

In 1996, the US government's deployment of two American aircraft carrier battle groups to the region effectively ensured that Mainland China's military exercises near our shores did not destabilize the region. That bold action upheld the intent of the Taiwan Relations Act, which also provides for continued sales of "defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability."

As for the Taiwan-US partnership, there really is only one course that our relations can take as we cross the threshold of the twenty-first century* and that is to continue expanding our economic, political, cultural, and security cooperation. Not only does it directly serve the purposes of both our peoples, but the greater cause of regional stability and development actually requires it. The Republic of China's unswerving commitment to the same values and interests that Americans embrace more firmly implants them within the Asian and Pacific Region. And it reinforces the cause of peace. " On the twentieth anniversary of the Taiwan Relations Act, we are American's steadfast partner in pursuing common ideals.

The Impact of the Court: Evaluating *Roe v. Wade*

by Rachel Brauner, BC '00

The Supreme Court has long been regarded as the protector of our fundamental and inalienable rights. In recent history, the Court has also been heralded as the instigator of significant political and social change. Despite the adamant opposition of the American public, the executive and legislative branches, or even other members on the bench, the Court has often proved itself to be a stalwart defender of equality and liberty. As a result of its countermajoritarian nature, the Court is characterized as not only a guarantor of freedom, but also as a "powerful, vigorous, and potent proponent of change."¹ In fact, historians, political scientists, and law scholars alike have depicted groundbreaking Supreme Court decisions as turning points in society throughout the twentieth century. One of the most notable is the 1973 opinion in *Roe v. Wade*,² which both granted women a constitutionally protected right to exert control over their own bodies, and galvanized the entire nation as well, permanently changing the face of American politics.

Still, some social scientists take issue with this notion of the Court as an instigator of social change. In his book *The Hollow Hope*, Gerald N. Rosenberg challenges the idea that the "Court produces significant social reform;"³ in his view, at best, "it can second the social reform acts of other branches of government."⁴ Rosenberg paints a picture of a Court "constrained" and limited in both scope and power. He sees the Court not as a trailblazer of social change, but instead as a mirror, reflecting transitions that have already been well underway. This "myth... that credits courts and judicial decisions with a power they do not have"⁵ steers activists towards an institution that is powerless to help them, and consequently drains crucial resources from other political arenas, ultimately hurting the movement itself.⁶ Rosenberg pinpoints *Roe* as a case where "the Court is far less responsible for the changes than people think,"⁷ claiming that governmental changes, ample precedent, and the marketplace are what actually fueled social change. Is Rosenberg correct in his assessment of *Roe* as largely ineffective? And if so, what implications does this research have on interest groups litigating for the purpose affecting social change?

One reason that Rosenberg sees *Roe* as merely an affirmation of a national shift towards legalized abortion is the growing governmental effort to repeal abortion laws that preceded the decision. He asserts that:

by the time the Court reached its decisions in 1973, there was little political opposition to abortion on the federal level, widespread support for it among relevant professional elites and social activists, large-scale use of it, and growing public support.⁸

From this historical interpretation, Rosenberg concludes that both the federal and state legislatures would have legalized abortion on their own, without the Court's mandate; rather than a controversial, unorthodox decision, *Roe* signified nothing more than the Court catching up with the overwhelming sentiment of the nation.⁹

Rosenberg's suggestion that *Roe* merely sanctioned a political climate largely favorable towards legalizing abortion, is at best, overstated. Alan Guttmacher, who spent much of his career lobbying Congress to decriminalize abortion, nevertheless recognized that "anything more than reform was legislatively impossible because the public does not want abortion on demand and is not prepared to accept it."¹⁰ Subjecting the abortion right to the legislatures left it open to the compromises inherent in our democratic process, for, contrary to the progressive milieu that Rosenberg describes, there was still incredible opposition to legal abortion at the time. In 1973, despite considerable efforts throughout the country, only four states had passed statutes legalizing abortion; and, as historian Leslie Friedman Goldstein notes, "the issue did not disappear even in these four states after legislative decriminalization... such a dramatic break with the past aroused very strong feelings on both sides of the controversy."¹¹ Many of the reform-style statutes effected in other parts of the country did even more damage to the problem, causing one Californian activist to lament "we have replaced one cruel, outmoded law with another one."¹² Clearly, abortion in the United States prior to 1973 was almost universally illegal, and was far from being recognized as the legal, not to mention fundamental, right of women that it is seen as today.

It is precisely this failure of abortion activists to induce significant change on either the federal or state levels that drove them, as a last resort, to the courts. The Supreme Court was seen as the only governmental institution secure enough to go beyond legalization and definitively characterize "abortion as a fundamental right,"¹³ thus shifting the debate away from the doctor's right to the rights of all women. Not only that, a Court decision, as one group of activists noted, would also "implicate every abortion statute in America"¹⁴ in one fell swoop. In light of Congress' avoidance of the issue, as well as the likelihood that federal efforts would politicize and ultimately compromise a right that was imperative for the protection of

women's lives, the only plausible way to legalize abortion for all women was through a Court decision that would have national significance.

Another reason Rosenberg claims that *Roe* was a logical extension of a pre-existing change is the strength of legal precedent it rested upon. He cites the Supreme Court's decisions in *Griswold v. Connecticut*¹⁶ and *Eisenstadt v. Baird*¹⁶ as a strong foundation for the privacy right on which *Roe* ultimately rests. In addition, he notes that four law-review articles "suggested] a supportive legal community."¹⁷ According to Rosenberg, the combination of two prior Court decisions, and modest academic endorsement of them, allowed the litigants to "ask for a modest extension of a well-accepted right."¹⁸

Despite the groundbreaking victories in the realm of privacy law that *Griswold* and *Eisenstadt* represent, by no means did these highly controversial Court decisions pass by without significant condemnation. In contrast to the four articles supporting the privacy right, a virtual avalanche of literature was produced challenging the basis on which these two decisions stood. Even the Chief Justice himself voiced his opposition to the creation of a constitutional right to privacy, declaring in his dissent that this "novel constitutional doctrine" has, "surprisingly, no authority cited for it."¹⁹ Rosenberg's supposition that the grounds on which *Roe* was argued were highly established and secure is nothing less than misinformed.

In fact, the failures of the underlying reasoning in *Roe* have been illuminated by critics on all sides of the abortion issue. Some of the protest surrounding this case stems from an objection to the actual constitutional grounds by which the right to abortion was granted. The most common assault waged against *Roe* is that the "right of privacy," on which it so heavily relies, is nowhere to be found in the Constitution. This complaint was exhaustively elucidated in what would soon become the most frequently cited law review ever written, John Hart Ely's *Yale Law Journal* article "The Wages of Crying Wolf," an essay historian David Garrow refers to as "the most important critique of *Roe v. Wader*"²⁰ Law student Kathryn Holmes Snedaker refers to this particular criticism in her evaluation of *Roe*:

Constitutional scholars were critical of the opinion, arguing there was no constitutional basis for finding the privacy notion embodied in either the Bill of Rights or the remainder of the Constitution encompasses a woman's right to control her body. In their view, the Court did not provide a satisfactory rationale for its conclusion that abortion is one of those rights included in the constitutional guarantee of personal privacy.²¹

The Court had simply stated, "this right of privacy... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."²² Clearly, this vagueness inherent in the very core of *Roe's* reasoning not only undermines the decision's persuasiveness, but Rosenberg's assertion that this was a jurisprudentially sound case.

Rosenberg also highlights the relatively small increase in legal abortions immediately succeeding *Roe* as an example of the Court's minor role in the transformation of abortion rights around the country. The political scientist points out that "the largest increase in the number of legal abortions occurred between 1970 and 1971, two years before *Roe*."²³ From this statistic he determines that "the Supreme Court was reflecting social change rather than legislating it"²⁴; therefore, any change in the number of abortions following the *Roe* decision can hardly be attributed to the Court.

Yet in his analysis of the abortion data, Rosenberg fails to consider not only what the numbers actually represent in terms of the lives of women, but the very complexity of the abortion struggle itself. The data that Rosenberg relies upon do not distinguish between or account for those abortions that were obtained illegally in potentially life-threatening environments, and those performed in a legal and safe environment. Sadly, this limited view misses the significance of both the necessity of legalized abortion for the safety of women's health, and the incredible impact that *Roe* had in meeting this need. A more accurate measure of *Roe's* efficacy would illuminate the rate of change in the estimated number of illegal abortions, not in the number of legal abortions. Such an inquiry would show that:

since the legalization of abortion in 1973, the safety of abortion has increased dramatically. By invalidating laws that forced women to resort to back-alley abortion, *Roe* was directly responsible for saving women's lives. It is estimated that as many as 5000 women died yearly from illegal abortion before *Roe*.²⁵

In fact, even if we were to consider only legal abortions, we would find that "the number of deaths per 100,000 legal abortion procedures declined more than five-fold between 1973 and 1991."²⁶ It is hard to see how Rosenberg can, in the face of this direct result of *Roe*, consider the number of abortions obtained as more indicative of the Court's success, rather than the number of lives saved.

Also, Rosenberg points to the Court's inability to implement its decision as further evidence of its impotence in the sphere of social change. He highlights the resistance of local institutions to the Court's decisions,

particularly on the part of hospitals. "Hospitals administrators," he notes, "both public and private, refused to change their abortion policies in reaction to the Court decisions"²⁷; as a result, women still find it difficult, or even impossible, to obtain abortion services. In addition, Rosenberg finds that "cost, a lack of information on where to go, and limitations on the circumstances under which a provider will make abortions available"²⁸ renders the decision wholly ineffective.

Though these limitations are still a harsh reality for women even today, interestingly enough, they reflect the true power of the Court in its decisions. Some law scholars and political scientists maintain that the constraints placed on the woman's abortion right are a direct consequence of the logic underlying *Roe*, instead of a deviation from it. Kathryn Holmes Snedaker, for example, believes that the decision itself ultimately infringes upon the very "fundamental right"²⁹ it deigns to protect. She notes, as does current Supreme Court Justice Ruth Bader Ginsburg, that "those who argue that woman's right to have an abortion is the right of a woman alone to decide what to do with her body were dissatisfied with the Court's decision because it placed restrictions on that right."³⁰ One of the primary targets of these absolutist pro-choice advocates within the decision itself is the trimester, or "three-stage" approach adopted by the court in *Roe*.³¹ Abortion critics from 1973 to the present have cried out that the decision should have given women the right to choose an abortion on demand, "a practical license for elective abortion at any stage, right up to the minute before normal delivery."³²

Law Professor Sylvia Law both recognizes and agrees with this criticism of *Roe's* constitutional grounding. She maintains that "the rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied."³³ Additionally, the line of reasoning in *Roe v. Wade* not only failed to end "women's struggle for control of their bodies, [but] transformed it into debates about medical practice and moral and religious views of the personhood of the fetus ... women's lives have become distinctly secondary issues."³⁴ Law feels that the doctrine of privacy not only allowed for what historian Leslie Friedman Goldstein describes as an "intense political backlash,"³⁵ but also reinforced a framework that perpetuates the powerlessness of women.³⁶ In light of this astute interpretation, it appears that Rosenberg's characterization of the Court's inability to protect abortion fails to consider the limitations the Court itself imposed on that right.

Did the Court, then, truly effect social change with its decision in *Roe v. Wade*? Rosenberg strongly argues against this position; yet his contentions do not represent an accurate portrayal of either the history or complexity of

the events surrounding this important decision. In order to accurately gauge the Court's impact, it is imperative to not only look questioningly at the figures and statutes both prior to and following *Roe*, but to regard the experiences of the women that they symbolize. The legalization of abortion by the Court directly affected the lives of women who may otherwise have succumbed to the danger of the back alleys; it also served as a significant step in the direction of equality for women. The very reasoning of the decision itself affected the abortion right, unfortunately resulting in limitations that are plaguing women today. Rosenberg's minimization of the impact of *Roe* is effectively a minimization of the power of the Court; and yet clearly, for a large part of America's population, the Court has made a difference.

Notes

- ¹ Gerald N. Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991) 2.
- ² 410 U.S. 113(1973).
- ³ Rosenberg 336.
- ⁴ Rosenberg 337.
- ⁵ Rosenberg 337.
- ⁶ Rosenberg 339.
- ⁷ Rosenberg 201.
- ⁸ Rosenberg 182.
- ⁹ Rosenberg 189.
- ¹⁰ David J. Garrow, *Liberty and Sexuality* (New York: Macmillan Publishing Co., 1994) 358.
- ¹¹ Leslie Friedman Goldstein, *The Constitutional Rights of Women* (Madison: University of Wisconsin Press, 1989) 335.
- ¹² Garrow 374.
- ¹³ Garrow 382.
- ¹⁴ Garrow 354.
- ¹⁵ 381 U.S. 479(1965).
- ¹⁶ 405 U.S. 438(1972).
- ¹⁷ Rosenberg 181.
- ¹⁸ Rosenberg 181.
- ¹⁹ Chief Justice Burger, *dissenting*, 405 U.S. 438 (1972).
- ²⁰ Garrow 609.
- ²¹ Kathryn Holmes Snedaker, "Reconsidering *Roe v. Wade*: Equal Protection Analysis as an Alternative Approach." *New Mexico Law Review* 17 (1987): 121.
- ²² *Roe v. Wade*, 410 U.S. 113. Online. Internet (available at <http://laws.findlaw.com/US/410/113.html>)

²³ Rosenberg 178.

²⁴ Rosenberg 178.

²⁵ Richard Schwarz, *Septic Abortion* (Philadelphia: J.B. Lippincott Co., 1968), 7; Willard Cates, Jr., "Legal Abortion: The Public Health Record," *Science* 215 (March 1982): 1586.

²⁶ Lisa M. Koonin et al., "Abortion Surveillance — United States, 1993 and 1994," *CDC Surveillance Summaries, Morbidity and Mortality Weekly Report* 46.SS-4, (August 8,1997): 96.

²⁷ Rosenberg 195.

²⁸ Rosenberg 195.

²⁹ *Roe v. Wade*, 410 U.S. 113.

³⁰ Snedaker 121.

³¹ Goldstein 386.

"Snedaker 121.

³³ Sylvia Law, "Rethinking Sex and the Constitution." *University of Pennsylvania Law Review* 955(1984): 1020.

³⁴ Law 986.

³⁵ Goldstein 334.

³⁶ Law 1020.