



**House
Legislative
Analysis
Section**

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CREATE FREEDOM OF CHOICE ACT

House Bill 5211 as introduced
First Analysis (9-19-90)

RECEIVED

Sponsor: Rep. Maxine Berman
Committee: Judiciary

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THE APPARENT PROBLEM:

In 1973, the United States Supreme Court decided Roe v. Wade (93 S.Ct. 705), issuing a landmark opinion that legalized abortion nationwide. The court said that states may not regulate abortion during the first trimester of pregnancy, that states may regulate abortion during the second trimester "to the extent that the regulation reasonably relates to preservation and protection of maternal health," and that "if a state is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."

In a companion case, Doe v. Bolton (93 S. Ct 739), the court struck down certain restrictions on where an abortion may be performed, and upheld a state requirement that a physician's decision to perform an abortion be "based upon his best clinical judgment that an abortion is necessary." The court reasoned that "the medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient," and that this would operate "for the benefit, not the disadvantage, of the pregnant woman."

In the years since 1973, the national controversy over abortion has continued to rage, and, if anything, increase in intensity whenever another major Supreme Court decision was handed down. Thus did later decisions on governmental funding for abortions (Maier v. Roe, et al [1977], McRae v. Califano [1980]) stimulate bitter battles in the states over Medicaid funding for abortions.

On July 3, 1989, the United States Supreme Court issued another opinion widely regarded as a milestone. In Webster v. Reproductive Health Services, the court said that the Roe trimester framework was "unsound in principle and unworkable in practice." The court upheld, among other restrictions on abortions, a Missouri law requiring a physician to perform viability tests before performing an abortion on any fetus believed to have a gestational age of 20 or more weeks. The plurality opinion pronounced the court "satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life." (Not at issue in the case was Missouri's prohibition against abortions of viable fetuses.) It seemed apparent to many that the court was replacing the Roe trimester standard with a fetal viability standard.

Applauded by those called "pro-life" and decried by those called "pro-choice," Webster did little to settle the abortion controversy. In the months before and since Webster, states and the courts have examined, among other things, the issues presented by requiring parental consent or notification before a minor may have an abortion. In Hodgson v. Minnesota (110 S.Ct. 2926) and Ohio v. Akron Center for Reproductive Health (110 S.Ct. 2972), both decided June 25, 1990, the court upheld aspects of two state laws generally requiring parental notification before an abortion may be performed on a minor. More recently

in Michigan, the legislature approved a similar law initiated by citizen petition.

Despite the attention given to various aspects of the abortion question, to many the fundamental issue is clear: whether the state may interfere in a woman's decision on whether to have a child. Legislation to articulate a succinct statement on this issue has been proposed.

THE CONTENT OF THE BILL:

The bill would create the Freedom of Choice Act. It would state that a state law shall not compel a pregnant woman to terminate or continue her pregnancy.

FISCAL IMPLICATIONS:

Fiscal information is not available. (9-18-90)

ARGUMENTS:

For:

The state has no right to intrude on the intensely personal decision a woman faces when deciding whether to become or remain pregnant. It must be the woman's decision whether to accept the burdens on her body, the health risks for herself and the fetus, the responsibilities of parenthood, and the implications for her future. A woman facing the difficult decision to terminate an unwanted pregnancy faces an additional moral decision on whether for nine months she should devote her body to the bringing of an unwanted, and possibly unadoptable, child into the world. The bill states an important premise, simply put: that the state should make no law compelling a pregnant woman to terminate or continue her pregnancy.

Against:

The bill would condone the murder of unborn children, which is what many consider abortion to be. With sexual activity should come responsibility for the consequences, but abortion punishes an innocent unborn child for the mistakes of the mother. A mother who does not want her child can give that child up for adoption into a loving home; she does not have to accept the lifetime responsibilities of parenthood.

Against:

There must be some middle ground. Both Roe and Webster recognized an important, if difficult, truth: that somehow a fertilized egg is not an unborn child in which the state has a legitimate interest, but a nine-month fetus is; the question becomes at what point the state may legitimately intrude. For many, the moral consequences of abortion increase over the term of the pregnancy, and as gestation progresses, a woman's right to control her body must gradually be balanced against the rights of the person-to-be.

Response: The bill would articulate a basic principle,

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which like any legal principle, would have to be balanced against constitutional rights and read in conjunction with relevant case law. More specifically, the bill simply says that pregnancy decisions are not within the legitimate purview of statute; a law should neither make a woman terminate a pregnancy nor continue one.

Against:

The bill may attempt an unconstitutional amendment by reference. Michigan has at present laws, valid at least in part, that prohibit performing abortions under certain circumstances. Section 14 of the Michigan Penal Code prohibits performing an abortion unless necessary to save the life of the mother. A 1973 Michigan Supreme Court decision (People v. Bricker, 389 Mich. 524) interpreted that prohibition in light of Roe and Doe and noted that the statute could not stand "as related to abortions in the first trimester of pregnancy as authorized by the pregnant woman's attending physician in exercise of his medical judgment." However, the court also construed the statute to mean that a physician may not perform an abortion "after viability except where necessary, in his medical judgment, to preserve the life or health of the mother." It appears that the state also retained the ability to regulate second trimester abortions in accordance with Supreme Court decisions.

Even without the above statute, Michigan would continue to outlaw post-viability abortions. Section 323 of the penal code (MCL 750.323) prohibits a person from performing an abortion on a "quick child." In a companion decision to Bricker, the Michigan Supreme Court held that the term "child" as used in this statute means "a viable child in the womb of its mother; that is, an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care and facilities available in the community." The court said that beyond the first trimester of pregnancy, the burden is "upon the people in a prosecution for manslaughter by abortion to prove beyond a reasonable doubt that the subject of the manslaughter was in fact a viable child" in its mother's womb. So interpreted, the court ruled, Section 323 was not unconstitutional (Larkin v. Wayne Prosecutor, 389 Mich. 533 [1973]).

Response: The bill would not constitute an amendment by reference. The existing criminal statutes apply to the person who performs an abortion, while the bill proposes a statement with regard to the rights of a pregnant woman. As a general rule, an act does not constitute an amendment by reference if both it and the other act can stand independently of each other.

Against:

Any statutory approach to abortion issues is inadequate, because it can be changed at any time by the legislature. For something approximating a permanent resolution to the matter, attention should be given to amending the state constitution.

Response: Even constitutional law is subject to change, by way of amendment and changing interpretation. Further, a constitutional approach would no more quell the abortion controversy than a statutory approach. Many people have strong opinions on abortion, and those opinions would not be modified by the nature of the law that conflicted with their beliefs.

POSITIONS:

The American Civil Liberties Union of Michigan supports the bill. (9-18-90)

The League of Women Voters of Michigan supports the bill. (10-31-89)

The Michigan Abortion Rights Action League supports the bill. (9-18-90)

The Michigan Women's Commission supports the bill. (9-18-90)

Planned Parenthood Affiliates of Michigan supports the bill. (9-18-90)

A representative of Right to Life of Michigan testified in opposition to the bill. (9-18-90)