ABORTION REGULATION IN LIGHT OF THE BILL OF ATTAINDER CLAUSE: MAZUREK V. ARMSTRONG

I fear for the future. I fear for the liberty and equality of the millions of woman who have lived and come of age in the 16 years since Roe was decided. I fear for the integrity of, and public esteem for, this Court.1

INTRODUCTION

In Roe v. Wade,2 the United States Supreme Court declared that a woman's right to decide whether or not to terminate her pregnancy was fundamental under the “right of privacy” derived from the Ninth and Fourteenth Amendments to the United States Constitution.3 Following Roe, the Supreme Court considered the constitutionality of state restrictions of abortion.4 In Cummings v. Missouri,5 the Supreme Court first examined the parameters of the Bill of Attainder Clause of the United States Constitution and held that the imposition of punishment by the legislature was impermissible.6

Recently, in Mazurek v. Armstrong,7 the United States Supreme Court addressed the constitutionality of a state law which provided

that only physicians could perform abortions. Relying on its landmark decision in Roe v. Wade, and a subsequent decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, the Supreme Court reaffirmed a woman’s right to terminate her pregnancy, but also reiterated that the right was not absolute. The Court concluded that a state may restrict the practice of abortions to licensed physicians in the interest of protecting maternal health. In the Supreme Court’s decision to uphold the abortion restriction, the Court failed to address the bill of attainder issue.

This Note will first address the facts and holding in Mazurek v. Armstrong. Next, this Note will give both a historical and present day survey of abortion regulation and bill of attainder treatment. Finally, this Note will analyze the Supreme Court’s decision in Mazurek, concluding (1) that although the outcome followed the current trend in abortion decisions, this current trend is deteriorating the holding in Roe v. Wade, and (2) that the Supreme Court erred in Mazurek by failing to review the bill of attainder argument.

FACTS AND HOLDING

In 1995, anti-abortion activists targeted abortion providers in Montana, with the purpose of stopping the performance of abortions. These attacks failed, prompting the activists to turn to the Montana legislature to propose abortion restrictions. During the legislative hearings, a fact sheet accused a physician assistant, Susan Cahill, of performing illegal abortions.

Physician assistants perform a variety of functions in Montana and are authorized by the state to perform approximately 200 medical procedures. In addition, physician assistants may prescribe almost all medications “many of which have much higher complication (mor-

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10. Id. at 1868.
11. Id. at 1867.
12. See infra notes 15-75 and accompanying text.
13. See infra notes 76-407 and accompanying text.
14. See infra notes 408-519 and accompanying text.
16. Brief for Respondent at 6, Mazurek (No. 96-1104).
17. Brief for Respondent at 6, Mazurek (No. 96-1104). Anti-abortion activists from the Montana Right to Life Association and Flathead Pro-Life sought the help of various government officials to investigate and prosecute Armstrong and Cahill for alleged violations of the Montana Abortion Control Act. Id. at 5. The fact sheet was distributed by a lobbyist for the Montana Right to Life Association. Id. at 6.
18. Brief for Respondent at 6, Mazurek (No. 96-1104).
bidity) rates and much higher mortality rates than abortion." Finally, the state authorizes physician assistants to deliver newborns without the supervision of a physician.

The Montana legislature amended the Montana Abortion Control Act for the purpose of restricting the performance of abortions. The amendment read, in pertinent part, "an abortion may not be performed within the state of Montana . . . except by a licensed physician." In addition to the "physicians only" provision, the amendment established that abortions after the first trimester must be performed in a licensed hospital. It also established that the facilities that perform abortions could not advertise, solicit, or communicate information for the purpose of inducing women to seek abortions.

Shortly after the Montana Legislature passed the "physicians only" amendment, a group of physicians and one physician assistant challenged the constitutionality of the provision. James H. Armstrong, M.D., was the only physician in the State of Montana using a physician assistant to aid in the performance of abortions. Susan Cahill, P.A., performed abortions under the supervision of Dr. Armstrong for almost eighteen years at the time the Montana legislature passed the statute. Under the physician assistant licensing scheme, Dr. Armstrong was required to be in the office and available for Ms. Cahill when performing abortions.

James H. Armstrong, M.D., Susan Cahill, P.A., and others ("Armstrong") brought an action in the United States District Court for the District of Montana. Armstrong sought declaratory and injunctive relief pursuant to section 1983 of Title 42 of the United States Code and challenged the constitutionality of the newly enacted amendment to the Montana Abortion Control Act. Armstrong questioned three provisions of the amendment:

19. Id.
20. Id.
26. Brief for Respondent at 7, Mazurek (No. 96-1104).
27. Id. The physician assistant licensing scheme contains procedures ensuring due process before the removal of a physician assistant’s area of practice. Id. at 3.
28. Brief for Respondent at 4, Mazurek (No. 96-1104).
30. Id. at 563.
an abortion may be performed only by a "licensed physician"; (2) an abortion may not be performed after the first trimester of pregnancy, except in a licensed hospital; and (3) the "solicitation, advertising, or other form of communication that has the purpose of inviting, inducing, or attracting any person" to utilize the services of a physician or facility that performs abortion is banned in the State of Montana.31

The district court noted before its analysis that the latter two provisions of the statute were already declared unconstitutional.32 Focusing on the constitutionality of the "physicians only" provision, Armstrong predicated his challenge on four bases:

1. the purpose of the provision is to impose a substantial obstacle in the path of a woman seeking a previability abortion;
2. the provision has the effect of imposing a substantial obstacle in the path of a woman seeking a previability abortion;
3. the provision violates the Bill of Attainder Clause of Article I, section 10 of the federal Constitution because it constitutes a form of legislative punishment directed specifically against plaintiff Cahill (the only physician assistant performing abortions in the State of Montana); and (4) the provision impermissibly discriminates on the basis of sex by excluding from the permissible scope of practice with physician assistants, a type of medical care sought by only women.33

Upon hearing Armstrong's request for a preliminary injunction against the enforcement of the "physicians only" provision, the district court cited three criteria to determine whether a preliminary injunction should be permitted: "(1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to the plaintiff if the preliminary relief is not granted; [and] (3) a balance of hardships favoring the plaintiff."34 In the alternative, the moving party must show either a probable success on the merits and possible irreparable injury or that the questions raised are of the nature to cause the balance of hardships to tip in the moving party's favor.35 Applying these principles to the facts of the case, the district court recognized that the "physicians only" statute posed a serious question, but the balance of hardships did not favor Armstrong, the moving party.36

31. Id.
32. Id. The State of Montana conceded these issues in the district court. Id.
34. Id. at 565 (quoting Los Angeles Mem'l Coliseum Comm. v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980)).
35. Id. (citations omitted).
36. Id. The court stated, [while the court's refusal to grant the preliminary injunctive relief requested will operate to preclude plaintiff Cahill from performing abortions, the hardship resulting from the disruption of the status quo, a hardship borne only by
Citing Planned Parenthood of Southeastern Pennsylvania v. Casey, the district court used the “undue burden” test requiring Armstrong to show that the “physicians only” requirement created a substantial obstacle to a woman seeking a pre-viability abortion. In examining the legislature’s purpose for enacting the amendment, the court found that a legislative intent to punish could not be assumed, because the evidence did not suggest that the motivation was something other than a desire to protect the health of a woman seeking an abortion. Focusing on the equal protection argument, the court rejected Armstrong’s contention that the “physicians only” provision discriminated on the basis of gender. The district court reasoned that the amendment did not threaten people of a suspect classification nor infringe on a fundamental right. Finding no necessity for heightened scrutiny, the district court applied the rational basis test to conclude that it was unnecessary to analyze the tests for a preliminary injunction.

Finally, the court applied the “functional test” and “motivational test” found in Nixon v. Administrator General Services to determine whether the “physicians only” provision violated the Bill of Attainder Clause of the United States Constitution. The court stated that the Supreme Court has “applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes. . . . Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decision makers.”

Cahill, is not accompanied by a sufficient showing of merit in the plaintiff’s position that would warrant provisional relief.

39. Id. at 567.
40. Id. at 568.
41. Id.
42. Id. The Court determined that if the statute constituted an impermissible obstacle to a woman’s choice concerning a pre-viability abortion, no rational basis for the classification would exist. Id. In order to for a statute to survive the rational basis test, the court must find that facts demonstrate a reasonable justification for the classification. Id. (citing F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993)).
The court discounted the likelihood that Armstrong would prevail under the "functional test," because the "physicians only" provision can be said to foster a non-punitive legislative purpose: the health of women seeking abortions.46

Applying the "motivational test," the court inquired whether "the legislative record evince[d] a [legislative] intent to punish."47 In making the determination, the court reviewed the legislative record to determine whether it reflected the existence of an intent to punish Cahill for her past performance of abortions.48 The district court concluded that it was simply unpersuaded that Armstrong would prevail on the merits, nor did the court believe that the balance of hardships and the preservation of the status quo tipped in their favor.49

Armstrong appealed the decision of the district court disallowing a preliminary injunction to the United States Court of Appeals for the Ninth Circuit.50 The Ninth Circuit found the district court's application of the "undue burden" test of Casey was correct, because an abortion restriction was at issue.51 However, the Ninth Circuit determined that the district court should have broadened its inquiry into the effect and purpose of the legislation, because case law required a balancing of interests.52 Agreeing with the district court that Armstrong presented a serious question, the Ninth Circuit found that the district court failed to balance Armstrong's hardships with those of the patient and the State.53 The Ninth Circuit vacated the district court's judgment and remanded the case for further proceedings.54

Following the decision of the Court of Appeals for the Ninth Circuit, Joseph P. Mazurek, Attorney General of Montana, petitioned the United States Supreme Court to grant certiorari.55 In a per curiam opinion, the Supreme Court reversed the decision of the Ninth Circuit, holding that the legislature did not evince an intent to pose a substantial obstacle to women seeking abortions.56

The Supreme Court first examined legislative intent and noted that "[i]t do[es] not assume unconstitutional legislative intent even when statutes produce harmful results . . . much less do[es] [i]t as-

46. Id.
47. Id. (quoting Nixon v. Administrator Gen. Servs., 433 U.S. 425 (1977)).
50. Armstrong, 94 F.3d at 566.
51. Id. at 567.
52. Id. at 567-68.
53. Id. at 568.
54. Id.
55. Mazurek, 117 S. Ct. at 1866.
56. Id. at 1865, 1867, 1869.
sume it when the results are harmless.\textsuperscript{57} Furthermore, the Supreme Court wrote “in the course of upholding the physician-only requirement at issue in that case, we emphasize that '[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others.’\textsuperscript{58} The Court found that the statute only affected one person, Cahill, because she was the only physician assistant in Montana administering abortions.\textsuperscript{59} Women seeking abortions were not required to seek an abortion from a different facility and were not, the Supreme Court found, burdened by the requirement.\textsuperscript{60}

The Supreme Court rejected Armstrong’s contention that there was no health basis for the law because an anti-abortion group drafted the statute.\textsuperscript{61} In addressing the complaint that the legislation targeted Cahill, the Supreme Court noted that because there only one physician was targeted, the conclusion of the district court that the “physicians only” provision did not create a substantial obstacle was furthered.\textsuperscript{62} Finally, the Supreme Court held that the Ninth Circuit decision disregarded the Supreme Court’s previous statements that states may restrict the performance of abortions to physicians.\textsuperscript{63}

Justice John Paul Stevens, Justice Ruth Bader Ginsburg, and Justice Stephen G. Breyer dissented.\textsuperscript{64} The dissent stated that the \textit{per curiam} decision lacked the sufficient importance to grant certiorari in the proceeding’s preliminary stage.\textsuperscript{65} The dissent relied on the facts surrounding the litigation and the Ninth Circuit’s discussion of legislative purpose to reach its conclusion.\textsuperscript{66} The dissent noted that

\textsuperscript{57} \textit{Id.} at 1867 (citing Washington v. Davis, 426 U.S. 229, 246 (1976)).
\textsuperscript{58} \textit{Id.} (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 885 (1992)).
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} The Supreme Court also noted that 40 other states have similar “physicians only” provisions codified in their state statutes. \textit{Id.} at 1865-66 & n.1 (citations omitted).
\textsuperscript{62} \textit{Mazurek}, 117 S. Ct. at 1867.
\textsuperscript{64} \textit{Id.} at 1869 (Stevens, J., dissenting).
\textsuperscript{65} \textit{Id.} (Stevens, J., dissenting). Justice Stevens also noted that Montana had previously defined “physician” to include physician assistants. \textit{Id.} & n.1 (Stevens, J., dissenting) (citing Mont. Code Ann. § 37-20-403 (1993) (recognizing “physician assistant [as] agent of the supervising physician”); Mont. Code Ann. § 37-20-303 (1995) (“authorizing Board of Medical Examiners to approve physician assistant utilization plans detailing range of physician assistants’ practice”); \textit{Armstrong}, 906 F. Supp. at 564 (noting “that the Montana Board of Medical Examiners construed its authority to include approval of Cahill’s utilization plan allowing her to perform first-trimester abortions')).
\textsuperscript{66} \textit{Mazurek}, 117 S. Ct. at 1869 (Stevens, J., dissenting).
“the record strongly indicate[d] that the physician assistant provision was aimed at excluding one specific person—respondent Cahill—from the category of persons who could perform abortions.”  

To support this conclusion, the dissent looked to the legislative history surrounding the statute’s enactment. The history contained several references to Cahill, and the enforcement of the “physicians only” provision of the statute applied only to Cahill. In addition, the dissent concluded that the “physicians only” requirement “targeted” Cahill in that the advertising ban and hospitalization requirement were clearly unconstitutional at the time of the amendment’s enactment. These facts, together with the fact that Armstrong’s practice was repeatedly the target of anti-abortion groups, led the dissent to conclude that Armstrong showed a violation of both the “undue burden” test and the Bill of Attainder Clause.

Focusing on the legislative motive, the dissent argued that the Court, in the plurality opinion, ignored its prior decisions and failed to look at the entirety of circumstances surrounding the statute’s enactment. When looking at all the circumstances, the dissent found that one could surmise that the legislature’s motive was to “make abortions more difficult.” Finally, neither the district court, nor the Ninth Circuit, made any indication that any injunction would be entered against the enforcement of the “physicians only” provision. For those reasons, the dissent stated that the threat of a “physicians only” statute was one which did not require the grant of certiorari.

BACKGROUND

RESTRICTIONS ON ABORTION

History of Abortion

The regulation of abortion has been traced back to ancient times. During the Persian Empire, criminal abortions were harshly

67. Id. at 1869-70 (Stevens, J., dissenting).
68. Id. at 1870 (Stevens, J., dissenting).
69. Id. at 1870 & n.2 (Stevens, J., dissenting) (citing Minutes of Comm. on Public Health, Welfare & Safety, Mont. Senate, 54th Legis. (Mar. 10, 1995)).
70. Id. at 1870 (Stevens, J., dissenting).
71. Id. (Stevens, J., dissenting).
73. Id. (Stevens, J., dissenting).
74. Id. at 1871 (Stevens, J., dissenting).
75. Id. (Stevens, J., dissenting).
punished. The "Hippocratic Oath," when translated, included the phrase "[s]imilarly, I will not give to a woman an abortive remedy." Conversely, during the Greek and Roman Eras, abortion was freely practiced without scruple. In fact, most Greek thinkers approved of abortion prior to viability.

The first criminal abortion statute in England made it a capital crime to abort a quick fetus. Lesser penalties were enforced for abortions prior to quickening. In addition, the need to preserve the mother's life vacated the English criminal penalty. In the early 1800's, most states in America legalized abortions performed before the "quickening," or point at which the fetus shows movement in the womb. The dangerous conditions imposed by the performance of abortions initiated a growth in lobbying efforts to limit and prohibit abortions. As a result, states, influenced by the American Medical Association ("AMA"), began enacting statutes to restrict abortion. Specifically, the AMA published a list of causes for general demoralization concerning abortion. By the late 1860's, the number of states and territories enacting statutes banning or limiting abortions grew to twenty-eight and eight, respectively.

The prohibition movement progressed, and by 1910 all states prohibited abortion either judicially or legislatively. By the 1960's, forty-nine states criminalized nontherapeutic abortions. In the 1970's, the American Public Health Association adopted abortion standards, and the American Bar Association approved the Uniform

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77. Roe, 410 U.S. at 130. (citing A. Castiglioni, A History of Medicine 84 (2nd ed. 1947)).
78. Id. at 131 (quoting L. Edelstein, The Hippocratic Oath 3 (1943)).
79. Id.
80. Id.
81. Id. at 136.
82. Id.
83. Id. at 137 (citing Rex v. Bourne, 1 K.B. 687 (1939) (holding that the phrase "preserving the life of the mother" included a permanent and serious threat to a mother's life based on a good-faith belief)).
85. McClard, 30 Hous. L. Rev. at 2044.
86. Roe, 410 U.S. at 138, 141. Connecticut was the first state to pass abortion legislation that related to the quickening stage of pregnancy. However, the statute did not impose the death penalty for abortions done after quickening. Id.
87. Roe, 410 U.S. at 141. Three causes of demoralization included "(1) widespread ignorance as to the character of a fetus at different intervals; (2) supposed carelessness of professionals as to fetal life; and (3) the inconsistency among statutes and case law concerning the existence of a fetus as a living being." Id. at 141-42.
88. Roe, 410 U.S. at 141-42.
89. Id. See EVA R. RUBIN, ABORTION, POLITICS, AND THE COURT: Roe v. Wade and Its Aftermath, 15 (1987) (stating that abortion was prohibited in all states after 1880).
90. McClard, 30 Hous. L. Rev. at 2044.
Abortion Act. Immediately prior to the decision in *Roe v. Wade*, many states still prohibited the performance of abortions, unless the mother's life was in jeopardy.

**Roe v. Wade**

In *Roe v. Wade*, the United States Supreme Court addressed the constitutionality of restrictions on abortions. In *Roe*, Jane Roe, a single pregnant woman, brought an action in the United States District Court for the Northern District of Texas for declaratory and injunctive relief respecting the Texas criminal abortion laws. The abortion laws prohibited procuring or attempting to procure an abortion except when the mother's life was endangered by continuing the pregnancy. The district court ruled that declaratory, but not injunctive, relief was warranted because the abortion statutes were not supported by a compelling state interest.

Following the decision of the district court, both parties appealed directly to the United States Supreme Court. The Supreme Court affirmed in part and reversed in part, holding that during the first trimester, a woman's right to end her pregnancy was protected by the “right of privacy” derived from the Ninth and Fourteenth Amendments. Justice Harry A. Blackmun, writing the opinion of the court, reasoned that the right of privacy “is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.” In order to substantiate this holding, the Supreme Court surveyed the history of abortion and the state interests behind the restrictions on abortions.

After tracing the origins of abortion restriction, the Supreme Court focused on the common law restrictions. The Supreme Court recognized a lack of a common law crime for abortions prior to quickening because of a confluence of prior theological, civil, philosophical, and canon law theories of the point at which life begins. Prior to

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92. McClard, 30 Hous. L. Rev. at 2044-45.
96. *Id.* at 117-18.
97. *Id.* at 122, 156.
98. *Id.* at 122.
99. *Id.* at 153, 166-67.
100. *Id.* at 153.
101. *Id.* at 129-47.
102. *Id.* at 130-31. See supra notes 76-92 and accompanying text.
quickening, the fetus was considered to be part of the mother, and abortion of the fetus was not considered homicide.\textsuperscript{104} The Supreme Court also noted that United States common law recognized, as critical, the point of "quickening."\textsuperscript{105} However, whether an abortion after the "quickening" of the fetus was a crime at common law was in dispute because various philosophers had disagreed on the gravity of the offense.\textsuperscript{106}

The Supreme Court then addressed the reasons for the advancement of historical criminal abortion laws into modern jurisprudence.\textsuperscript{107} First, the Supreme Court discounted the argument that these laws were an attempt to discourage illicit sexual activity, stating that courts and commentators have not accepted the argument.\textsuperscript{108} Dismissing the argument that a state's real concern, when enacting a criminal abortion statute, was to protect the mother from procedures which could jeopardize her life, the Supreme Court determined that present medical procedures, although not entirely risk free, were relatively safe.\textsuperscript{109} Finally, the Supreme Court noted a sharp contrast in opinion concerning the point at which life begins, wherein the Court focused its discussion on the "right of privacy."\textsuperscript{110}

The Supreme Court next weighed the harms that a pregnant woman would suffer if a state could deny a pregnant woman's choice of whether or not to terminate her pregnancy.\textsuperscript{111} The Court found medical complications could exist even in early pregnancy, in addition to psychological harm.\textsuperscript{112} The Court rejected the contention that a woman's right to choose was absolute and countered that a state may assert significant interests in protecting health, maintaining medical standards, and protecting potential life.\textsuperscript{113} The Court noted that it has refused to assert that a "right to do with one's body as one pleases bears a close relationship to the right of privacy..."\textsuperscript{114} In conclusion,
the Court found that because the woman's right to choose whether or not to terminate her pregnancy was fundamental, the limitation of that right was justified only by a narrowly drawn compelling state interest.\textsuperscript{115}

Although the Supreme Court discussed the definition of "person" under the Constitution, it found that an unborn fetus was not a "person" under the Constitution and that this finding did not undermine the analysis of the issue.\textsuperscript{116} In turn, the Supreme Court specifically stated the compelling interest in light of medical concerns begins at the end of the first trimester, whereas the compelling interest in protecting potential life is at the point of viability.\textsuperscript{117} Employing the articulated standards, the Supreme Court found the Texas Penal Code swept too broadly to satisfy the requirement of being narrowly drawn.\textsuperscript{118} No distinction was made between abortions performed in the first trimester as opposed to those performed later.\textsuperscript{119}

In summary, \textit{Roe v. Wade} set forth the proposition that the Ninth and Fourteenth Amendments protected a woman's right to seek an abortion.\textsuperscript{120} A state could assert a compelling state interest under two circumstances.\textsuperscript{121} First, a state could override a woman's right to terminate her pregnancy in order to protect the health of the mother after the first trimester.\textsuperscript{122} Second, a state could assert an interest in protecting potential human life after the point of viability.\textsuperscript{123}

\textit{The Limitation of \textit{Roe v. Wade}}

The propositions set forth in \textit{Roe} were interpreted and expanded by the United States Supreme Court in \textit{Connecticut v. Menillo}.\textsuperscript{124} In \textit{Menillo}, the United States Supreme Court upheld an abortion statute which restricted performance of an abortion by "any person."\textsuperscript{125} Patrick Menillo was convicted before the Superior Court for the Judicial District of Waterbury of attempting to perform an abortion without medical training, in violation of Connecticut law.\textsuperscript{126} This law prohib-

\begin{itemize}
  \item \textsuperscript{115} Id. at 155 (citations omitted).
  \item \textsuperscript{116} Id. at 157-59.
  \item \textsuperscript{117} Id. at 163.
  \item \textsuperscript{118} Id. at 164.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id. at 153, 166-69.
  \item \textsuperscript{121} Id. at 164.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} 423 U.S. 9, 9-11 (1975).
  \item \textsuperscript{125} Menillo, 423 U.S. at 9-10.
  \item \textsuperscript{126} Connecticut v. Menillo, 362 A.2d 962 (Conn. 1975), vacated, 423 U.S. 9 (1975); Menillo, 423 U.S. at 9 n.1. The statute in question read:
    Any person who gives or administers to any woman, or advises or causes her to take or use anything, or uses any means, with intent to procure upon her a
itted anyone from administering an abortion to a woman. Menillo appealed his conviction to the Connecticut Supreme Court.

The supreme court set aside the conviction, holding, in accordance with Roe, that the statute under which Menillo was convicted violated a woman's right to obtain an abortion. More specifically, the supreme court found that the statute's use of "any person" was overly broad and did not meet the standard of narrowness set forth in Roe. Therefore, the supreme court concluded that the statute must be invalidated even as applied to nonphysicians. The United States Supreme Court granted Connecticut's petition for certiorari.

On appeal, the United States Supreme Court vacated the judgment of the Connecticut Supreme Court holding that, as applied to medically untrained individuals, the statute did not infringe upon the right of privacy secured by the Constitution. The Court distinguished the facts of Menillo from those in Roe. The Court stated that Roe protected the right to choose whether or not to terminate a pregnancy only if "medically competent personnel under conditions insuring maximum safety for the woman" perform the abortion. In addition, the Supreme Court found that Connecticut's interest in assuring the safety of the woman provided additional justification for prohibiting abortions by medically untrained individuals. In short, the Supreme Court limited its holding in Roe to situations in which a medically competent individual would perform the abortion.

This initial limitation led to several other limits on the applicability of Roe, including the limitation on Medicaid funding for abortions as set forth in Harris v. McRae. In Harris, the United States

miscarriage or abortion, unless the same is necessary to preserve her life or that of her unborn child, shall be fined not more than one thousand dollars or imprisoned in the State Prison not more than five years.

Menillo, 423 U.S. at 9 n.1. Menillo attempted to perform an abortion in a hotel room for a fee. Menillo, 362 A.2d at 962.

127. Menillo, 362 A.2d at 962.
128. Id.
129. Id. at 963; Menillo, 423 U.S. at 10.
130. Menillo, 362 A.2d at 963.
132. Id. at 9.
133. Id. at 9-11.
134. Id. at 10.
135. Id. at 10-11.
136. Id. at 11.
137. See supra notes 135-36 and accompanying text.
Supreme Court declared that federal funds to reimburse the cost of abortions under the Medicaid program could be limited, because the right of privacy set forth in Roe only articulated a right to seek an abortion, not a right to have an abortion funded by the state. In Harris, Cora McRae, a New York Medicaid recipient in the first trimester of pregnancy, along with New York City Health and Hospitals Corp. and others ("McRae"), brought an action against the Secretary of Health, Education, and Welfare in the United States District Court for the Eastern District of New York. McRae sought an injunction to prevent the enforcement of the Hyde Amendments, which prohibited reimbursement for abortions under the Medicaid program, except in special circumstances. The district court granted a preliminary injunction prohibiting enforcement, reasoning that the Hyde Amendments unconstitutionally relieved a state of the obligation to include medically necessary abortions in its funding program.

The Secretary appealed directly to the United States Supreme Court. The Supreme Court vacated the injunction in light of prior precedent. On remand, the district court allowed several plaintiffs to intervene. After a trial, which considered medical and religious views on abortion, the district court determined that all the provisions of the Hyde Amendments were unconstitutional. The district court concluded that the amendments violated the equal protection portions of the Due Process Clause of the Fifth Amendment and the Free Exercise Clause of the First Amendment.

First, the district court reasoned that when an abortion is necessary to preserve a mother's health, prohibition on Medicare funding directly conflicted with a woman's right to an abortion under the Fifth Amendment.


141. Harris, 448 U.S. at 303-04. The Hyde Amendments allow for payment of abortion costs through Medicaid, if the abortion is necessary for the life of the mother or when such procedures are needed in the case of incest or rape victims. Id. at 302.
142. Harris, 448 U.S. at 304, 307-08.
143. Id. at 304.
144. Id. (citing Beal v. Doe, 432 U.S. 438, 440, 447 (1977) (holding that the Social Security Act did not require funding of nontherapeutic abortions as a condition of participation in the medicaid program); Maher v. Roe, 432 U.S. 464, 469-80 (1997) (concluding that a state participating in Medicaid is not required by the Equal Protection Clause to pay for nontherapeutic abortions when it pays for childbirth expenses)).
145. Harris, 448 U.S. at 304.
146. Id. at 305.
147. Id.
Amendment.\textsuperscript{148} Second, the district court concluded that the equal protection guarantee was violated because the decision by Congress to fund necessary medical services, with the exception of abortion, served no legitimate government interest.\textsuperscript{149} Finally, the district court stated that a woman’s decision to obtain a medically necessary abortion might be a result of religious beliefs, and the funding restriction infringed upon the right articulated in the Free Exercise Clause of the First Amendment.\textsuperscript{150}

The Secretary applied again for a writ of certiorari to the United States Supreme Court.\textsuperscript{151} The Supreme Court refused to stay the judgment of the district court until the appeal was taken; however, the Supreme Court noted probable jurisdiction.\textsuperscript{152} On appeal, the United States Supreme Court reversed the judgment of the district court holding that the Hyde Amendments did not violate the Fifth Amendment or the Establishment Clause of the First Amendment.\textsuperscript{153} The Supreme Court reasoned that a state may make a value judgment of child birth over abortion, which was what the Hyde Amendments allowed states to do.\textsuperscript{154} Furthermore, the Supreme Court found that the appellees lacked standing to challenge the Hyde Amendments under the Free Exercise Clause of the First Amendment.\textsuperscript{155}

The Supreme Court’s opinion, written by Justice Potter Stewart, began with an interpretation of the language of the Hyde Amendments.\textsuperscript{156} After determining Medicaid did not require state funding for medically necessary abortions, the Supreme Court addressed the constitutionality of the amendments by reciting, “it is well settled, quite apart from the guarantee of equal protection, if a law ‘impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.’”\textsuperscript{157} Applying this proposition, the Supreme Court examined whether the Hyde Amendments violated any substantive constitutional rights.\textsuperscript{158}

\begin{itemize}
    \item \textsuperscript{148} Id. at 305-06 (quoting McRae v. Califano, 491 F. Supp. 630, 737 (E.D.N.Y. 1980), rev’d by Harris v. McRae, 448 U.S. 297 (1980)).
    \item \textsuperscript{149} Id. at 306.
    \item \textsuperscript{150} Id.
    \item \textsuperscript{151} Id.
    \item \textsuperscript{152} Id. When the Supreme Court notes probable jurisdiction, it demonstrates that it has the power to decide the subject matter of the case. \textsc{Black’s Law Dictionary} 853 (6th ed. 1990).
    \item \textsuperscript{153} Harris, 448 U.S. at 326-27.
    \item \textsuperscript{154} Id. at 324-25. The value judgment was permitted by the Supreme Court in \textit{Maher v. Roe}. Maher, 432 U.S. at 474.
    \item \textsuperscript{155} Harris, 448 U.S. at 320.
    \item \textsuperscript{156} Id. at 306-07.
    \item \textsuperscript{157} Id. at 312 (citation omitted).
    \item \textsuperscript{158} Id.
\end{itemize}
Addressing the Due Process Clause, the Supreme Court recognized that the "liberty" implicit within the Due Process Clause of the Fourteenth Amendment includes a woman's right to choose whether or not to terminate her pregnancy. Despite this "liberty," the Supreme Court reiterated its conclusion in Roe that a State has a legitimate interest in protecting both the mother's life and potential human life, which conflicted with a woman's right to choose. Furthermore, the Supreme Court found that a State could show favoritism for potential life over abortion by the unequal subsidy of other medical services in comparison to abortion. Finally, the Court concluded, "regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in [Roe v. Wade], it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources. . . ." The Court then addressed the issues concerning the Establishment and the Free Exercise Clauses of the First Amendment. The Supreme Court noted that the appellees lacked standing to sue on free exercise grounds because they had not asserted that they sought an abortion on religious grounds. Finally, the Supreme Court turned to the equal protection challenge to the Hyde Amendments. The Supreme Court reasoned that "equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity." The Supreme Court determined that the Hyde Amendments were not predicated on a suspect classification, such as race. Applying the rational basis test, the Supreme Court held that the Hyde Amendments were "rationally related to a legitimate governmental objective," protecting the potentiality of human life.

In conclusion, the Supreme Court found that the Hyde Amendments did not violate any substantive rights of the Constitution and held that a woman does not have the right to receive financial assistance for an abortion. Financial assistance for abortions, the
Supreme Court held, did not affect any substantive rights of a woman and was, therefore, subject to the "rational basis" test.\textsuperscript{170}

In \textit{Webster v. Reproductive Health Services},\textsuperscript{171} the United States Supreme Court again addressed the funding issue and held that a prohibition on the use of public funding for an abortion was not unconstitutional.\textsuperscript{172} In \textit{Webster}, five state-employed health professionals of Missouri and two nonprofit corporations brought a class action in the United States District Court for the Western District of Missouri challenging the constitutionality of a Missouri statute restricting abortions.\textsuperscript{173} The district court held seven provisions of the statute unconstitutional and enjoined enforcement of those provisions.\textsuperscript{174}

First, the district court reasoned that the preamble to the state abortion regulations was invalid in light of \textit{Roe}, because the medical experts trained could not determine the point at which a fetus became person.\textsuperscript{175} In addition, the district court found that because "person" as used in the Fourteenth Amendment did not include unborn feti, the preamble was unconstitutional.\textsuperscript{176} Second, the district court determined that the informed consent provision was invalid, because the statute did not allow a physician to delegate the task of informed consent to other qualified individuals.\textsuperscript{177} Third, the district court invalidated the hospital requirement, because the court found it created a "substantial interference with and impose[d] a direct burden on a wo-

\textsuperscript{170} Id. at 926. \textit{See Patricia J. Williams, Courtspeak: When is a Fundamental Right Not a Fundamental Right?, in Reflections After Casey: Women Look at the Status of Reproductive Rights in America 25, 27-28 (Center for Constitutional Rights 1992) (discussing the different standards of review for "fundamental" rights); Vicki Alexander, The Future of Reproductive Rights, in Reflections After Casey: Women Look at the Status of Reproductive Rights in America 3 (Center for Constitutional Rights 1992) (characterizing the passing of the Hyde Amendments as "one of the most devastating blows to abortion rights").

\textsuperscript{171} 492 U.S. 490 (1989).

\textsuperscript{172} \textit{Webster v. Reproductive Health Servs.}, 492 U.S. 490, 509-10 (1989).

\textsuperscript{173} \textit{Webster}, 492 U.S. at 501-02.

\textsuperscript{174} Id. at 502. The invalidated provisions included:

the preamble, § 1.205; the "informed consent" provision, which required physicians to inform the pregnant woman of certain facts before performing an abortion, § 188.039; the requirement that post-16-week abortions be performed only in hospitals, § 188.025; the mandated tests to determine viability, § 188.029; and the prohibition on the use of public funds, employees, and facilities to perform or assist nontherapeutic abortions, and the restrictions on the use of public funds, employees, and facilities to encourage or counsel women to have such abortions, §§ 188.205, 188.210, 188.215.

\textsuperscript{175} Id. at 502-03.


\textsuperscript{176} \textit{Reproductive Health Servs.}, 662 F. Supp. at 413.

\textsuperscript{177} Id. at 414 (citing Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), overruled by Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992) (holding that a statute requiring a physician to counsel the patient was invalid)).
man's decision to have an abortion” and was not supported by a reasonably related governmental interest in protecting maternal health. Fourth, the mandated tests determining viability were found unconstitutional due to Roe’s holding that the state’s interest in protecting potential human life became compelling only at the point of viability. Additionally, the provision at issue was not narrowly tailored to fit the state’s interest. Finally, the district court held that the provisions restricting public funds, facilities, and employees were sufficiently vague to render them unconstitutional.

The State appealed the judgment of the district court to the United States Court of Appeals for the Eighth Circuit, which affirmed in part, but reversed the declaration of when life begins. The Eighth Circuit reasoned that the declaration was an impermissible theory to justify abortion regulation. Furthermore, the Eighth Circuit held that the provision requiring physicians to administer viability tests was an intrusion into medical skill and judgment and, therefore, unconstitutional. The Eighth Circuit invalidated the provision which prohibited the use of public employees and facilities to perform or assist in nontherapeutic abortions, distinguishing between public funding and allowing abortions to be performed in a publicly owned hospital. The Eighth Circuit also invalidated the prohibition on the use of public dollars for ‘encouraging or counseling’ women for abortions as unconstitutionally vague. Finally, the court struck down the 16-week hospital requirement and the prohibition on the use of public facilities and employees for abortion counseling.

The State appealed to the United States Supreme Court arguing that the preamble did not impose substantive restrictions on abortions and that the Eighth Circuit erred in concluding the other provisions were unconstitutional. The Supreme Court noted probable jurisdiction to determine the constitutionality of the preamble, the prohibition on public employees and facilities to perform abortions, the prohibition of public funding of abortions, and the requirement that viability tests be performed by physicians prior to abortions.

178. Id. at 417, 419-20.
179. Id. at 420.
180. Id.
181. Id. at 423-24, 426.
182. Webster, 492 U.S. at 503.
183. Id.
184. Id.
185. Id. at 503 (citing Nyberg v. City of Virginia, 667 F.2d 754, 758 (8th Cir. 1982), appeal dismissed, 462 U.S. 1125 (1983)).
186. Id.
187. Id. at 503-04.
188. Id. at 505-06.
189. Id. at 499, 504.
The Supreme Court reversed the decision of the Eighth Circuit. Concerning the Act’s preamble, the Supreme Court reasoned that the preamble did not attempt to regulate abortion, and the State is not limited in its authority “... to make a value judgment favoring childbirth over abortion.” The Court stated that the preamble was merely an expression of the State's value judgment unreviewable by the federal courts until the preamble was applied to restrict activities in some way.

Next, the Supreme Court next addressed section 188.210, which provided that “[i]t shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother,” and section 188.215, which provided that it was “unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother.” In its analysis, the Court noted that the Due Process Clause did not confer an affirmative right to government aid, even when “life, liberty, or property interests...” are involved. The Court previously held that statutes withholding federal funds under Medicaid for reimbursement of abortion costs were valid. In maintaining this line of reasoning, the Court found no government obstacle to a woman who chooses to end her pregnancy. The Court stated that the provision merely restricted a woman in her ability to have an abortion if she chooses to use a public hospital or physician. Having held the prohibition on public funds for abortions legal, the Court reasoned that a contrary result could not be reached in regard to public employees and facilities. The Court concluded that the State need not commit public resources to facilitate abortions.

The Missouri Act also contained three informed consent provisions relating to “encouraging and counseling a woman to have an abortion not necessary to save her life.” The Supreme Court only reviewed section 188.205 concerning the use of public funds for such

190. Id. at 499.
191. Id. at 506 (quoting Maher, 432 U.S. at 474).
192. Id.
193. Id. at 507. In addition, the Court noted that “public employee” was defined by the statute as ‘any person employed by this state or any agency or political subdivision thereof.’ Id. at 507 n.7 (citing Mo. Rev. Stat. § 188.200(1) (1986)).
194. Webster, 492 U.S. at 507 (quoting DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 196 (1989)).
195. Id. at 508 (citations omitted).
196. Id. at 509.
197. Id.
198. Id. at 509-10.
199. Id. at 510.
200. Id. at 511.
“encouraging and counseling.”

In its analysis, the Court framed the issue as “whether this provision reaches primary conduct, or whether it is simply an instruction to the State’s fiscal officers not to allocate funds for abortion counseling.” The Court concluded that the issue was moot because both parties conceded to the latter interpretation, and the appellees were not affected thereby.

Looking at the provisions of the Act as a whole, the Supreme Court determined that the statutorily imposed duty of a physician to test the unborn fetus was constitutional, because the provision furthered the State’s interest in safeguarding potential human life.

The Court noted that the tests required by the provision would be performed in the second trimester and would often indicate nonviable fetuses.

In 1983, a similar analytical test was employed in *Akron v. Akron Center for Reproductive Health, Inc.* In *Akron*, the Supreme Court held several portions of a city abortion ordinance invalid. Three corporations that operated abortion clinics and a physician who performed abortions in one of those clinics brought an action in the United States District Court for the Northern District of Ohio challenging the constitutionality of the “Regulation of Abortion” ordinance passed by the City of Akron. The district court invalidated four provisions of the ordinance, including: (1) parental notice and consent; (2) requirement of disclosure of facts concerning fetal development, the woman’s pregnancy, agencies available to help women, and complications associated with abortion; and (3) disposal of fetal remains. As to the parental notice and consent requirement, the district court found that the provision lacked a method by which a

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201. *Id.*
202. *Id.* at 512.
203. *Id.*
205. *Id.*
208. *Akron*, 462 U.S. at 421, 425. Five provisions were specifically challenged:
   (i) Section 1870.03 requires that all abortions performed after the first trimester of pregnancy be performed in a hospital.
   (ii) Section 1870.05 sets forth requirements for notification of and consent by parents before abortions may be performed on unmarried minors.
   (iii) Section 1870.06 requires that the attending physician make certain statements to the patient “to insure that the consent for an abortion is truly informed consent.”
   (iv) Section 1870.07 requires a 24-hour waiting period between the time the woman signs a consent form and the time the abortion is performed.
   (v) Section 1870.16 requires that fetal remains be “disposed of in a humane and sanitary manner.”
   *Id.* at 422-24.
minor could avoid a parental veto by demonstrating that the decision was informed.\textsuperscript{210} The district court found that the informed consent requirement included medically indeterminable information, "such as the 'unborn child's' sensitivity to pain."\textsuperscript{211} The district court held constitutional the remaining provisions of the ordinance, including: (1) hospitalization for abortions following the first trimester; (2) disclosure of the particular risks of pregnancy and of the abortion technique to be used; and (3) the twenty-four hour waiting period.\textsuperscript{212} The district court concluded that the evidence set forth to invalidate the hospital requirement was not sufficiently convincing to disregard the trimester framework in \textit{Roe}.\textsuperscript{213} Finally, the district court found that the twenty-four hour waiting period increased the cost of abortion by requiring two trips to the abortion facility.\textsuperscript{214}

Both the City of Akron and the abortion clinics appealed to the United States Court of Appeals for the Sixth Circuit concerning some portion of the district court's judgment.\textsuperscript{215} The City of Akron argued that the district court erred in finding any provisions unconstitutional, whereas the abortion clinics claimed all provisions were unconstitutional.\textsuperscript{216} The Sixth Circuit affirmed in part and reversed in part, holding as constitutional the hospitalization requirement and unconstitutional the parental notification and consent, informed patient consent and fetal remains disposal provisions.\textsuperscript{217} The Sixth Circuit accepted the abortion clinic's argument that the hospitalization requirement did not have a reasonable health justification during part of the second trimester; however, the court declined to depart from the trimester framework of \textit{Roe}.\textsuperscript{218} In invalidating the parental notification and consent requirement, the Sixth Circuit followed the reasoning of the district court in that no substitution for parental consent was available to the minor.\textsuperscript{219} Finally, the Sixth Circuit refused to separate the word "humane" from "sanitary" in the disposal requirement and held that the word "humane" was impermissibly vague.\textsuperscript{220} Both parties again appealed the judgment of the Sixth Circuit to the United States Supreme Court, which granted certiorari to consider the validity of the hospitalization requirement, and the provisions for

\textsuperscript{210.} \textit{Id.} at 439.
\textsuperscript{211.} \textit{Id.} at 444 n.34.
\textsuperscript{212.} \textit{Id.} at 425.
\textsuperscript{213.} \textit{Id.} at 432.
\textsuperscript{214.} \textit{Id.} at 450.
\textsuperscript{215.} \textit{Id.} at 426.
\textsuperscript{216.} \textit{Id.}
\textsuperscript{217.} \textit{Id.} at 425.
\textsuperscript{218.} \textit{Id.} at 432.
\textsuperscript{219.} \textit{Id.} at 439.
\textsuperscript{220.} \textit{Id.} at 451.
the twenty-four hour waiting period, parental consent and notification, informed consent of the patient, and disposal of the fetal remains.\textsuperscript{221}

On appeal, the Supreme Court reversed the decision of the Sixth Circuit and held that all the provisions were invalid.\textsuperscript{222} Justice Lewis F. Powell, writing for the majority, reasoned that the decision in \textit{Roe} was based on a long recognized Fourteenth Amendment right to privacy.\textsuperscript{223} Furthermore, the Supreme Court noted that it has recognized that "because abortion is a medical procedure, that the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.'"\textsuperscript{224} In contrast, the Court found that a woman's right to an abortion, though fundamental, was not unqualified.\textsuperscript{225} The Court stated that compelling state interests must support a state regulation that seeks to restrict abortion.\textsuperscript{226} More specifically, the Court noted two compelling state interests: protecting potential human life, and safeguarding health and medical standards.\textsuperscript{227} The state may also regulate abortions in the first trimester, if the proposed restrictions do not interfere substantially with a woman's right to an abortion.\textsuperscript{228}

Applying the above principles, the Court first examined the hospital requirement, which stated that abortions performed after the first trimester must be performed in a hospital.\textsuperscript{229} The Court found "there can be no doubt that [section] 1870.03's second-trimester hospitaliza-
tion requirement places a significant obstacle in the path of women seeking an abortion.”230 A primary burden, the Court reasoned, was the additional cost to women.231 Testimony in the Sixth Circuit indicated that second-trimester abortions cost twice as much in hospitals than in clinics.232 Furthermore, the Court noted, women may be forced to travel to other facilities, adding to costs and health risks.233 Countering the City’s defense of the provision as a reasonable health regulation, the Court determined that the safety of second-trimester abortions had significantly increased since the Court’s decision in Roe.234 In conclusion, the Court found that the recent developments in abortion procedures constituted impressive evidence that abortions may be performed as safely in outpatient clinics as in full-service hospitals.235

Focusing on the parental notification and consent provision, the Supreme Court found the legal standards undisputed.236 The Court previously held that “the State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for an abortion of an unmarried minor.”237 The Court stated that the ordinance created no substitute for the parental consent and notification requirement and was unconstitutional.238

In addition to the parental consent provision, the Supreme Court addressed the provision, which required that no abortion be performed without the consent of the pregnant woman, freely given and without coercion.239 The provision also required the physician to inform the patient of the status of her pregnancy, development and date of viability of the fetus, the physical and emotional implications that may result from abortion, and the availability of agencies to assist the woman with respect to childbirth, adoption, and birth control.240 Finally, the physician was required to inform the patient of the risks

231. Id.
232. Id. at 434-35.
233. Id. at 435.
234. Id. at 435-37.
235. Id. at 437. The Supreme Court found that “a state abortion regulation is not unconstitutional simply because it does not correspond perfectly in all cases to the asserted state interest. But the lines drawn in a state regulation must be reasonable. . . .” Id. at 438.
236. Akron, 462 U.S. at 439.
237. Id. (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)). In loco parentis is defined as “in the place of the parent; instead of a parent; charged, factitiously, with a parent’s rights, duties, and responsibilities” Black’s Law Dictionary 787 (6th ed. 1990).
238. Akron, 462 U.S. at 439, 441-42.
239. Id. at 442.
240. Id.
associated with pregnancy and the abortion procedure to be employed.\footnote{241}

Previously, the Court had upheld statutes requiring a patient’s consent to be informed.\footnote{242} However, the Court reasoned, the City in this case attempted to ensure informed consent beyond the permissible limits.\footnote{243} First, rather than ensuring informed consent, the Court found that some of the required information would dissuade a woman from giving her consent.\footnote{244} Second, the requirements regarding the physical characteristics of an unborn child required speculation by the physician.\footnote{245} Third, the Court noted that the information regarding complications of abortion was a “parade of horribles” intended to portray abortion as a dangerous procedure.\footnote{246} Finally, the Court found the intrusion upon the discretion of the attending physician placed “obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.”\footnote{247} The Court stated that a woman’s consent was not necessarily uninformed if the counseling required for informed consent was given by another qualified individual apart from the attending physician.\footnote{248}

In addition, the Supreme Court held the twenty-four hour waiting period invalid, because Akron failed to demonstrate that any legitimate state interest was furthered by the waiting period.\footnote{249} The Court found no evidence of increased safety in the record due to the waiting period, nor did it find a woman’s informed decision to be effected.\footnote{250} In response to the “disposal” provision, the Supreme Court found the words “humane” and “sanitary” overly broad and, therefore, invalid.\footnote{251}

A dissenting opinion written by Justice Sandra Day O’Connor proposed that a new test for abortion restrictions be applied to determine constitutionality.\footnote{252} The dissent suggested that instead of ap-
plying strict scrutiny, the courts should employ an "undue burden" standard. Using this test, the courts would only be required to use strict scrutiny after an absolute obstacle or severe limitation on the right of abortion was found to exist. If the regulation did not produce an undue burden, then, according to Justice O'Connor, the review would consist of the rational basis test. The dissent reasoned that the "undue burden" test was not foreign in fundamental rights analysis, but rather had been applied in non-abortion cases. Finally, the dissent noted that the Supreme Court's practice regarding stare decisis did not apply as rigidly in constitutional question cases as in cases in which no constitutional question is at issue.

The "undue burden" test, articulated by Justice O'Connor, was eventually adopted by the Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey. In Casey, one physician representing himself, a class of physicians, and five abortion clinics brought an action in the United States District Court for the Eastern District of Pennsylvania to challenge amendments to the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. The district court entered a preliminary injunction prohibiting enforcement of the amendments and held that all the amendments were unconstitutional. The district court found that three serious conditions would not be covered under the amendment: inevitable abortion, preeclampsia, and premature ruptured membrane. These

253. Id. at 453 (O'Connor, J., dissenting).
254. Id. at 463-64 (O'Connor, J., dissenting).
255. Id. at 462 (O'Connor, J., dissenting).
256. Id. (O'Connor, J., dissenting) (discussing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37-38 (1973), reh'g denied, 411 U.S. 959 (1973) in which the Court held that strict scrutiny should be applied only when legislation deprives, infringes or interferes with the free exercise of a fundamental right or liberty).
257. Id. at 458 (O'Connor, J., dissenting) (citing Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962), reh'g denied, 371 U.S. 854 (1962)). The dissent continued by noting that the Supreme Court "has never felt constrained to follow precedent." Id.
258. 505 U.S. 833 (1992); Akron, 462 U.S. at 453 (O'Connor, J., dissenting); Williams, supra note 170, at 27.
259. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 844-45 (1992). The questioned amendments to the Pennsylvania Control Act were:
§ 3206, which required a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; § 3209, which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a "medical emergency" that will excuse compliance with the foregoing requirements; and §§ 3207(b), 3214(a), and 3214(f), which impose certain reporting requirements on facilities providing abortion services.

Casey, 505 U.S. at 833.
260. Id. at 845.
261. Id. at 880.
conditions, the district court noted, could jeopardize a woman's health; therefore, a prohibition on obtaining an abortion under these conditions was unconstitutional.\textsuperscript{262}

The State of Pennsylvania appealed the decision of the district court to the United States Court of Appeals for the Third Circuit.\textsuperscript{263} The Third Circuit affirmed in part and reversed in part, holding constitutional all of the amendments, with the exception of the husband notification requirement.\textsuperscript{264} The court reasoned that the amendments were "rationally related to a legitimate state interest."\textsuperscript{265} In its holding, the Third Circuit applied a variation of the "undue burden" test.\textsuperscript{266} Reversing the district court's judgment regarding the definition of "medical emergency," the Third Circuit found the term "serious risk" to include the circumstances articulated by the district court.\textsuperscript{267} The United States Supreme Court granted certiorari to consider the constitutionality of the challenged provisions.\textsuperscript{268}

Before addressing the merits of the case, the Supreme Court first reiterated the Court's precedent regarding liberty as it pertains to abortion.\textsuperscript{269} At the outset, the Supreme Court reaffirmed the essential holding of \textit{Roe}, which had three pertinent parts.\textsuperscript{270} First, the Supreme Court noted that a woman had the right "to choose to have an abortion before viability and to obtain it without undue interference from the State."\textsuperscript{271} Second, the Court confirmed a state's authority to restrict abortions after viability, except in cases in which the maternal health is questioned.\textsuperscript{272} Finally, the Court reaffirmed the notion that a state has a legitimate interest at the beginning of pregnancy in protecting a woman's health and preserving potential life.\textsuperscript{273}

\textsuperscript{264.} Casey, 947 F.2d at 687.
\textsuperscript{265.} \textit{Id.} at 726-27.
\textsuperscript{266.} Casey, 505 U.S. at 879.
\textsuperscript{267.} \textit{Id.} at 880.
\textsuperscript{268.} \textit{Id.} at 845.
\textsuperscript{269.} \textit{Id.} at 844. The Supreme Court stated, "[l]iberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages . . . that definition of liberty is still questioned." \textit{Id.}
\textsuperscript{270.} Casey, 505 U.S. at 846.
\textsuperscript{271.} \textit{Id.}
\textsuperscript{272.} \textit{Id.}
\textsuperscript{273.} \textit{Id.}
The Supreme Court then addressed the scope of the Due Process Clause of the Fourteenth Amendment. This clause, the Court found, has been applied as a substantive bar to government intrusions regardless of the procedures used. In addition, the Court noted that the Fourteenth Amendment protected a “realm of personal liberty” not specifically expressed in the language of the Constitution. The Supreme Court noted that “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” The Court concluded that the holding in Roe had not been weakened by subsequent decisions, but that instead of the rigid trimester framework of Roe, the line should be drawn at viability.

Applying the above principles, the Supreme Court affirmed the decision of the Third Circuit and upheld all disputed provisions except the husband notification requirement. The Supreme Court first addressed the statute's definition of “medical emergency”:

that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Normally, the Court noted, great deference is given to the lower federal courts in the interpretation of a state statute. Adhering to that notion, the Supreme Court deferred to the Third Circuit's interpretation of “medical emergency” and held that the definition did not impose an undue burden on a women's right to choose whether or not to terminate her pregnancy.

Next, the Supreme Court considered the informed consent requirement, which required a physician, twenty-four hours before the

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274. Id. The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state shall “deprive any person of life, liberty, or property without due process of law . . .” U.S. CONST. amend. XIV.
275. Casey, 505 U.S. at 846 (citation omitted).
277. Id. at 851.
278. Id. at 864, 870, 872. The Supreme Court stated viability is “the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.” Id. at 870.
279. Casey, 505 U.S. at 879.
280. Id. (quoting 18 PA. CONS. STAT. § 3203 (1990)).
281. Id. at 880 (citing Brockett v. Spokane Arcade, Inc., 472 U.S. 491, 499-500 (1985)).
282. Id.
procedure, to inform the patient of the nature of the procedure, the health risks of abortion and childbirth, and the gestational age of the fetus. The statute required the physician, or a qualified nonphysician, to inform the woman of available printed materials concerning: the fetus, medical assistance for childbirth, child support from the father, and adoption. The Court compared the statute at issue with the ordinance addressed in Akron and found that the information required in both cases was truthful and not misleading.

The Court held that requiring a woman to be notified of information relating to fetal development and assistance in childbirth did not create an undue burden on obtaining an abortion. Finding the patient notification provision constitutional, the court addressed the twenty-four hour requirement. Expressly overruling its holding in Akron, in which the twenty-four hour waiting period was held invalid, the Court found reasonable the notion that reflection leads to more informed and deliberate decisions. In addition, the Court found an undue burden was not factually proven.

In holding the husband notification requirement unconstitutional, the Supreme Court addressed the reality of spousal abuse in the United States. In functional marriages, the Court reasoned, spouses discuss important issues, such as procreation. In contrast, the fear of physical abuse in dysfunctional marriages would preclude many women from obtaining an abortion. The parental consent provision was held constitutional by the Supreme Court. The provision allowed for a judicial bypass of the parental consent requirement, in addition to only requiring one parent to consent to the abortion. Thus, by allowing a bypass, the Court

283. Id. at 881 (citing 18 Pa. Cons. Stat. § 3205 (1990)).
284. Id.
285. Id. at 882.
286. Id. at 883. The Court also addressed the argument that the notification requirement interferes with the constitutional right of privacy between the patient and physician. Id. In dispelling that argument, the Court noted that a physician may waive compliance by showing that dissemination of the information would have a negative effect on the mental and physical health of the patient. Id. at 883-84 (citing 18 Pa. Cons. Stat. § 3205 (1990)).
287. Casey, 505 U.S. at 884-85.
288. Id. at 885.
289. Id. at 885-86. The Court found that a “particularly burdensome” effect did not qualify as a substantive obstacle nor an undue burden. Id. at 886-87.
290. Casey, 505 U.S. at 888-92.
291. Id. at 892-93.
292. Id. at 893. The Court noted that the only way in which a woman could circumvent the spousal notification requirement was to contact the police within 90 days of an assault. Id. The exception created a substantial obstacle, because spousal sexual assault victims are very reluctant to report the abuse to the government. Id. at 893-94.
293. Casey, 505 U.S. at 899.
294. Id.
found that the requirement did not substantially interfere with a woman's right to seek an abortion. 295

Finally, the Supreme Court addressed the reporting and record keeping requirements of the statute, which required every abortion facility to file a report with the State. 296 The Court found the statute constitutional, reasoning that the collection of information was vital to medical research. 297 Although the cost of abortions may increase, the Court found no evidence in the record that the increased cost could create a substantial obstacle. 298

THE BILL OF ATTAINDER CLAUSE OF THE CONSTITUTION

In General

The Bill of Attainder Clause states that “[n]o Bill of Attainder or ex post facto Law shall be passed.” 299 More specifically, a bill of attainder is an action by a legislature which inflicts punishment on an individual or group of individuals. 300 The original prohibition against bills of attainder was enacted by the English Parliament to prohibit condemnation of a particular group. 301 Similarly, the United States, following the American Revolution, sought to prohibit bills of attainder by including the prohibition in the Constitution. 302 However, the early forms of the Constitution did little to protect against these types of state actions. 303 Members of the Philadelphia Convention felt that imposing multiple restrictions on the states would decrease the chances that the states would ratify the Constitution. 304 However, without these restrictions, state legislatures showed the inability to
resist temptations to abuse power. The Framers felt that the most
retroactive and vengeful legislation should be forbidden, and thus the
Bill of Attainder Clause was enacted. The Framers, however, de-
clined to explain this clause, and the recorded debate on the matter is
silent. The United States Supreme Court has turned to the histori-
cal underpinnings of the Clause to interpret its meaning.

Early Judicial Interpretation of the Bill of Attainder Clause

In 1867, the United States Supreme Court first addressed the
meaning of the Bill of Attainder Clause in Cummings v. Missouri,
in which the Court defined a bill of attainder as a “legislative act
which inflicts punishment without judicial trial.” In Cummings,
Reverend Cummings, a priest of the Roman Catholic Church, ques-
tioned the validity of an amendment to the Missouri Constitution
which required that a person desiring to hold an office of trust, honor,
or profit, take an “Oath of Loyalty” to the United States and the State
of Missouri. In 1865, the priest was convicted by the Circuit Court
of Pike County in the State of Missouri, because he refused to take
such an oath. The priest appealed the decision of the Circuit Court
of Pike County directly to the Supreme Court of Missouri, which af-
irmed, holding that a state may regulate its municipal affairs.

On appeal, the United States Supreme Court assessed the valid-
ity of the oath under the United States Constitution. The Supreme
Court reversed the conviction holding that the oath violated the Bill of
Attainder Clause of the United States Constitution. Justice Ste-
phan J. Field delivered the opinion of the Court. First, the Court
determined that the oath was without precedent. The Court stated
that the wording of the oath caused retrospective application which
embraced past conduct. The Supreme Court referred to English
and French oaths, which were always limited to affirmation of present

305. Id.
306. Id.
309. 71 U.S. (4 Wall.) 277 (1866).
310. Welsh, 50 BROOK. L. REV. at 77; Cummings, 71 U.S. at 323.
312. Id. at 281-82. In 1861, the priest gave a cup of coffee to a soldier who fought to
seize a camp run by Missouri and overthrow its forces. Id. at 283. For this reason, the
priest felt that he was unable to truthfully take the oath. Id. at 283-84.
313. Cummings, 71 U.S. (4 Wall.) at 293, 316.
314. Id.
315. Id. at 323-24, 332.
316. Id. at 316.
317. Id. at 318.
318. Id.
beliefs, rather than addressing specific instances of past misconduct.319

In holding for the appellant, the Supreme Court noted "... by no means... [can a state], under the form of creating a qualification or attaching a condition... inflict a punishment for a past act which was not punishable at the time it was committed."320 Furthermore, the Supreme Court found the "qualification" set forth had no relation to the fitness of one's pursuit and profession.321 The Supreme Court found that the priest's expression of sympathy for rebellion movements did not demonstrate a lack of fitness to administer the sacraments or teach the doctrines of the church.322 By passing the oath provision, the Supreme Court noted, the legislature exercised the functions of the judiciary.323 In addition, the Supreme Court found that bills of attainder generally refer to individuals by name, but could be directed at a whole class.324 In short, the Supreme Court determined that the key to a bill of attainder is the imposition of legislative punishment, a power that belongs to the judiciary.325

The Modern Application of the Bill of Attainder Clause

The courts, at this early stage, did not inquire into the importance of the deprived right, nor did the courts defer to the explanations of the legislative bodies in enacting the bills of attainder.326 However, the modern courts often look at the magnitude of the deprived right, in addition to the legislative purposes for enacting statutes.327

In United States v. Lovett,328 the United States Supreme Court held that a provision of the Urgent Deficiency Appropriation Act of 1943 violated the Bill of Attainder Clause of the United States Constitution.329 In Lovett, a member of the House of Representatives attacked thirty-nine named government employees as radical bureaucrats and affiliates of communist organizations and proposed immediate steps to remove the individuals from office.330 The chal-

319. Id.
320. Id. at 319, 332.
321. Id. at 319.
322. Id. at 319-20.
323. Id. at 323.
324. Id.
325. Id.
326. Welsh, 50 Brook. L. Rev. at 91. Despite the Clause's potential power, attempts to use bill of attainder in invalidating legislative enactments amount to only twelve successes. Id. at 77-78 (citations omitted). The Bill of Attainder Clause can be used to invalidate civil statutes. Lovett, 328 U.S. at 305, 315.
327. See infra notes 330-407 and accompanying text.
328. 328 U.S. 303 (1946).
330. Lovett, 328 U.S. at 308-09.
lengers in this case were among the named employees attacked as known radicals and affiliates of communist organizations. The challengers were among the named employees attacked as known radicals and affiliates of communist organizations. Robert Morss Lovett, Goodwin B. Watson, and William E. Dodd, Jr. brought an action in the Court of Claims against the United States Government to recover unpaid compensation, challenging the Urgent Deficiency Appropriation Act of 1943. The questioned provision declared that after November 15, 1943, no compensation would be paid to the plaintiffs except for services as jurors or in the armed forces, unless, prior to November 15, 1943, they were appointed by the President with the approval of the Senate. The Court of Claims found for the plaintiffs, holding that the questioned provision did not terminate the plaintiffs' employment. Therefore, the court reasoned that the plaintiffs were justified in bringing an action for compensation. The United States appealed the Court of Claims judgment to the United States Supreme Court, which granted certiorari to determine the constitutionality of the questioned provision.

On appeal, the Supreme Court affirmed the decision of the Court of Claims, holding that the questioned provision was a bill of attainder violating the United States Constitution. Justice Hugo L. Black, writing for the majority, reasoned that the effect of the provision was to punish the named individuals for "subversive" activities. The Court first looked at the background of the statute, which indicated that the motivation for the Act stemmed from the accusations of one House member, which lead to "charges" against the challengers. In addition, the Supreme Court noted that the Congressional Record showed that many debate participants agreed

331. Id. at 309.
332. Id. at 305-06 & n.1. The challengers were all employed with the government for several years before the passage of the Act. Id. at 304.
333. Lovett, 328 U.S. at 305. Section 304 of the Urgent Deficiency Appropriation Act provided:

No part of any appropriation, allocation or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services of, Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate... Id. at 307 n.1.
334. Lovett, 328 U.S. at 307.
335. Id. The Supreme Court noted that others on the Court of Claims thought the provision was unconstitutional as a violation of either the Bill of Attainder Clause, denial of due process, or encroachment of exclusive executive authority. Id.
337. Id. at 318.
338. Id. at 304, 310-11, 316.
339. Id. at 308.
that the "charges" against the named individuals were serious.\textsuperscript{340} Eventually, the Appropriations Committee was responsible for holding hearings to determine whether those charged were actually guilty of "subversive" beliefs and associations.\textsuperscript{341}

In light of these facts, the Supreme Court dismissed the argument that the questioned provision was an appropriation measure under the complete control of Congress.\textsuperscript{342} Rather, the Supreme Court held that the purpose of the section was to permanently bar the respondents from government service.\textsuperscript{343} The Supreme Court reasoned that the section was aimed at preventing three individuals, whose reputation and potential to earn a living was stigmatized by the section, from challenging the enactment.\textsuperscript{344} The Court found that the provision constituted an impermissible bill of attainder that inflicted punishment without judicial trial.\textsuperscript{345}

The Supreme Court addressed a similar compensation conflict in \textit{Garner v. Board of Public Works of Los Angeles}.\textsuperscript{346} In \textit{Garner}, the United States Supreme Court upheld a municipal charter barring from municipal employment persons who advocated or belonged to a group advocating the overthrow of the government, because it applied prospectively.\textsuperscript{347} Ray H. Garner, along with other municipal employees who were discharged after failing to comply with the ordinance, brought an action in the Superior Court of Los Angeles County seeking unpaid salaries and reinstatement as municipal employees.\textsuperscript{348} The superior court denied relief, holding the ordinance was valid in light of loyalty concerns of government employment.\textsuperscript{349}

The former municipal employees appealed the superior court's judgment to the District Court of Appeals of California, Second District.\textsuperscript{350} The district court affirmed the judgment, reasoning that the Constitution seeks to preserve our government, not to serve as a protective screen for those who intend to destroy it, while claiming its privileges.\textsuperscript{351} Applying this statement, the district court found that

\begin{itemize}
\item 340. \textit{Id.}
\item 341. \textit{Id.} at 310-11.
\item 342. \textit{Id.} at 313.
\item 343. \textit{Id.} at 313-14.
\item 344. \textit{Id.} at 314.
\item 345. \textit{Id.} at 315.
\item 349. Garner, 220 P.2d at 959, 961.
\item 350. \textit{Id.} at 959.
\item 351. \textit{Id.} at 960 (citations omitted).
\end{itemize}
loyalty is necessary between a state and its servants to ensure governmental service.\textsuperscript{352} The United States Supreme Court granted certiorari to determine the constitutionality of the Los Angeles ordinance in light of the Bill of Attainder Clause.\textsuperscript{353}

On appeal, the Supreme Court held that a city could require its employees to file an affidavit to disclose their previous or current membership in the Communist Party and require the employees to take an oath that they had not in the past five years advocated, or belonged to a group which advocated, the overthrow of the government.\textsuperscript{354} Justice Tom C. Clark, writing for the majority, reasoned that the affidavit and oath were permissible requirements, because they may prove the fitness and suitability of employees for public service.\textsuperscript{355} The Supreme Court assumed the validity of the ordinance operating prospectively.\textsuperscript{356} Furthermore, the Supreme Court reasoned that regulating the political activity of employees protected the competency and integrity of the services provided.\textsuperscript{357} Finally, the Supreme Court held that the ordinance provided for general regulation and standards of qualification for employment, not punishment.\textsuperscript{358} Distinguishing \textit{Lovett}, the Court held that the provisions of the present ordinance were unlike those found unconstitutional in \textit{Lovett}.\textsuperscript{359} In \textit{Garner}, the ordinance did not apply retroactively because a similar ordinance was in place prior to the questioned ordinance, whereas in \textit{Lovett}, the Act prohibited any further payment to named employees.\textsuperscript{360} In other words, the ordinance in \textit{Garner} did not impose any burdens of which the challengers had no prior notice.\textsuperscript{361}

Shortly after \textit{Garner}, the Supreme Court again addressed legislative attempts to ascertain communist sympathizers in \textit{United States v. Brown}.\textsuperscript{362} In \textit{Brown}, the United States Supreme Court invalidated a statute aimed at forbidding employment of communist party members by invoking the Bill of Attainder Clause.\textsuperscript{363} \textit{Brown} involved an open member of the Communist Party who was convicted in the United States District Court for the Northern District of California of violating section 504 of Title 29 of the United States Code by serving as an

\begin{itemize}
\item \textsuperscript{352} \textit{Id.}
\item \textsuperscript{353} \textit{Garner}, 341 U.S. at 719-20.
\item \textsuperscript{354} \textit{Id.} at 718-21.
\item \textsuperscript{355} \textit{Id.} at 720-21.
\item \textsuperscript{356} \textit{Id.} at 720.
\item \textsuperscript{357} \textit{Id.} at 721.
\item \textsuperscript{358} \textit{Id.} at 722.
\item \textsuperscript{359} \textit{Id.} at 723.
\item \textsuperscript{360} \textit{Id.} at 720, 723.
\item \textsuperscript{361} \textit{Id.} at 723.
\item \textsuperscript{362} 381 U.S. 437, 438-39 & n.1 (1965).
\end{itemize}
executive board member while he was a member of the Communist Party.\textsuperscript{364} Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 expressly criminalized serving as an officer or employee of a labor union while a member of the Communist Party.\textsuperscript{365} Brown was convicted under this statute and sentenced to six months in prison.\textsuperscript{366}

Brown appealed the conviction to the United States Court of Appeals for the Ninth Circuit.\textsuperscript{367} The Ninth Circuit reversed and remanded, instructing the district court to set aside Brown's conviction.\textsuperscript{368} The Ninth Circuit reasoned that section 504 violated the First and Fifth Amendments to the Constitution, because the relationship between the status or conduct punished and the evil intended to be prevented lacked a sufficient connection.\textsuperscript{369} The United States Supreme Court granted certiorari, on the request of the United States, to determine the constitutionality of section 504.\textsuperscript{370}

The United States Supreme Court, in an opinion written by Chief Justice Earl Warren, affirmed the judgment of the Ninth Circuit, but on other grounds, holding that section 504 violated the Bill of Attainder Clause.\textsuperscript{371} The Supreme Court reasoned that the Bill of Attainder Clause was adopted by the Constitutional Convention as a separation of powers safeguard against a legislature's exercise of judicial functions.\textsuperscript{372} In recapping the historical nature of bills of attainder, the Court quoted Alexander Hamilton:

> Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine

\textsuperscript{364} Brown, 381 U.S. at 440.
\textsuperscript{365} Id. at 438. Section 504 stated:

> [n]o person who is or has been a member of the Communist Party . . . shall serve . . . as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . . during or for five years after the termination of his membership in the Communist Party . . . [a]ny person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

\textsuperscript{366} Brown, 381 U.S. at 440. No evidence presented at trial proved that Brown was at any time advocating or suggesting unlawful activity by the union, or proposing a political strike. Id.
\textsuperscript{367} Brown v. United States, 334 F.2d 488, 489 (9th Cir. 1964), aff'd, 381 U.S. 437 (1965).
\textsuperscript{368} Brown, 381 U.S. at 440.
\textsuperscript{369} Brown, 334 F.2d at 496.
\textsuperscript{370} Brown, 381 U.S. at 440-62.
\textsuperscript{371} Id. at 438, 440.
\textsuperscript{372} Id. at 442.
of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy. . . . The name of liberty applied to such a government, would be a mockery of common sense.\textsuperscript{373}

In addition, the Court found that the Bill of Attainder Clause was not only implemented as a maxim of fractionalized power, but the Clause was also a reflection of the Framers' belief that the legislature was not a suitable body to levy punishment on specific individuals.\textsuperscript{374}

Applying the historical ramifications, the Supreme Court found that section 504 left no judicial determination of the commission of certain acts, but rather forbids one who may possess the proscribed characteristics from holding office without criminal liability resulting therefrom.\textsuperscript{375} The Supreme Court determined that the only choice remaining for such an individual is either to decline a leadership position or incur criminal liability.\textsuperscript{376} The Supreme Court found that Congress's purpose for enacting the statute was to disallow persons guilty of subversive associations and acts to fill positions that may affect interstate commerce.\textsuperscript{377} Congress, the Supreme Court concluded, had exceeded its authority to regulate interstate commerce in this instance.\textsuperscript{378} The Supreme Court determined that "[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution . . . ."\textsuperscript{379} Finally, the Court reasoned that bills of attainder are not restricted to retribution, but rather can apply to retributive, rehabilitative, deterrent, and preventive attempts to punish.\textsuperscript{380}

In conclusion, the Supreme Court in \textit{Brown} relied on historical justifications for the Bill of Attainder Clause in determining the constitutionality of section 504.\textsuperscript{381} In holding section 504 unconstitutional, the Supreme Court concluded that legislative acts which apply

\textsuperscript{373} \textit{Id.} at 444 (citing \textsc{John C. Hamilton, History of the Republic of the United States} 34 (1859)).

\textsuperscript{374} \textit{Id.} at 445.

\textsuperscript{375} \textit{Id.} at 450.

\textsuperscript{376} \textit{Id.} at 452.

\textsuperscript{377} \textit{Id.} at 460.

\textsuperscript{378} \textit{Id.} at 449-50.

\textsuperscript{379} \textit{Id.} at 448-49 (Lovett, 328 U.S. at 315-16).

\textsuperscript{380} \textit{Id.} at 458.

\textsuperscript{381} \textit{Id.} at 441.
to either a named individual or a class of members are unconstitutional regardless of the legislative form. The decision in Brown was an attempt to clarify the bill of attainder doctrine by distinguishing between general applicability and specificity in legislative regulation.

The Current Tests

In Nixon v. Administrator General Services, the United States Supreme Court set forth three tests for finding a violation of the Bill of Attainder Clause. In Nixon, former President Richard M. Nixon filed an action in the United States District Court for the District of Columbia challenging the constitutionality of the Presidential Recordings and Materials Preservation Act ("Act"). The Act required the Administrator of General Services . . . to take custody of the Presidential papers and tape recordings of . . . former President Richard M. Nixon and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to Nixon those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained.

The district court limited its review to the challenges concerning facial unconstitutionality of the Act and determined that the public access provision was not yet ripe. The district court held that the challenges were without merit and dismissed the complaint, reasoning that no evidence existed to show that the Presidential Recordings and Materials Preservation Act sought to impose any punishment on the former President. Nixon appealed directly to the United States Supreme Court, which noted jurisdiction and granted certiorari to determine the constitutionality of the Act.

The United States Supreme Court affirmed the district court's decision and held that the Act did not violate: (1) the separation of powers doctrine, (2) the Presidential privilege doctrines, (3) the appellant's privacy interests, (4) the appellant's First Amendment

382. Id. at 448.
383. Welsh, 50 Brook. L. Rev. at 98.
387. Id. at 429.
388. Id. at 430.
Nixon argued that Congress had passed the statute on the premise that Nixon was an "unreliable custodian" of his own documents, engaged in "misconduct," and was worthy of blame. The Supreme Court stated that although the Act referred to Nixon by name, it was not an automatic offense to the Bill of Attainder Clause. Addressing the question of legislative punishment, the Court inquired "... whether Congress, by lodging appellant's materials in the custody of the General Services Administration pending their screening by Government archivists and the promulgation of further regulations, 'inflict[ed] punishment' within the constitutional proscription against bills of attainder." The Supreme Court's first conclusion was that Nixon was part of a legitimate class, in that although at the time the statute was enacted he was the only one affected, both his predecessors and successors would also be governed.

Next, the Supreme Court addressed whether the Act could fairly be characterized as punishment levied against Nixon. The Court set forth three distinct tests, requiring an examination of historical sanctions using the "historical test," legislative intent using the "functional test," and legislative motivation using the "motivational test." These tests led the Supreme Court to hold that the Presidential Recordings and Materials Preservation Act did not constitute a bill of attainder as applied to the former President Nixon.

The Supreme Court first applied the historical test, noting that sanctions historically banned by the Bill of Attainder Clause include: imprisonment, banishment, the states' punitive confiscation of property, and barring designated groups or individuals from participating in specified employments or vocations. The Supreme Court found that Nixon did not suffer any of these deprivations, and thus did not satisfy the "historical test."

391. Id. at 430, 441, 455, 465-67, 471-72.
392. Id. at 429, 468. Justice Brennan also addressed other arguments the Court used in reaching its conclusion. Id. at 439-68.
394. Id. at 471-72.
395. Id. at 472-73.
396. Id. at 472.
397. Id. at 473.
398. Id. at 475, 478, 483-84.
400. Id. at 474. Though the confiscation of property is normally deemed a bill of pains and penalties, the Supreme Court distinguished the statute in Nixon, because it included a provision of 'just compensation.' Id. at 474-75.
The Supreme Court next looked at the legislative intent, applying the "functional test." The Court concluded that Congress has a historical interest in preserving records and monuments of historical value, as well as a responsibility to see that fair administration of a criminal trial is preserved. Nixon's agreement with Sampson, which contemplated the destruction of the documents, validated Congress' assertion of those interests.

In applying the "motivational test," the Court concluded that no expression of the intent to punish or penalize Nixon was found in the record. In addition, the Court considered whether less burdensome alternatives existed to reach the same objective. On this matter, the Court deferred to the legislative judgment that the alternative had its own difficulties.

ANALYSIS

In Mazurek v. Armstrong, the United States Supreme Court held that a Montana statute, which restricted the performance of abortions to licensed physicians, did not pose a substantial obstacle to a woman seeking an abortion. The Supreme Court rejected the Ninth Circuit's decision that the legislature intended to create a substantial obstacle to a woman seeking an abortion. In addition, the Supreme Court reiterated its opinion in other cases, which gave great deference to a state's decision limiting the performance of certain tasks to licensed professionals. Finally, the Supreme Court dismissed Armstrong's bill of attainder argument without analysis. An examination of the current trend in abortion regulation indicates that the Supreme Court was correct in finding no "undue burden" on a woman's right to terminate her pregnancy. However, the Supreme Court

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402. Id. at 475-78. The Supreme Court inquired whether, in light of the severity of punishment imposed, the statute can be said to further non-punitive purposes. Id. at 475. The Court stated "[w]here such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." Id. at 476.
404. Id. at 476-77.
405. Id. at 478.
406. Id. at 482.
407. Id. at 483.
408. 117 S. Ct. 1865 (1997).
410. Mazurek, 117 S. Ct. at 1867.
411. Id. (citing Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 885 (1992)).
412. Id.
413. See infra notes 419-436 and accompanying text.
Court's failure to find a bill of attainder against the physician assistant, Susan Cahill, disregarded precedent on that issue.\textsuperscript{414}

The United States Supreme Court's holding invites two points of criticism.\textsuperscript{415} First, while the Supreme Court correctly followed the current analysis of abortion regulations using the "undue burden" test, the decision in \textit{Mazurek} continues the gradual deterioration of the holding in \textit{Roe v. Wade},\textsuperscript{416} as the Supreme Court demonstrates disfavor toward the right to obtain an abortion.\textsuperscript{417} Second, the Supreme Court erred by failing to address Armstrong's bill of attainder argument, because the facts of \textit{Mazurek} create an overwhelming basis for bill of attainder invalidation.\textsuperscript{418}

\textbf{THE CURRENT TREND IN ABORTION REGULATIONS}

The United States Supreme Court correctly applied the current trend in abortion regulation decisions in \textit{Mazurek v. Armstrong}.\textsuperscript{419} Prior to \textit{Roe}, several states restricted abortion.\textsuperscript{420} Yet in \textit{Roe}, the Court recognized that a woman's right to decide whether to terminate her pregnancy was a fundamental right found within the "right of privacy" of the Ninth and Fourteenth Amendments.\textsuperscript{421} The Court, in subsequent decisions, has limited a woman's right to an abortion in light of state interests and continued that trend in \textit{Mazurek}.\textsuperscript{422}

In \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{423} the Court formulated the workable "undue burden" test.\textsuperscript{424} In this test the undue burden is balanced with the legislature's purpose for enacting the restriction on abortion.\textsuperscript{425} Generally, if the legislature articulates either an interest in protecting a woman's health, or an

\begin{itemize}
  \item 414. See infra notes 473-519 and accompanying text.
  \item 415. See infra notes 416-418 and accompanying text.
  \item 418. See infra notes 517-519 and accompanying text; Mazurek, 117 S. Ct. at 1870 (Stevens, J., dissenting).
  \item 419. See infra notes 437-472 and accompanying text.
  \item 423. 505 U.S. 833 (1992).
  \item 425. Casey, 505 U.S. at 878.
\end{itemize}
interest in protecting the potentiality of human life, the Court will find the statute is constitutional within the confines of the “right of privacy” articulated in *Roe*.426

In *Mazurek*, the Supreme Court held that the Montana statute did not place an impermissible burden on a woman’s right to an abortion.427 The Supreme Court’s first level of inquiry involved whether the Montana “physicians only” statute created a substantial obstacle to a woman seeking an abortion.428 The very operation of the statute only prohibited one person in the state of Montana from practicing abortions.429 As a consequence, no woman would be required to travel to another facility.430 Therefore, no undue burden was placed on a woman seeking an abortion.431

The Supreme Court next analyzed the purpose for which Montana enacted the statute.432 Citing both *Roe* and *Connecticut v. Menillo*,433 the Court found that states are given broad latitude in deciding the activities which may only be performed by a licensed physician, regardless if others may be capable of performing the activities in question equally well.434 The Supreme Court in *Menillo* stated that the right articulated in *Roe* was the right to obtain an abortion from a physician, not the right to obtain an abortion from anyone.435 Following these principles, the Supreme Court correctly found that Montana’s “physicians only” requirement neither created an undue burden nor was the purpose for the statute’s enactment impermissible under precedent.436

**THE DETERIORATION OF THE RIGHT OF ABORTION**

Although the United States Supreme Court arguably reached a correct decision in *Mazurek* concerning the abortion issue, the holding demonstrates the gradual deterioration of *Roe*.437 The Supreme Court

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426. *Id.* at 875-76, 878 (citation omitted).
428. *Id.* at 1867.
429. *Id.*
430. *Id.*
431. *Id.*; *Casey*, 505 U.S. at 847.
437. *Mazurek*, 117 S. Ct. at 1869 (Stevens, J., dissenting); Allegrucci, 7 St. John’s J. Legal Comment. at 326; Patricia J. Williams, Courtspeak: When is a Fundamental Right Not a Fundamental Right?, in Reflections After *Casey*: Women Look at the Status of Reproductive Rights in America, 25, 28 (Center for Constitutional Rights 1992); McClard, 30 Hous. L. Rev. at 2042.
no longer treats abortion as a fundamental right. Following the historical progression of abortion decisions, the deterioration of the Supreme Court's holding in *Roe* becomes apparent.

A notable case following *Roe* was *Menillo*. In *Menillo*, an integral part of the Supreme Court's analysis was that *Roe* stood for a right to obtain an abortion from medically competent personnel, not just any person. However, the Supreme Court in *Roe* never made this distinction. The Supreme Court in *Menillo* failed to abide by the requirement stated in *Roe* that abortion restrictions be narrowly drawn. Instead the Supreme Court used an “as applied” analysis to uphold a statute proscribing “anyone” from performing an abortion, because the challenger was medically untrained. Thus, the first deterioration of *Roe* was evidenced by both the application of an “as applied” analysis and the failure of the Supreme Court to comport with the narrowness requirement set forth in *Roe*.

*Harris v. McRae* also represents a deterioration of the holding in *Roe*. The Supreme Court in *Harris* declared that a woman has a right to seek an abortion, but the state is not required to provide funding for that abortion. According to *Roe*, a state may interfere with the woman's right to an abortion under two circumstances: (1) to protect the health of the mother after the first trimester, and (2) to protect the potentiality of human life after viability. Despite this holding, the Supreme Court in *Harris* allowed a complete restriction of abortion funding during any point of the pregnancy. In practical terms, the restriction on funding bars indigent women from exercising their right to choose abortion. The Supreme Court, in essence, gave the states the power, through funding, to effectively diminish the fundamental right to abortion.

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438. Copelon, supra note 422, at 10.
439. See infra notes 440-472 and accompanying text.
440. See supra notes 124-137 and accompanying text.
442. *Id.* Cf. *Roe*, 410 U.S. at 113 (noting that Roe sought an abortion from a licensed physician but not requiring that fact be present).
445. See supra notes 441-444 and accompanying text.
446. 448 U.S. 297 (1980),reh'g denied by Harris v. McRae, 448 U.S. 917 (1980).
447. *See infra notes 449-452 and accompanying text.*
450. *Harris*, 448 U.S. at 301-02, 316 (emphasis added).
452. Allegrucci, 7 St. John's J. Legal Comment. at 302.
In a similar case, *Webster v. Reproductive Health Services*, the Supreme Court struck down an attempt to invalidate a statute which prohibited the use of public facilities or employees for abortions. First, the Supreme Court articulated the position that a state may make a value judgment which favored childbirth over abortion. However, in *Roe*, the Supreme Court determined that the value judgments may not be used to override a women’s right. The Supreme Court in *Webster* also maintained that the provision only restricted “a woman’s ability to obtain an abortion to the extent she chooses a public facility.” This conclusion was unsupported by evidence in the record. The Supreme Court did not examine the costs involved between public and private facilities, nor did they address the state’s reason for restricting abortions in public facilities.

Although the Supreme Court’s holding in *Webster* did not expressly overrule *Roe*, the opinion invited the states to experiment with abortion restrictions. The decision also showed the Supreme Court’s reluctance to approve the trimester guidelines constructed in *Roe*. Using the substantive due process analysis as a vehicle for protecting family related matters, the Supreme Court demonstrated the lack of fundamentality of abortion. The abortion right, as analyzed by the Supreme Court, now involves the use of the rational basis test.

The “undue burden” test of *Casey*, first articulated by Justice O’Connor in *Akron*, is the most obvious “cut into women’s access to abortion.” If no prohibition or severe limitation on abortion exists, the court employs a rational basis test to determine whether the state restriction serves a legitimate government interest. In addition, the Supreme Court determined the trimester framework in *Roe* was not a workable test. The new test decreases the circumstances

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458. *Id.* at 539-41 n.1 (Blackmun, J., dissenting).
459. *See id.* at 509-10 (discussing the restriction on public facilities and employees but failing to address the state’s reason for the restriction).
463. *Id.* at 278-79.
465. McClard, 30 Hous. L. Rev. at 2047.
466. *Casey*, 505 U.S. at 872.
under which abortion regulations are invalidated.\textsuperscript{467} The Supreme Court in \textit{Casey} essentially raised the proof required from a significant interference to an absolute prohibition or severe limitation.\textsuperscript{468} In short, the majority in \textit{Casey} essentially overruled \textit{Roe v. Wade}, even as it explicitly affirmed that holding.\textsuperscript{469}

In \textit{Mazurek}, the Supreme Court followed the current trend toward decreasing the importance of the right to abortion.\textsuperscript{470} The Supreme Court articulated a new circumstance under which the state may regulate abortion: the restriction of the practice of abortions to licensed physicians.\textsuperscript{471} As a result, the holding in \textit{Roe}, which required a compelling state interest, has been negated by a state's interest in regulating its professionals.\textsuperscript{472}

THE SUPREME COURT'S FAILURE TO ADDRESS THE BILL OF ATTAINER

While the Supreme Court followed precedent in deciding the abortion issue, the Supreme Court erred in \textit{Mazurek} by failing to address Armstrong's bill of attainder challenge.\textsuperscript{473} In analyzing a bill of attainder argument, the Court employs three distinct tests.\textsuperscript{474} The first test inquires whether the requirement is historically regarded as punishment.\textsuperscript{475} The second test, the "functional test," requires the court to determine whether the legislative record shows an intent to punish.\textsuperscript{476} Finally, the third test, the "motivational test," assesses whether the requirement, in light of the legislative history, demonstrates a nonpunitive purpose.\textsuperscript{477}

In \textit{Cummings v. Missouri},\textsuperscript{478} the Supreme Court found that bills of attainder generally refer to individuals by name, but could be directed at a whole class.\textsuperscript{479} In addition, the Supreme Court in \textit{United States v. Lovett}\textsuperscript{480} held "legislative acts . . . that apply either to named individuals or to easily ascertaining members of a group in such a

\textsuperscript{467} McClard, 30 Hous. L. REV. at 2042.
\textsuperscript{468} Id. at 2045-49.
\textsuperscript{469} COPLEON, supra note 422, at 10.
\textsuperscript{470} Mazurek, 117 S.Ct. at 1867; see supra notes 437-469 and accompanying text.
\textsuperscript{471} Mazurek, 117 S. Ct. at 1867. Cf. Casey, 505 U.S. at 885 (reasoning that the provision at issue which required a physician to provide information about the procedure was a reasonable means to ensure informed consent).
\textsuperscript{472} Mazurek, 117 S. Ct. at 1867; Roe, 410 U.S. at 155.
\textsuperscript{473} See supra notes 419-436 and accompanying text; see infra notes 474-519 and accompanying text.
\textsuperscript{475} Nixon, 433 U.S. at 473.
\textsuperscript{476} Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 282 (1866).
\textsuperscript{477} Id. at 475-76.
\textsuperscript{478} 71 U.S. (4 Wall.) 277 (1866).
\textsuperscript{479} Cummings, 71 U.S. (4 Wall.) at 323.
\textsuperscript{480} 328 U.S. 303 (1946).
way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.\footnote{United States v. Lovett, 328 U.S. 303, 315-16 (1946).} This concept was further refined in Nixon v. Administrator of General Services,\footnote{433 U.S. 425 (1977).} in which the Supreme Court concluded that the inclusion of a name or class of persons in a statute did not automatically violate the Bill of Attainder Clause.\footnote{Nixon, 433 U.S. at 471-72.}

In Mazurek, the Montana legislature, in passing the amendments to the Montana Abortion Control Act, mentioned Susan Cahill several times by name.\footnote{Brief for Respondent at 6-7, Mazurek v. Armstrong, 117 S. Ct. 1865 (1997) (No. 96-1104).} Although one may argue that no violation existed because Cahill's name did not appear in the actual statute, the mention of Cahill in the legislative history should have at least triggered an analysis of the bill of attainder argument.\footnote{Mazurek, 117 S. Ct. at 1869-70 (Stevens, J., dissenting).}

Applying the first test, the “historical test,” involves determining whether, historically, the requirement is regarded as punishment.\footnote{Nixon, 433 U.S. at 473.} The historical bills of attainder included: imprisonment, banishment, the state’s punitive confiscation of property, and barring designated individuals from participating in specified vocations or employments.\footnote{Id. at 474.} Historically, a deprivation of the ability to practice one’s profession has been deemed punishment.\footnote{Cummings, 71 U.S. (4 Wall.) at 320.} The amendments to the Montana Abortion Control Act deprived Cahill of her profession which she practiced for eighteen years prior to the amendments.\footnote{Brief for Respondent at 7, Mazurek (No. 96-1104).} Furthermore, the deprivation acted retrospectively, violating the first test.\footnote{See Mazurek, 117 S. Ct. at 1867 (applying the statute to a physician assistant present performing abortions); MONT. CODE ANN. § 50-20-109(1)(a) (1997) (proscribing the performance of abortions by physician assistants).}

Applying the second test, the “functional test,” a court determines whether the legislative history surrounding the statute demonstrates a legislative intent to punish for past conduct.\footnote{Nixon, 433 U.S. at 473-74.} Case law interpreting this test requires a showing that the “legislative act . . . inflicts punishment without a judicial trial.”\footnote{Cummings, 71 U.S. (4 Wall.) at 319-20.} In Cummings, the Supreme Court noted that a statute which has the overtones of a “qualification” for office may be an impermissible bill of attainder when the “qualification” has no relation to the ability to practice one’s profession.\footnote{Id. at 319-20.} In
a more modern application, the circumstances surrounding Lovett, Garner v. Board of Public Works of City of Los Angeles, and United States v. Brown showed a fear of Communism and activities subversive to government. In both Lovett and Garner, named individuals were targeted for subversive activities or affiliations. However, the statute in Lovett applied retroactively leading to a finding of unconstitutionality, whereas in Garner, there was no retroactive application which lead to a finding of constitutionality. In addition in Brown, although the individuals were not named, the legislative history showed the intent to keep persons whom Congress felt were subversive out of positions that may effect interstate commerce.

Applying these principles to the facts of Mazurek, the legislative intent to punish Cahill is apparent. First, at the legislative hearings, a flyer was distributed among legislators accusing Susan Cahill of practicing illegal abortions. Cahill was the only physician assistant in the state of Montana practicing abortions. Prior to the enactment of the “physicians only” licensing scheme, Montana trained and licensed Cahill to practice abortions under the supervision of a licensed physician. These facts show that Cahill, not unlike the persons in Lovett and Garner, was targeted by the legislature. Furthermore, the other two provisions of the amendments had, before their enactment, been found unconstitutional by the Supreme Court of the United States. The Montana legislature sought to restrict physician assistants, and more specifically Cahill, who was named in the legislative history and was the only physician assistant in Montana.

495. 381 U.S. 437 (1965).
496. See Lovett, 328 U.S. at 310-11 (discussing a congressional statute which operated to seek out government employees committing subversive acts or associated with subversive groups and remove them from further employment); Garner v. Board of Pub. Works of Los Angeles, 341 U.S. 716, 718-19 (1951), reh'g denied, 342 U.S. 843 (1951) (discussing an ordinance requiring city employees to file an affidavit and take and oath indicating the employee is not a member of the communist party); United States v. Brown, 381 U.S. 437, 460 (1965) (finding Congress' purpose for enacting the statute was to prevent persons guilty of subversive associations and acts from filling positions affecting interstate commerce).
497. Lovett, 328 U.S. at 305 n.1; Garner, 341 U.S. at 719.
500. See supra notes 501-519 and accompanying text; Mazurek, 117 S.Ct. at 1869-70 (Stevens, J., dissenting).
501. Brief for Respondent at 6, Mazurek (No. 96-1104).
502. Mazurek, 117 S. Ct. at 1869 (Stevens, J., dissenting).
503. Brief for Respondent at 3-4, Mazurek (No. 96-1104).
504. Mazurek, 117 S. Ct. at 1869-70 (Stevens, J., dissenting); Lovett, 328 U.S. at 305 n.1; Garner, 341 U.S. at 719.
505. Mazurek, 117 S. Ct. at 1870 (Stevens, J., dissenting).
practicing abortions. These facts, together with the flyer passed at the legislative hearings, show legislative intent to punish. In the abortion discussion, the Supreme Court addressed the concern that Cahill was the only individual targeted by the statute, but the Court failed to address this same concern in light of the Bill of Attainder Clause.

The third test, the "motivational test," requires the court to determine whether a legitimate state objective exists for enacting the statute and whether a less burdensome alternative exists. The Montana legislature's interest was to protect both the health of the mother and the potentiality of human life. Although these interests are legitimate, a less burdensome alternative of prospective application exists. Retroactive application is disfavored in the law. However, this statute was held constitutional, because a state has a right to prescribe the tasks that may be performed only by licensed physicians. A less intrusive measure would be to apply the "physicians only" requirement to future physician assistants, grandfathering Cahill. Although the state may argue this would defeat its interest in protecting the health of the mother, Cahill does not pose an increased risk over a physician. Cahill is an experienced professional and is required, by law, to be supervised by a practicing physician.

In conclusion, the facts of Mazurek present a likely bill of attainder violation. Not only do the circumstances surrounding the enactment of the "physician only" requirement show an intent to punish, but they also represent a historical form of punishment, deprivation of one's profession. Although the Supreme Court may have deter-

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506. Id. at 1869-70. (Stevens, J., dissenting).
507. Id. (Stevens, J., dissenting).
508. Id. at 1870; Brief for Respondent at 6, Mazurek (No. 96-1104).
509. Nixon, 433 U.S. at 475, 482.
511. Armstrong, 906 F. Supp. at 569; see infra notes 513-16 and accompanying text.
512. See Garner, 341 U.S. at 720-21, 723-24 (distinguishing the unconstitutional retrospective statute in Lovett from the constitutional prospective ordinance in Garner).
513. Mazurek, 117 S. Ct. at 1867.
514. Compare Mazurek, 117 S. Ct. at 1870 (Stevens, J., dissenting) (proscribing any physician assistant, including Cahill, from performing abortions), with Garner, 341 U.S. at 720-21 (adding to an existing statute, which required disclosure of membership in the Communist Party, by requiring an affidavit and oath disclaiming that membership).
515. Cf. Brief for Respondent at 4, Mazurek (No. 96-1104) (stating that physician assistants perform functions which pose a greater health risks than abortions).
516. Brief for Respondent at 4, Mazurek (No. 96-1104).
517. Mazurek, 117 S. Ct. at 1869-70 (Stevens, J., dissenting).
518. See supra notes 486-490 and accompanying text.
mined no bill of attainder existed, the Supreme Court should have, at least, addressed the issue in light of these facts.519

CONCLUSION

The Supreme Court in Mazurek v. Armstrong520 complied with the current trend for determining the constitutionality of abortion regulations, holding Montana’s “physician only” statute was not an undue burden on a woman’s right to choose an abortion.521 However, in the Supreme Court’s flight from the responsibility of making that determination, they failed to address a very important argument, violation of the Bill of Attainder Clause.

With the current trend gaining momentum, one can expect to Supreme Court to wash its hands clean of abortion regulation in the future. The holding in Roe v. Wade522 is deteriorating to the point at which eventually no constitutional protection will be afforded. Although some scholars may disagree, the result of the trend is a reversion to the state of abortion regulation in the pre-Civil War era.523 The fundamental right to abortion is no longer treated as a fundamental, but rather as a minimally important right.

The failure of the Supreme Court to address the weight of the bill of attainder argument demonstrates a complete disregard not only for a provision in the United States Constitution, but also a complete disregard for precedent. Although case law interpreting the Bill of Attainder Clause is not abundant, the Supreme Court has a deeply rooted historical background from which it may draw the interpretation. As a result of ignoring this background, the Supreme Court in Mazurek, in the interest of the state, has stripped one woman of her livelihood without judicial review.

Rebecca A. Bortolotti—'99

519. Mazurek, 117 S. Ct. at 1869-70 (Stevens, J., dissenting).
521. Mazurek, 117 S. Ct. at 1867; Casey, 505 U.S. at 874.