 505 U.S. at 965.

[25] *Id.*

[26] *Stenberg*, 530 U.S. at 955 (quoting *Casey*, 505 U.S. at 986).