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The Scope of Abortion Rights Since Roe v. Wade and the Next Tier: The Right to Access

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Since the Supreme Court's 1973 decision in *Roe v. Wade*, abortion has occupied a lot of the Court's time and energy. Beyond the legalization of the procedure, the Court has had to wrestle with several related issues, as well. Ranging from parental consent laws to waiting periods, from state- and federal-funding denials to procedural regulations, the Court has ruled on many abortion-related issues, most of them more than three times. Although most of these issues were ruled on in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court's invocation of the "undue burden" test will probably cause the Court as many headaches as did *Roe*'s "trimester framework."

The ambiguity of *Roe*'s "trimester framework," a guideline designed to set limits on state infringement on the right to choose an abortion, caused much of the litigation since. Unlike a judicial "test", which is designed to gauge the constitutionality of statutes as they come before the Court, the legislative nature of the "trimester framework" seemingly was designed to limit, not promote, future litigation on the subject. The "trimester framework"'s ambiguity prevented this from occurring.

The "undue burden" test will do the same. It is a classic example of judicial doctrine aimed at defining a limit past which a statute may not advance. However, no limit is defined by the "undue burden" test, only the sorry explanation that a state may not impose an "undue burden" on the woman's right to abort. Such ambiguity can accomplish nothing but more litigation as states such as Missouri and Louisiana and Ohio (states always seemingly at the forefront of

anti-choice legislation) scramble to write legislation testing what the limits on "undue burdens" might be.

In the meantime, the Court has moved on to a new volatile issue, access to clinics where abortions are provided. The scene displayed in Wichita, Kansas in the summer of 1991, massive protests with little recourse but to jail those protesting to keep clinic doors open, and repeated across the nation, has led to enormous amounts of litigation in the federal court system as pro-choice groups attempt to scale back the threat to clinic access by these "rescues."

An in-depth probe of the Court's decision in *N.O.W. v. Scheidler* (114 S. Ct. 798; 1994), along with the future of RICO (the Racketeering Influenced and Corrupt Organizations provisions of the Organized Crime Control Act of 1970) claims in blockade cases, will be discussed. The future of RICO claims is apparently tenuous, because of both the proof required to make a racketeering claim against the activities of pro-life blockade groups, as well as the probable First Amendment speech and assembly rights implications.

The ambiguity of the "undue burden" test, along with the tenuous nature of RICO claims and their basis in abortion clinic blockade situations, has opened a new can of litigious worms for the Supreme Court in the arena of abortion law.

Part I-Abortion Law from *Griswold* to *Casey*

Chapter 1-The Foundation of the Rights to Privacy and Abortion

A. The Right to Privacy

Nowhere in the United States Constitution did the framers specifically grant a right to privacy to the citizens of the United States. In fact, not until the landmark 1965 Supreme Court decision in *Griswold v. Connecticut* (381 U.S. 479) was such a right "found" unambiguously to exist. In *Griswold*, the Court found that a Connecticut law that outlawed the use of contraceptives between married persons was violative of a "right to privacy" protected by the Fourteenth Amendment's Due Process Clause (which applies most of the original Bill of Rights to the states) and the Ninth Amendment, which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In other words, just because the Constitution does not explicitly grant a right to privacy, that does not mean that one does not exist.

The right to privacy was reaffirmed and broadened by the Court's holding in the 1972 case *Eisenstadt v. Baird.* (405 U.S. 438). Here, the Court ruled unconstitutional a Massachusetts statute outlawing contraceptive distribution to unmarried persons.

B. The Right to an Abortion

Following the Court's rulings in *Griswold* (1965) and *Eisenstadt* (1972), the Court, in *Roe v. Wade* and *Doe v. Bolton* (both 1973), struck down Texas and Georgia criminal abortion statutes, respectively. In *Roe*, the first of the companion cases, the Court found a:

> concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights... or among those rights reserved to the people by the Ninth Amendment (*Roe*, 410 U.S. 113).

The personal liberty in the Fourteenth Amendment, according to the Court, included the right to reproductive choice, to a point. In defending its statute, Texas argued that it had a "compelling state interest" in outlawing abortion. In order for a state or the federal government to disparage a liberty, it must demonstrate that an overriding state interest exists. The *Roe* Court examined three possible justifications for Texas's statute. The first was to deter illicit sex. The Court gave little weight to this argument and spent little space in the written decision deciding that no compelling state interest in deterring illicit sex warranted a ban on abortion.

The second was the risk involved in the abortion procedure. The Court noted that at the time most abortion statutes were enacted, the procedure was very hazardous. However, the advancement of medical technology, especially antiseptic techniques, has made abortion during the first trimester as safe a procedure as childbirth, if not safer. From the end of the first trimester through

viability of the fetus (the time when it is capable of surviving outside of the womb, roughly at the end of the second trimester when *Roe* was written), abortion appears to be as safe (or as dangerous) as childbirth. By the third trimester (post-viability), childbirth is statistically safer than abortion. This reasoning, though not in itself resulting in a compelling interest, played a crucial role in what became known as the "trimester framework" laid out in *Roe.*

The third possible justification for proscribing abortion considered by the Court was the State's interest in protecting the future life of an unborn fetus. The State argued that its interest in protecting "potential life" (a term used in Texas' statute) overrode the right to privacy as it applies to abortion. This concept, too, played a role in developing the trimester framework.

In what many consider the prime example of Court-made law, the *Roe* Court manufactured the trimester framework which was to gauge the constitutionality of future state statutes regarding abortion. The Court argued that during the first trimester of pregnancy, there was no compelling state interest overriding a woman's right to terminate her pregnancy. Therefore, a state may place no restrictions on a first trimester abortion, other than that it must be performed by a licensed physician (as would most other medical procedures).

During the second trimester, when the abortion procedure becomes riskier, the Court found that the state had a compelling interest in safeguarding the health of the woman undertaking an abortion. Hence, the state may pass regulations related to guaranteeing the health and life of the woman, but not the fetus.

These regulations, though not specifically outlined may include regulating where an abortion may or may not take place and the like.

At the point that the fetus becomes viable, the state's compelling interest in preserving fetal life takes precedence over the abortion right, except in cases of rape and where the life or health of the woman would be jeopardized by carrying the fetus to term. With these exceptions in place, a state may go so far as to ban all third trimester abortions not meeting one of those criteria. It is apparent that in manufacturing the trimester framework, the Court took into account both the risk associated with the abortion procedure as compared with childbirth, as well as the point at which the fetus becomes viable (viability, in the Court's language, including the capability of artificially-sustained life).

Many took umbrage at the Court's gall to reach such a broad decision. Beyond the fact that *Roe v. Wade* overturned statutes in almost every state, the fact that the Court seemed to stretch its powers to the limit fazed many. With the *Roe* decision, the Court seemingly rewrote the statutes passed by the legislatures of almost every state. However, the Court's action in *Roe* is not all that unique. The Court at times sees what it perceives as constitutional problems that simply will not go away unless acted upon. For example, another case in which the Court made a similar ruling was *County of Riverside v. McLaughlin* (500 U.S. 44; 1991). Decided in 1991, the Court changed a previously ambiguous decision concerning the warrantless incarceration of suspects. While pointing out that the Court did not like to set arbitrary time limits, the Court did just that, ruling that suspects arrested without a warrant could be held no

longer than forty-eight hours without a hearing on probable cause. In doing so, the Court reasoned that only by doing what it wished to avoid, set an arbitrary limit, could they ensure that jurisdictions would be forced to end their unconstitutional detentions without prolonged litigation. While it may not be quite correct to call the trimester framework "arbitrary," as there are obvious reasons for its set-up (viability and health reasons), the fact that it goes further than drawing a line makes it appear legislative in nature, rather than judicial.

While in *County of Riverside* the Court seemingly put an end to most of the litigation on the subject by making a ruling that was open to little interpretation, the Court failed to do so in *Roe*, thus opening a "can of worms" as far as abortion legislation and litigation was concerned. The Court, though seemingly hoping to reach the same end as in *Riverside*, an end to vastly time-consuming litigation, instead brought upon itself a heap of cases probing the boundaries of the "trimester framework." As a guideline to state legislatures to write abortion statutes that passed constitutional muster, the "trimester framework" failed miserably, and the Court began hearing case after case on state limits on the abortion choice.

The Court, in finding the right to privacy and the right to choose an abortion in the Constitution without a specific reference to them, should be required to clarify those rights as much as possible, lest they become "secondary" to the rights which are specifically written into the document. If the right to privacy is so vague, it is easily argued that such a right is the mere folly of the Court and does not actually exist. The Court should hold itself to stricter standards

when defining the unenumerated rights in the Constitution. Otherwise, those who disagree may be able to mount a strong argument against them, in the process weakening the public perception of the wisdom and justice supposedly inherent in our highest court.

Roe has had plenty of detractors, in some cases rightfully so. For all the intentions to settle the issue once and for all, *Roe* opened up a huge can of worms in abortion litigation. The Court has had to rule over and over on similar statutes with a certain distinction that separates it from the others. For instance, the Court has had to rule on single-parent notification laws, and then had to rule on a dual-parent notification law. In the end, all that is left of *Roe*, after *Planned Parenthood of Southeastern Pennsylvania v. Casey* (112 S. Ct. 2791; 1992), is that a woman retains the right to choose an abortion and the state cannot intrude on that choice. Beyond that, *Casey* is now the law of the land where most abortion statutes are concerned. Whereas the right to choose may seem very broad, indeed the state is only prohibited from taking that choice away. As long as a statute does not infringe on the right to choose to have an abortion, it now stands a better chance of passing constitutional muster. In essence, the state may now place any restriction on the right to choose which does not create an "undue burden." Of course, the Court has not told us what such a burden would constitute, save an all-out ban on abortions.

I will now examine, issue-by-issue, how the trimester framework of *Roe v. Wade* spawned a generation's worth of litigation, with little left to the original decision.

Chapter 2-The Abortion Choice Issues Since *Roe*

A. State- and Federal-Funding

The Supreme Court has heard a handful of cases concerning the denial of state and federal funding for abortions. In all cases, the Court has upheld bans on government-funded non-therapeutic abortions, just as they would likely uphold a ban on government-funding for non-therapeutic plastic surgery. Although the resultant mental health issues surrounding a patient in either case may be vastly different (a child vs. a large nose, for instance), the Court has never really paid much credence to issues of mental health in the abortion debate.

The first case the Court heard on abortion funding was *Beal v. Doe* (1977). *Beal* determined that states were not required to fund non-therapeutic abortions under Title XIX of the Social Security Act (Medicaid). States were given broad power to decide what would and would not be funded and "[n]othing in the language of Title XIX requires a participating State to fund every medical procedure falling within the delineated categories of medical care" (*Beal*, 432 U.S. 438; 1977). Furthermore, the Court ruled that although a problem may arise if necessary treatment was not funded, "it is not inconsistent with the Act's goals to refuse to fund unnecessary... medical services" (*Beal*, 432 U.S. 438; 1977).

The second case before the Supreme Court addressing the funding issue was *Maher v. Roe*, also decided in 1977. Connecticut declined to use state Medicaid funds for abortion while state funds

were used to finance childbirth. An action was brought challenging this policy as a violation of Equal Protection under the Fourteenth Amendment. The Court found Connecticut's policy to be constitutional. According to the Court's reasoning, "[a]n indigent woman desiring an abortion is not disadvantaged by Connecticut's decision to fund childbirth; she continues as before to be dependent on private abortion services" (*Maher*, 432 U.S. 464; 1977). Although this decision has been upheld, the reasoning here is very misleading. While it is true that an indigent woman is not disadvantaged by the decision to fund childbirth, she is disadvantaged by the decision **not** to fund elective abortions. The real reason behind this decision lies in the fact that the Court has not granted the indigent suspect classification. A grant of suspect classification causes certain groups to have a greater amount of weight on their side when they are seemingly maligned. Hence, it is much easier to prove discrimination against a group with suspect classification, as racial and religious minorities have attained. Women and the indigent have not been granted such classification. Accordingly, women and the poor are not seen by the Court, as racial or religious minorities are, as a class that deserves special legal protection. This circumstance, of course, makes the abortion dilemma all the tougher for the majority of women who seek abortions, the poor ones. Because neither women nor the poor have suspect classification, the Equal Protection challenge failed.

In *Harris v. McRae* (1980), the Court ruled on the constitutionality of the Hyde Amendment, which withholds Title XIX Medicaid funds from even those abortions deemed necessary. The

Court upheld the Hyde Amendment, adding that a state is not required to cover the costs of abortions not funded by federal Medicaid funds. Following the reasoning of *Maher*, the government need not remove obstacles to abortion not of its own creation "and indigency falls within [that] category" (*Harris*, 448 U.S. 297; 1980). In other words, because the government did not make one poor and pregnant, the government need not provide any aid to rectify the situation. The government would, however, provide aid to a poor woman with the flu or to a poor woman electing to give birth. In other words, this is a political policy decision not to fund abortions and has nothing to do with health-related issues. Legislatures argue that the majority of the people do not wish their tax dollars to fund abortions, however, the taxpayer has never had a choice as to what his or her dollars went to. If this were the real reason behind such legislation, there would be larger defense cuts and less money in pickle research and the relationship between cattle and methane production.

In 1989, the Court ruled in *Webster v. Reproductive Health Services* that a state may deny its facilities, funds, and employees to abortion services, except in an emergency where the woman's life is threatened. According to the Court, "[t]he Due Process Clauses generally confer no affirmative right to governmental aid" (*Webster*, 492 U.S. 490; 1989). This was seen as a logical extension of the *Maher* ruling.

Finally, in *Rust v. Sullivan* (1991), the Court upheld that "none of the federal funds appropriated under the [Public Health Service] Act's Title X for Family planning services 'shall be used in programs

where abortion is a method of family planning'" (*Rust*, 500 U.S. 173; 1991) as per a directive issued by then-Health and Human Services Secretary Louis Sullivan. Here again, the Court upheld a political policy that had nothing to do with health issues, but only with the fact that the Bush Administration was anti-choice. In a rare case, this section of the Act is upheld because the Act's wording concerning the power of the H.H.S. secretary is so ambiguous. The directive of H.H.S. Secretary Louis Sullivan banning the use of funds could be construed as permissible under the broad language in the construction of the Act. As the ban reached so far as to ban even counseling, the decision became known as the "gag rule." The "gag rule" was criticized by many as impinging free speech and endangering the doctor-patient relationship. Not only would a doctor at a federally-funded clinic be banned from answering his or her patients questions about abortion, the doctor would be required to give a prepared speech explaining the clinic's non-involvement in the issue of abortion (speaking reams about the Bush Administration's eagerness to turn away from anything "unsightly" and merely pretend it doesn't exist; "Abortion?, we don't talk about that here"). Sullivan's directive was overturned by an executive order signed by President Clinton early in his administration.

B. Parental Notification/Consent

Early parental consent laws were generally struck down as too harsh by a mid-1970's Court still somewhat liberal regarding the abortion issue. However, as states, increasingly lenient, began

writing their statutes with available judicial bypasses, the Court, increasingly conservative, began to find them acceptable.

The first case dealing with parental consent came from one of the three states that have contributed the most to the Court's abortion docket, Missouri (the other two being Pennsylvania and Ohio). The Court, in *Planned Parenthood of Central Missouri v. Danforth* (1976), struck down Missouri's parental consent law which required an unmarried woman under eighteen years of age to obtain written parental consent prior to obtaining a first trimester abortion. The Court had several problems with this statute. The Court ruled here for the first time that a state may not "impose a blanket parental consent requirement..." (*Danforth*, 428 U.S. 52; 1976). Additionally, the Court found offensive to *Roe v. Wade* the fact that the statute places new regulations on first trimester abortions, something prohibited by *Roe*'s trimester framework.

In *Bellotti v. Baird* (1979), the Court struck down a Massachusetts parental consent law. In this case, the Massachusetts statute required parental consent, yet provided for a judicial bypass (i.e. the Court may override the decision of the parent, or may grant consent in the parent's place). However, the minor was still subject to a third-party veto of her decision.

> [I]f the superior court finds that the minor is capable of making... an informed and reasonable decision... the court may refuse its consent on a finding that a parent's, or its own, contrary decision is a better one (*Bellotti* 443 U.S. 622; 1979).

Furthermore, the statute required an attempt at obtaining parental consent prior to invoking the bypass procedure. The Court found this to be a harsh measure in that it fails to take into account situations in which such action would not be in the minor's best interests.

In 1981, the Court upheld its first parental notification law, but this was based more upon the facts of the specific case rather than the constitutionality of the statute. In *H.L. v. Matheson*, the Court upheld a Utah law requiring a physician to notify, if possible, the parents of a minor before performing an abortion on that minor. The minor in this case, H.L., did not offer any evidence of maturity or emancipation, and the Court as such found no reason to strike down the statute on its face. Because of H.L.'s immaturity and dependence, the statute was held to be reasonable as it applied to her and the Court declined to rule as to whether that would be the case with a mature or emancipated minor, as is standard procedure. The Court will not offer rulings on facts not present in the case before it.

In 1983, the Court decided two parental consent cases. The first was *Akron v. Akron Center for Reproductive Health*, now referred to as "*Akron* I." This case concerned an Akron, Ohio city ordinance which required a minor under fifteen years of age seeking an abortion to receive either parental consent or a judicial bypass. The Court stuck down the ordinance following its reasoning in *Danforth* that the ordinance:

> mak[es] a blanket determination that all minors under the age of 15 are too immature to make an abortion decision or that an abortion never may be in the minor's best interests without parental approval (*Akron* I, 462 U.S. 416; 1983).

Furthermore, the Court did not find that the Ohio Juvenile Court operated in such a way as to promote the "opportunity for case-by-case evaluations of the maturity of pregnant minors" (*Akron* I, 462 U.S. 416; 1983). The Court apparently believed the O.J.C. to be run in a way so as to streamline the judicial process, thereby sacrificing the time needed to determine the maturity of the pregnant minors before it.

The second 1983 case was *Planned Parenthood of Kansas City, Mo. v. Ashcroft.* In *Ashcroft,* the statute challenged required that minors obtain parental consent or a judicial bypass. For the first time, the Court found the parental consent statute constitutional as it applied to a mature minor. The Court's reasoning, however, relies on the assumption, noted by the Court, that the state may not impose a parental veto on the decision to abort. This assumption being true, the provision of the statute stands as there is no longer a roadblock to a mature minor obtaining an abortion.

The first of two cases heard in 1990, *Hodgson v. Minnesota* (497 U.S. 417), concerned a Minnesota consent law that required notification of both parents. This was struck down for simply not furthering any state interest not satisfied by single-parent notification.

In 1990, the Court also decided *Akron* II, *Ohio v. Akron Center for Reproductive Health,* the last case heard by the Court on this issue. Challenged here was Ohio's House Bill 319 which requires:

> ...the physician provides timely notice to one of the minor's parents or a juvenile court issues an order authorizing the minor to consent. To obtain a judicial

> bypass of the notice requirement, the minor must present **clear and convincing** proof that she has sufficient maturity... or that one of her parents has engaged in a pattern of... abuse against her... or that notice is not in her best interests (emphasis added) (*Akron* II, 497 U.S. 502; 1990).

The statute was upheld as it satisfied the four criteria set forth in *Bellotti* (1979). First, the minor has the opportunity to prove maturity to make the decision regardless of the wishes of her parents. Second, the statute, unlike the one struck down in *Bellotti*, requires the Court to consent if it is in the best interests of the minor. Third, the bypass procedure virtually ensures the juvenile's anonymity. Finally, the bypass procedure would not cause a delay that would cause greater risk to the minor.

C. Mandatory Waiting Periods

Some states have tried their hand at passing mandatory waiting periods that a woman must comply with prior to procuring a scheduled abortion. This is another policy attempt, analogous to the "cooling off period" required before purchasing a handgun, that states hope will cause pregnant women to reverse their decisions. The policy is cloaked in the guise of giving the woman more time to process "information" on the abortion procedure. Of course, it also wreaks havoc on poor women who must travel a long distance to procure an abortion only to be unable to afford an overnight trip to satisfy the requirement. The Supreme Court has only heard three cases concerning this type of provision. The first, *Akron* I, was

struck down. But, *Hodgson*'s and *Casey*'s provisions were both upheld.

In *Akron* I, the challenged Akron ordinance required a twenty-four hour waiting period after consent before a minor may procure an abortion. The Court struck down the provision as not furthering any state interest. The mandate was found "arbitrary and inflexible" and the Court argued that the ordinance would neither cause the procedure to be performed more safely, nor serve the state's concern that the woman make an informed decision.

In *Hodgson* (1990) however, the Court, while striking down the two-parent notification, upheld Minnesota's requirement that a minor be subjected to a forty-eight hour waiting period prior to undergoing the abortion procedure, effectively overturning the decision in *Akron* I. The Court merely "admitted" they made a mistake, and that the waiting period may very well serve an interest in providing for a more informed decision.

In *Casey* (1992), the Court upheld a twenty-four hour waiting period for **all** women seeking an abortion. This case established waiting period provisions for all women as constitutional. The effect, once again felt by indigent women, is that some abortions may now be "more expensive and less convenient," according to the Court, apparently also deciding that that is not so bad an effect. Both here, and in *Hodgson*, the Court modified its thinking, deciding that waiting periods now did further the state's interest in making sure the woman is making a well-informed decision.

D. Informed Consent Laws

The motive behind informed consent laws is twofold. First, the state wishes to ensure that certain information is given to a woman about to have an abortion. The second, in the eyes of the Court in early cases, was to intimidate the woman into not having an abortion. Therefore, early versions of informed consent laws were struck down, but the Court, in later decisions, has reversed that line of thinking.

The first case to deal with informed consent was *Danforth* (1976). That case was brought as a challenge to a Missouri statute which required a woman to consent in writing prior to receiving a first trimester abortion. Because this part of the statute was so harmless, the Court let it stand, even though most of the rest of the statute was struck down. This statute required only the signature and did not require any specific dissemination of information.

The ordinance involved in *Akron* I (1983) was much stricter. Here, it was required:

> that the attending physician inform his patient of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth, and also inform her of the particular risks associated with her pregnancy and the abortion technique to be employed (*Akron* I, 462 U.S. 416; 1983).

The Court found this ordinance to be an unconstitutional infringement on the discretion of the physician. "[A] State [does not have] unreviewable authority to decide what information a woman

must be given" (*Akron* I, 462 U.S. 416; 1983). (Although in *Rust*, Secretary Sullivan apparently did). Furthermore, the Court found it excessive that only a physician (and not some other, trained health care provider) may give the patient this information.

In *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), the Court struck down another informed consent law as harsh as the one in *Akron* I. Challenged was the Pennsylvania Abortion Control Act of 1982. The informed consent provision required that:

> [the patient] be informed of the name of the physician who will perform the abortion, the "particular medical risks" of the abortion procedure to be used and of carrying her child to term, and the facts that there may be "detrimental physical and psychological effects," medical assistance benefits may be available for prenatal care, childbirth, and neonatal care, the father is liable to assist in the child's support, and printed materials are available from the state that describe the fetus and list agencies offering alternatives to abortion; [and] requires such printed materials to include a statement that there are agencies willing to help the mother carry her child to term and to assist her after the child is born and a description of the probable anatomical and physiological characteristics of an unborn child at "two-week gestational increments" (*Thornburgh*, 476 U.S. 747; 1986).

The Court viewed this statute as "intimidat[ing] women into continuing pregnancies." Additionally, the Court ruled that the printed materials "are nothing less than an attempt to wedge the State's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician" (*Thornburgh*, 476 U.S. 747; 1986). Here, it is interesting to note the

Court's inconsistencies. A much more liberal Court upheld the policy decisions (that had **no** health-related value) to disallow state-funding for abortions, yet the much more conservative Court of 1986 struck down the policy decisions to disseminate information **for which a health-related value could be argued!** This is a phenomenal inconsistency that has yet to be explained in any logical, legal manner, and can only be attributed to the forces of society and politics.

However, in the *Casey* ruling of 1992 the Court reversed its decisions concerning informed consent laws. In this case, the Court upheld a Pennsylvania law requiring that the patient "be provided with certain information at least 24 hours before the abortion is performed" (*Casey*, 112 S. Ct. 2791; 1992). The Court's decision rested on its overturning of the trimester framework of *Roe v. Wade* and its establishment of the undue burden test (which actually began to form in the *Webster* ruling of 1989, much to Antonin Scalia's chagrin). According to the undue burden test, an undue burden exists when a law's "purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability" (*Casey*, 112 S. Ct. 2791; 1992). Following this new standard, the Court disaffirmed its previous holdings regarding informed consent, and here ruled that informed consent laws did not create a substantial obstacle and so did not cause an undue burden on a woman's choice to have an abortion. In fact, the Court even rejected its past arguments against what it had labeled "intimidation." "Measures designed to advance [informed consent] should not be invalidated if their purpose is to persuade the woman

to choose childbirth over abortion" (*Casey*, 112 S.Ct. 2791; 1992).

The dissent in *Casey*, in concurring with the overturning of the trimester framework, argues that the undue burden standard is no better. The Court, instead of settling the issue, will now have to hear case after case on what constitutes a "substantial" obstacle. "The undue burden standard... has no basis in constitutional law and will not result in the sort of simple limitation... which the opinion anticipates... The standard presents nothing more workable than the trimester framework" (*Casey*, 112 S. Ct. 2791; 1992). Whether or not this will be the case remains to be seen. Since *Casey*, there has been only one case before the Court dealing with the abortion choice. That case, *Ada v. Guam Society of Obstetricians and Gynecologists* (1992), was not argued before the Court. The Court, by denying *certiorari* (a petition to the Court to hear an appeal not in conflict among the lesser courts), let the decision of the Ninth Circuit of the Court of Appeals stand. That decision invalidated a Guam law outlawing all abortions except in medical emergencies as unconstitutional on its face.

Of course, proscribing all abortions is such a substantial obstacle to a woman's choice that that case is not one to look at to in order to predict the future of undue burden tests.

E. Mandatory Procedures

Many states have adopted mandatory procedures that must be followed in the procurement of an abortion. Examples include reporting standards, fetal life preservation techniques, and where the abortion must be performed. While most of these have been

struck down, in light of *Casey*, this seems to be the area in which most future litigation will arise.

The first case dealing with this issue was *Roe*'s companion case, *Doe v. Bolton* (1973). The Georgia law invalidated in *Doe* required that the patient must be a Georgia resident, that the abortion must be performed in a JCAH-accredited hospital, that the procedure must be approved by a hospital committee set up to specifically approve abortions, and that the physician's judgment must be concurred in by two other doctors. The Court, understandably, found fault with all of these requirements. First, in one of the rare applications of the Privileges and Immunities Clause (a clause requiring one state to treat those of another state in the same manner) of the Fourteenth Amendment, the Court struck down the resident requirement as unconstitutional. Second, the Court ruled that not only does the procedure not have to take place in a JCAH-accredited hospital, but it does not even need to take place in any hospital. In what seems an early version of the undue burden standard (albeit, a liberal one), the Court rejected the argument that such a requirement was shown by the state to further its interest in protecting maternal health. Third, the interposition of the committee is "unduly restrictive of the patient's rights" (*Doe*, 410 U.S. 179; 1973). Finally, the Court found that the concurrence of two other doctors "has no rational connection with a patient's needs and unduly infringes on her physician's right to practice" (*Doe*, 410 U.S. 179; 1973).

In 1975, the Court heard *Connecticut v. Menillo*. The Court upheld a Connecticut law which criminalized the abortion procedure as performed by non-physicians. As this was the only restriction

that the Court ruled that the state may place on first trimester abortions in *Roe*, there was nothing to keep Connecticut from passing such a statute.

In *Danforth* (1976), the Court struck down the part of the Missouri statute which required the physician performing the abortion to take steps to preserve the fetus, subject to prosecution for manslaughter. Here, the Court seemed to reason in a roundabout manner. Where the first part of the provision (that the physician attempt to preserve the life of the fetus) is deemed impermissible regardless of the stage of pregnancy, the second part (providing criminal and civil sanctions) is struck down as being inextricably tied to the first. The statute in *Danforth* also called for reporting and recordkeeping by health facilities and doctors providing abortions. The Court upheld this provision provided that the anonymity of the patient is preserved. Finally, the statute outlawed the use of the amniocentesis procedure to induce abortion. The Court struck down this provision which outlawed what was, at the time, the safest and most widely used technique in the nation. Furthermore, it was the technique used for most second trimester abortions. "As an arbitrary regulation designed to prevent the vast majority of abortions after the first twelve weeks, it is plainly unconstitutional" (*Danforth*, 428 U.S. 52; 1976).

In *Colautti v. Franklin* (1979), the Court struck down portions of the Pennsylvania Abortion Control Act which required physicians to determine fetal viability, if possible, and to try to preserve the life of the fetus, subject to criminal prosecution. The viability-determination requirement was struck down for its ambiguity. "The

intended distinction between "is viable" and "may be viable" is elusive" (*Colautti*, 439 U.S. 379; 1979). Likewise, the Court struck down the preservation requirement for the same reason. "It is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus" (*Colautti*, 439 U.S. 379; 1979).

The Court heard three cases on these issues in 1983. The first case, *Akron* I (1983), saw the Court strike down two more parts of the Akron ordinance concerning this issue. First, the ordinance required that all post-first trimester abortions be obtained in a hospital. The Court rejected this portion as Akron presented no evidence that it was tailoring its ordinance in such a way as to be a "reasonable effort" to limit its effect on women seeking abortions (again, an apparent early incarnation of the undue burden test). The Court's argument here was that, although the state's interest in maternal health becomes compelling after the first trimester, the abortion procedure is still reasonably safe throughout the greater portion of the second trimester so as to render this part of the ordinance as unreasonable for the vast majority of the second trimester. The second part struck down required that physicians "ensure that fetal remains are disposed of in a 'humane and sanitary manner'" (*Akron* I, 462 U.S. 416; 1983). Although this appears to be a reasonable requirement (though maybe more suited for environmental control), the time of the *Akron* I decision appears to be at the height of the Court's liberalness regarding its protection of abortion and related issues as is evidenced here. The Court struck down this provision as "violat[ing] the Due Process Clause by failing

to give a physician fair notice that his contemplated conduct is forbidden" (*Akron* I, 462 U.S. 416; 1983).

The second of three 1983 cases heard on these issues was *Ashcroft*. Citing *Akron* I, the Court struck down the part of the Missouri statute requiring that all post-first trimester abortions be performed in a hospital. However, the Court upheld two other provisions. First, that a pathology report be prepared for each aborted fetus was approved as it entails a small additional cost and "does not significantly burden a pregnant woman's abortion decision" (once again, a glimpse of undue burden) (*Ashcroft*, 462 U.S. 476; 1983). Second, the Court upheld the requirement that a second physician be in attendance for a post-viability abortion. The Court argued that this provision furthered the state interest in viable fetal life, even though it does not require an attempt to preserve the life of the fetus. It appears to be unclear, then, how a second physician will further the fetus's benefit if there is no required attempt to preserve it. Perhaps, there is no detriment, but there does not appear to be any benefit.

The last 1983 case was *Simopoulos v. Virginia*. Here, a physician was convicted for inducing an abortion at his unlicensed clinic. Although the conviction was affirmed by the Court, the Court reaffirmed its decisions in *Akron* I and *Ashcroft* that all second trimester abortions need not be performed in a hospital. The Virginia law, in fact, required that clinics performing second trimester abortions be licensed, a regulation that the Court deemed as not unreasonable in furthering the state's interest in maternal health.

Finally, in *Thornburgh* (1986), the Court affirmed its decisions in *Danforth* and *Colautti* that it is unconstitutional to require physicians to attempt to preserve the life of aborted viable fetuses. Here, however, the Court seemingly implies that such a requirement could pass constitutional muster if constructed correctly. "Section 3210(c), by failing to provide a medical-emergency exception... chills the performance of a late abortion, which, more than one performed at an earlier date, tends to be under emergency conditions" (*Thornburgh*, 476 U.S. 747). In other words, most late abortions are of an emergency nature. Because the statute requires attempted fetal preservation in all cases and not just those that are not emergencies, the portion of the statute cannot stand.

F. Miscellaneous Provisions

There are, of course, certain statutes that will not conform to any of the previous headings. That fact will not allow them to escape my attention.

In two Missouri cases, *Danforth* (1976) and *Webster* (1989), statutory preambles (non-operative clauses of the statutes) were challenged. In *Danforth*, the state defined "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems" (*Danforth*, 428 U.S. 52; 1976). The Court upheld this definition of viability as consistent with its findings in *Roe*.

In *Webster*, the Court threw out the challenge to the statutory preamble as it had no activating powers, and therefore, could in no way inhibit any right. That preamble "sets forth 'findings' that... 'the

life of each human being begins at conception,' and that 'unborn children have protectable interests in life, health, and well-being,'" (*Webster*, 492 U.S. 490; 1989).

The Court has also twice struck down spousal consent laws. First, in *Danforth* (1976), and finally, in *Casey* (1992). In *Danforth*, the Missouri statute at issue required spousal consent for a first trimester abortion. The Court, recognizing the lack of state authority to regulate a first trimester abortion ruled that "the State cannot 'delegate to a spouse a veto power which the [S]tate itself is absolutely and totally prohibited from exercising...'" (*Danforth*, 428 U.S. 52; 1976).

Finally, in *Casey*, the Court ruled that Pennsylvania's spousal notification requirement is unconstitutional. Here, the Court finds that such a notification constitutes an undue burden on the choice to abort. "A significant number of women will likely be prevented from obtaining an abortion just as surely as if Pennsylvania had outlawed the procedure entirely" (*Casey*, 112 S. Ct. 2791; 1992).

Conclusion-Part I

The opinion in *Planned Parenthood v. Casey* (1992) has established the constitutionality of most of the preceding issues. First, the central holding of *Roe v. Wade*, that a woman has a constitutional right to choose to have an abortion, was reaffirmed. In addition, strong informed consent laws were upheld, as were waiting periods, parental notification (with a judicial bypass), and reporting procedures. The Court's option not to hear *Ada* also reaffirmed *Roe*'s central holding. The right to choose an abortion is apparently safe

for a long time. The scope of the *Casey* decision remains to be seen, however. Just as states were willing to test the limits of the trimester framework, they are likely just as willing, if not more so, to see what they can get away with under the eyes of the undue burden standard. Clearly, it seems that obstacles to abortion will no longer be held to such a strict scrutiny as the one they were under the trimester framework. The undue burden test, as it appears in *Webster* and *Casey*, is a much more lenient tool.

The undue burden test is much more grounded in judicial precedent than the trimester framework was. Whereas the trimester framework had the appearance of legislating, the undue burden test has the appearance of any number of "tests" the Court has manufactured over the years to reach decisions on various subjects. Unfortunately, as a test, the undue burden test accomplishes little in both expediency and straightforwardness. The ambiguity of the undue burden test will cause many state legislatures to wonder what will pass the test and what will not. Many states will undoubtedly attempt to make their abortion control laws just a little bit tougher than Pennsylvania's, and maybe they'll get away with it. More than a few times, even in *Roe*'s companion case, undue burden seemed to rear its head before it wholeheartedly superseded the trimester framework in *Webster* and *Casey*.

Twenty years after *Roe*, the choice remains. Perhaps it will not take another twenty years to see how *Casey* will affect that choice. I concur in the judgment of *Casey*'s dissenters that there will be much tougher cases ahead where the imaginary line delineating what constitutes an undue burden and what doesn't will be extremely

blurry. How could there not be? There are two ways, neither of them likely. The first is that each state will model its abortion control statutes after Pennsylvania's and will not test the waters as they did with the trimester framework. That is extremely unlikely. Equally unlikely is that the Supreme Court will be wholeheartedly satisfied with the decisions of the lower courts and that no two jurisdictions will come into conflict with each other, thereby ensuring that no case on abortion regulation ever again comes be fore the Court. That will not happen, either.

Part II-The Right to Clinic Access

Chapter 3-Access Denied: The Failure of the Civil Rights Act of 1871

Here we delve into a different aspect of abortion, not the government's regulations and the politics of choice, but the government's obligation to prevent non-governmental forces from removing that choice.

Although the harassment suffered by abortion service providers and their patients is nothing new, the question of how to combat the nationwide tactics of groups like Operation Rescue in our overburdened courts is. Since the volatile Wichita summer of 1991, the nation has been engaged in debate over the rights of women seeking an abortion versus the rights of pro-life groups to engage in free speech. The lower federal courts have been swamped with cases. The Supreme Court has already decided two cases on the subject. At issue is whether the blockade tactics of the pro-life forces are a constitutional invocation of free speech rights, or whether they constitute, among other things, extortion.

In 1991, in Wichita, Kansas, violent abortion clinic blockades took place. With the local police force unable to keep the clinics open, U.S. District Court Judge Patrick Kelly imposed numerous restraining orders and injunctions against Operation Rescue. Kelly also called out the U.S. Marshal Service to aid the local police. With thousands of protesters being arrested for contempt in violation of the injunctions, the actions of Judge Kelly seemed fruitless.

In fact, in more than thirteen instances since 1989, lower federal courts have placed injunctions on Operation Rescue and similar organizations, forbidding them from denying access to abortion clinics. Eight of these injunctions had been based on the Civil Rights Act of 1871 (also known as the "K.K.K. Act"). In order to support an injunction based on the Act, there must be a showing of "class-based animus." In other words, there must be an invidious discrimination found with that discrimination coming as the result of one's belonging to a certain class, such as being a female. Operation Rescue has contended that no such animus exists. Their contention is rather that only women seeking abortions are targeted, and that is not a class protected under Section 1985(3) (the section of the Act providing relief).

Judge Kelly, and many other federal judges in other jurisdictions, found that:

> [t]he blocking of entry into the clinics is not the goal, but the means by which the defendants seek to obtain their goal. That goal is the elimination of the right to obtain an abortion. Necessarily, that goal infringes on the rights of women, and the rights of women only. The patients of the plaintiffs herein form a gender-based class supporting the application of Section 1985(3) (*Women's Health Care Services, et al. v. Operation Rescue National, et al.*, 773 F. Supp. 265; 1991).

In making this finding, Judge Kelly proceeded to the next requirement to make a claim under Section 1985(3).

The plaintiffs in Wichita, and elsewhere, needed to prove a violation of their right to privacy under the Fourteenth Amendment

of the Constitution. However, such a violation must come about as a result of state action, meaning the state must play some role in denying that right. In *Great Am. Fed. Sav. & Loan Ass'n. v. Novotny* (442 U.S. 366; 1979), Judge Kelly found the basis for this claim:

> private action which inhibits or thwarts the ability of the state to guarantee equal protection may cause the state either unwillingly or unwittingly to further the ends of the conspiracy. 'If private persons take conspiratorial action that prevents or hinders the constituted authorities from giving or securing equal treatment, the private persons would cause those authorities to violate the 14th amendment; the private persons would then have violated Section 1985(3)' (*Women's Health Care Services*, 773 F. Supp. 265; 1991).

Finding Operation Rescue, et al. now in violation of the Fourteenth Amendment, Judge Kelly reviewed the 1871 Act's right to travel provision.

Here, the plaintiffs need not demonstrate state action; the mere evidence of private conspiracy to prevent interstate travel of citizens is sufficient. Operation Rescue argued that because it interfered with the rights of all persons seeking clinic access, and not just those travelling from out-of-state, the claim fails. Judge Kelly threw out that line of reasoning as ludicrous countering "the defendants may not escape liability... by the mere expediency of enlarging the scope of their conspiracy to include local victims as well" (*W.H.C.S.*, 773 F. Supp. 267; 1991).

Finally, the plaintiffs must prove that injunctive relief (relief that ends or preempts the action causing harm) is an available remedy under Section 1985(3). Operation Rescue argued that only

monetary relief is possible, but Judge Kelly disagreed. "None of the arguments advanced by Operation Rescue compels the conclusion that injunctive relief, although not expressly provided under Section 1985(3), may not be granted where money damages would be inadequate" (*W.H.C.S.*, 773 F. Supp. 267; 1991). Furthermore, according to Judge Kelly, "...the primarily remedial purpose of the statute [is not] a bar to the granting of injunctive relief" (*W.H.C.S.*, 773 F. Supp. 267; 1991). Or, because the statute is written primarily to provide relief for harm already established, that does not dismiss the opportunity to act to prevent further harm.

Section 1985(3) claims have been upheld in *New York State N.O.W., et al. v. Terry, et al.* (U.S. Ct. of App./2nd Circ.-886 F. 2d 1339); *N.O.W., et al. v. Operation Rescue, et al.* (U.S. Dist. Ct./E. Dist. of Va.-726 F. Supp. 1483); *Cousins, M.D., et al. v. Terry, et al.* (U.S. Dist. Ct./N. Dist. of N.Y.-721 F. Supp. 426); *Roe, et al. v. Operation Rescue, et al.* (U.S. Dist. Ct./E. Dist. of Pa.-710 F. Supp. 577: affirmed by 3rd Circ.-919 F.2d 857); *N.O.W., et al. v. Operation Rescue, et al.* (U.S. Dist. Ct./D.Columbia-747 F. Supp. 772); and *Women's Health Care Services, et al. v. Operation Rescue-National, et al.* (U.S. Dist. Ct./Dist. of Kan.-1991 U.S. Dist. LEXIS 14521).

Regardless of Section 1985(3) claims, the plaintiffs in all of the blockade cases have presented state claims (claims based on the civil and criminal laws of the state in which the harm took place), as well. The state claims encompass the tortious acts of trespass, interference with business relations, and public and private nuisance. Almost every jurisdiction faced with these cases have upheld the use of

injunctive relief based on state claims if the Supreme Court overruled the use of Section 1985(3) to combat the problem.

As it turned out, the Supreme Court did just that. In the 1993 case *Bray v. Alexandria Women's Health Clinic* , the Court held that Section 1985(3) "does not provide a federal cause of action against persons obstructing access to abortion clinics" (*Bray*, 113 S. Ct. 753; 1993). The Court first ruled that a class-based animus was not present to support a Section 1985(3) claim.

> Respondents have not shown that opposition to abortion qualifies alongside race discrimination as an 'otherwise class-based, invidiously discriminatory animus [underlying] the conspirators' action...' the 'animus' requirement demands at least a purpose that focuses upon women by reason of their sex,... Opposition to abortion cannot reasonably be presumed to reflect sex-based intent (*Bray*, 113 S. Ct. 753; 1993).

The Court also found that the plaintiffs failed to prove a disparagement of their right to travel.

> Although the right to interstate travel is constitutionally protected against private interference in at least some contexts, *Carpenters* makes clear that a Section 1985(3) private conspiracy must be 'aimed at' that right... [defendants] proposed demonstrations would erect 'actual barriers to... movement' only intrastate (*Zobel v. Williams* via *Bray*, 113 S. Ct. 753; 1993).

This defeat of the use of Section 1985(3) of the 1871 Civil Rights Act did not vacate the injunctions. It only forced them to be upheld on the state claims, rather than on Section 1985(3). However, it also vacated the award of attorneys' fees to plaintiffs, because those fees were awarded via Section 1988 of the same Act. The state claims did

not allow those fees to be awarded in most cases. (A further case could be made that the federal courts did not have jurisdiction to hear those state claims because the federal claims under Section 1985(3) failed. The Court dismissed that argument. For the District Court to have no jurisdiction on the state claims, the federal claims would have to be "wholly insubstantial and frivolous" (*Bell v. Hood*, via *Bray*). As this was not the case, the District Courts retained jurisdiction on the state law claims.

Chapter 4-Access Envisioned: The Victory? of RICO

Because the main motive of challenging the blockades under Section 1985(3) was to hurt Operation Rescue, et al. monetarily (jailing them for contempt had no effect), attorneys for pro-choice groups searched for a new weapon. That weapon is the RICO (Racketeering Influenced and Corrupt Organizations) provision of the Organized Crime Control Act of 1970. RICO has both civil and criminal provisions and was enacted primarily as a weapon against organized crime. Here, it is put to a new test.

RICO is a formidable weapon as it awards treble damages in civil suits. The use of RICO against clinic blockades has been upheld by the 2nd and 3rd Circuit Courts of Appeal. However, in *N.O.W. v. Scheidler* (968 F. 2d 612), the Seventh Circuit Court of Appeals ruled that civil RICO could not be wielded for lack of an economic motive on behalf of those participating in the blockade. The Supreme Court heard *N.O.W. v. Scheidler* on appeal on December 8, 1993.

In arguing for applying RICO to Operation Rescue, et al., N.O.W. argued that RICO was violated because:

> the donations they receive from supporters is derived from their racketeering activity. The racketeering activity is extortion under the Hobbs Act... directed at health centers, center employees, and patients...'it is well known that the more outrageous and highly publicized the activities are, the more likely the RICO Defendants and the enterprises are to receive larger donations' (*N.O.W. v. Scheidler*, 968 F. 2d 623; 1993).

The District Court and the Seventh Circuit found this argument unpersuasive. Instead, the courts ruled that the money was not derived from racketeering activities. "The attenuated causal connection between the defendants' criminal trespass, threats, and vandalism, and their receipt of donations from third parties... is not sufficient" to support a civil RICO claim (*Scheidler*, 968 F. 2d 625; 1993). As a result, the courts refused to grant that N.O.W. had established economic motive and dismissed the cause.

It appeared likely that the Supreme Court would also rule against N.O.W. in this matter. Although two Circuits had allowed the RICO claim, the Court has ruled in past opinions that, regardless of the broad language in RICO, the Court was reluctant to let RICO become a federal tort law. However, the Court did deny *certiorari* to *Northeast Women's Center Inc. v. McMonagle* (868 F.2d 1342; 1993) which upheld the RICO claim on the Hobbs' Act violation without a further finding of economic motive. The Court's reason, therefore, for granting *certiorari* to this case seemed, obviously, either to deny the RICO claim based on the findings of the Seventh Circuit Court of Appeals, or to uphold the claim based on *McMonagle*. Because the Court erred somewhat in not hearing *McMonagle* (the Court usually hears cases when lower Appellate Courts are in conflict), it seemed that the Court would take the stand that RICO does not provide relief in this case.

As further support for that stance, the Court will generally defer to Congress when deciding whether or not to offer a remedy. If Congress has acted in some way on an issue, the Court will generally not act contrary to Congress. In mid-November, 1993, both

houses of Congress passed legislation making it a federal crime to violently obstruct an abortion service facility. As that remedy will be available in the near future, the Court, following its own examples, would likely not grant N.O.W. the civil RICO claim it asked.

Although it is not clear that the new legislation will offer any more of a remedy than state claims do, the Court, likely, would recognize Congress's explicit intent in passing the new legislation, and, therefore would not apply RICO in a situation where it was not explicitly intended by Congress.

On January 24, 1994, the Court surprised many.

In *National Organization for Women v. Scheidler* (114 S. Ct. 798; 1994), the Supreme Court reversed the ruling of the Seventh Circuit Court of Appeals (in Chicago) which dismissed N.O.W.'s civil RICO claims for lack of an economic motive on the part of PLAN (the Pro-Life Action Network, a league of anti-abortion groups including Joseph Scheidler). The Court held that the dismissal was in error and that the language of RICO was broad enough for such a claim to be made. This ruling did not award damages to N.O.W. This ruling merely holds that civil RICO claims may be filed without the need for an economic motive on behalf of the wrongdoers.

There were many strong arguments on both sides of this issue. The one that may be most important, relating to First Amendment rights, was not entertained by the Court.

First, the intent of PLAN was not in doubt. In Joseph Scheidler's own words, from his congressional testimony, the aims of

PLAN were "to shut down the clinics and persuade women not to have abortions" (*Scheidler*, 114 S. Ct. 798; 1994).

N.O.W.'s argument was that PLAN was a "nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity including extortion in violation of the Hobbs Act" (*Scheidler*, 114 S. Ct. 798; 1994). These claims appear reasonable, although PLAN would probably object to the terms "racketeering" and "extortion." According to N.O.W., the extortion ("the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear...") on the part of PLAN took the form of conspiring to use force, violence and/or fear to keep clinic employees and physicians from their jobs, to "give up their economic right to practice medicine," and for patients to give up their right to receive treatment at the clinics.

The District Court dismissed the case citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (365 U.S. 127; 1961): the activities alleged "involved political opponents, not commercial competitors, and political objectives, not marketplace goals." The District Court and Appellate Court also dismissed based on the lack of PLAN's economic motive. It is on this point that the Supreme Court's reading of RICO and that of the lower courts' differed enormously.

RICO, in section 1962(a), provides that:

> it 'shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity... to use or invest, directly or indirectly, any part of such income, or the proceeds of

> such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce' (*Scheidler*, 114 S. Ct. 798).

Likewise, section 1962(b) of RICO states that:

> it 'shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce' (*Scheidler*, 114 S. Ct. 798).

In sections 1962(a) and 1962(b), the "enterprise" referred to is the victim acquired through the racketeering activity. Here, the term "enterprise" connotes a profit-seeking vehicle and it is this connotation that the lower courts used in determining that PLAN did not have an economic motive. The courts ruled that PLAN, through its activities, was not seeking to gain control of any profit-seeking enterprise, hence, PLAN had no economic motive.

The Supreme Court, however, relied on the connotation of the term "enterprise" as it was used in section 1962(c) of RICO
In section 1962(c), RICO makes it illegal:

> 'for any person employed by or associated with any enterprise engaged in , or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt' (*Scheidler*, 114 S. Ct. 798; 1994).

It is in this section that the Court finds a different connotation of the word "enterprise," one that allows the Court to drop the economic motive requirement.

According to the Court, "[a]rguably an enterprise engaged in interstate or foreign commerce would have a profit-seeking motive, but the language in [section] 1962(c) does not stop there; it includes enterprises whose activities 'affect' interstate or foreign commerce" (*Scheidler*, 114 S. Ct. 798; 1994). Therefore, the connotation of "enterprise" in this section makes it the vehicle through which the harm is done. According to this section, PLAN would be the enterprise which "affects interstate or foreign commerce" through racketeering activities, provided those activities could be proven. Using this argument, there need not be an economic motive for PLAN, they need only be affecting the interstate commerce of the clinics through extortion or other means. Other such means which fall within the scope of RICO include any threats involving murder, arson, obstruction of justice, obstruction of State or local law enforcement, interference with commerce, etc. Those are the examples which PLAN could be linked to in future cases. RICO is much broader, however, adding bribery, mail fraud, gambling, tampering, obscene material and other activities.

The Court did not simply tie the argument up at that point, however. Everything does not fall into place that quickly. The Court of Appeals, following the example of the Supreme Court in *Sedima v. Imrex* (473 U.S. 479; 1985) believed that the connotation of "enterprise" as it appeared in sections 1962(a) and (b) should also apply to (c) to restrict the breadth of RICO to that for which it was

apparently intended, to be a weapon against organized crime. In *Sedima*, the term "violation" seemed to have differing connotations in adjacent sections of the same statute passed by Congress. The Court ruled that "we should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections" (*Sedima*, 473 U.S. 479; 1985). The Court of Appeals took that to mean that they should not infer the term "enterprise" to have a wholly different meaning in section 1962(c) than it does in 1962(a) and (b). According to the Supreme Court, however, "'enterprise'... plays a different role in the structure of those subsections than it does in subsection (c)" (*Scheidler*, 114 S. Ct. 798; 1994). Because in subsections (a) and (b) the enterprise is the victim of the racketeering activity and in subsection (c) it is the vehicle for the racketeering, the Court argues that it is almost necessary to have a wholly different meaning.

> Consequently, since the enterprise in subsection (c) is not being acquired, it need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity. Nothing in subsections (a) and (b) directs us to a contrary conclusion (*Scheidler*, 114 S. Ct. 798; 1994).

Hence, PLAN does not require an economic motive to be found liable in a civil RICO suit. PLAN need only be found to be engaging in a pattern of racketeering activity that is affecting interstate or foreign commerce through any of the aforementioned means (i.e. extortion).

There were yet more arguments for the economic motive requirement for the Court to sift through, however. One concerned

the Appellate Court case *U.S. v. Bagaric* (706 F.2d 42; 1983). In this case, a civil RICO suit against a political terrorist group was dismissed for lack of an economic motive. The basis for the dismissal was partly the congressional statement of findings prefacing RICO and referring to the activities of groups that "drain billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption" (*Bagaric*, 706 F.2d, at 57). The Appellate Court used this statement as one basis for the economic motive requirement.

The Supreme Court countered, arguing "[w]e... think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied..." (*Scheidler*, 114 S. Ct. 798; 1994).

The Court has often expressed its desire to interpret statutes with the intentions of Congress in mind. Here, the Court calls the congressional findings a "rather thin reed," yet the Court has no reed at all that shows Congress's intention to wield RICO as broadly as the Court wishes to now. In essence, because the Court does not have **enough** evidence for the intentions of Congress to have an economic motive requirement, they will follow the route for which they have **no** evidence, only the lack of proof for the contrary. That is quite a circular argument that the Court has spun. In other words, the lack of evidence for Congress's intentions not to have an economic motive requirement is the fact that they have little evidence that Congress intended for there to be an economic motive requirement. Disregard the fact that there is no positive evidence for no economic motive requirement. In this case, for the Court, less is more. The less

Congress has said, the more the Court can mold it. And, "Thank God," said the Court, "the only thing Congress said were in the 'findings'." Instead, it seems likely that the Court felt "compelled" to reach such a decision. It is unlikely for Justices Scalia, Thomas and Kennedy and Chief Justice Rehnquist (who wrote the decision) to endorse anything that may appear to support the right to abort. That would explain the failure of the 1871 Civil Rights Act to work in the *Bray* decision. Rather, the Court relied specifically on the language in RICO and disregarded what the facts of the case were. The *Scheidler* decision was a theoretically-based, and not a reality-based, decision. In other words, the facts of the case were not of paramount importance in *Scheidler*. The Court merely ruled on whether a RICO claim include proof of economic motive. It did not matter to the Court that the defendants were pro-life.

Finally, the Court declined to entertain constitutional arguments on this subject because they did not pertain to RICO as it was argued before the Court in this case. PLAN argued that their actions were protected by the First Amendment's rights to speech and assembly (although anyone watching the news has seen that these "assemblies" are anything but peaceful). However, since none of the arguments presented by PLAN questioned the constitutionality of RICO's construction, they were a moot point in this matter. One can be sure, however, that such arguments will emerge the very next time that PLAN is sued under the ambit of civil RICO.

The following will probably occur. An abortion rights group will sue a group of clinic blockaders under civil RICO. The pro-life group will move to dismiss, arguing that the present construction and

interpretation of section 1962(c) of RICO unconstitutionally infringes on their First Amendment rights to speak and peaceably assemble. This will likely occur in more than one jurisdiction. It is also likely that one District or Appellate Court will dismiss the suit, finding that the pro-life group's argument holds water (just as the Seventh Circuit Court of Appeals found PLAN to be a political group and not an enterprise under RICO). It is further likely that another District or Appellate Court will find in favor of the clinic. The Court, having lower courts issuing conflicting rulings, will now have an increasingly tougher nut to crack as the issue of First Amendment freedoms becomes a part of the civil RICO equation.

The Court, in the past, has issued rulings in cases contrary to what they may have preferred, in order to keep these constitutional questions from arising. One such case, noted in Justice Souter's concurrence in *Scheidler* (in which he discussed the First Amendment issue), was the aforementioned *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (365 U.S. 127; 1961). In this case, the Court held that "antitrust laws do not apply to businesses combining to lobby... even where such conduct has an anticompetitive effect... because the alternative 'would raise important constitutional questions' under the First Amendment" (*Scheidler*, 114 S. Ct. 798; 1994, J. Souter, concurring).

The Court also stated in *Lucas v. Alexander* (279 U.S. 573; 1929) that a law "'must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity'" (*Scheidler*, 114 S. Ct. 798; 1994, J. Souter, concurring). Justice Souter claims that these two cases do not apply to RICO because they only

matter "when the meaning of a statute is in doubt... and here 'the statutory language is unambiguous'" (*Scheidler*, 114 S. Ct.; 1994, J. Souter, concurring).

In fact, Justice Souter uses some important civil rights cases as examples for why an economic motive requirement is unnecessary. In *N.A.A.C.P. v. Claiborne Hardware* (458 U.S. 886; 1982), the Court held that boycotts do not fall under the state common law crime of malicious interference with business. And in *N.A.A.C.P. V. Alabama* (357 U.S. 449; 1958), the Court ruled against Alabama's attempt at compelling the N.A.A.C.P. to turn over its membership list.

Finally, in *Oregon Natural Resources Council v. Mohla* (944 F.2d 531; 1991), an Appellate Court afforded the respondent with a heightened pleading standard for the complaint was based on"presumptively protected First Amendment conduct" (*Scheidler*, 114 S. Ct. 798; 1994, J. Souter, concurring).

Conclusion-Part II

Likely, almost all civil RICO suits against PLAN will have PLAN claiming their actions to be constitutionally protected speech. This will not make it easy for N.O.W. or some other appellant to make their case, as they will have to overcome stricter standards of scrutiny to show why the actions of PLAN should no longer be protected by the First Amendment. As I stated earlier, there is almost certainty that separate circuits in our Appellate Court system will reach disparate conclusions. As such, the Supreme Court will have a touchier subject matter to deal with as is almost always the

case when the Bill of Rights is involved. The abortion cases have shown us that.

As it becomes increasingly clear that both the rights of pregnant women and the rights of abortion opponents need to be protected, it must also be recognized that the tactics of those involved in the pro-life movement have not always been legal. Many in the pro-life movement have drawn the comparison to the civil rights movement, but such a comparison appears to me to be fallacious. The movement for civil rights was sanctioned by the Fourteenth Amendment's equal protection laws, which were passed specifically to afford nonwhites the same rights as other (*Plessey v. Ferguson* notwithstanding). The Fourteenth Amendment does not confer those rights on the unborn, and "person" as used in the Constitution has never been interpreted to include the fetus. And the hypocrisy of those who will profess the value of life and then kill in the name of it is beyond any definition of "civil disobedience."

The politics of the abortion issue, likewise have and will continue to play an important role in the future of abortion litigation and legislation. Since *Roe v. Wade*, the politics of the Court, of the Congress, of the President, and of the state legislatures have shared more or less equal parts in the shaping of abortion law. In addition, the politics and social mores of the American people have directly influenced the politics of the aforementioned. It is unlikely that a

pro-life Democrat will ever be elected president, at least in the near future, although a pro-choice Republican may have a shot.

Indeed, the conservative Rehnquist Court seemed to follow the policy decisions of the Reagan and Bush Administrations that largely shaped the Court in the Eighties. The "gag rule" and the *Webster* decisions are plain indications of that. Is the Court now influenced by the pro-choice politics of the Clinton Administration, however? The RICO decision may be an indication that the politics of the sitting president may have some influence over the Court at least where issues of societal import are concerned. On the other hand, the wisdom of the Court can not be overlooked when it came into indirect conflict with the wishes of the president.

Depending on the poll, it is apparent that a slight majority of the American people support the right to choose an abortion, however, even as that support has risen or fallen since the *Roe* decision, the Court has remained consistent in its inconsistency to fully support or abandon its belief in that right. The Court has moved from liberal (*Roe*, 1973) to conservative (*Maher*, 1977) to liberal (*Thornburgh*, 1986) to conservative (*Webster*, 1989) to liberal (*Scheidler*, 1994). The opinion of America has not been so wishy-washy. At least where abortion is concerned, the societal mores of America have seemed to affect the Court only to the point of keeping the choice available and not much further beyond that.

The Supreme Court may never be silent on the issue of abortion. As the Court left still more questions unanswered after *Casey* and *Scheidler*, we can only watch as the debate over abortion continues for another generation. Although I was pleasantly

surprised at the ruling in *Scheidler* (and completely overwhelmed by the fact that it was a unanimous decision), I can't help but think that it merely opened another can of worms. Unless the constitutional problem is solved quickly (and quickly in our judicial system may be seven-to-ten years), the weapon of civil RICO may never find its mark. And, meanwhile, we wonder if America will ever draw closure on this subject.

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