Case: Roe v. Wade, 410 U.S. 113 (1973)

Background & Procedural Posture:

Note: For constitutional purposes associated with the scope of our course, non-relevant background has been omitted.

Plaintiff, Roe, a pregnant single woman brought a class action challenging the constitutionality of the Texas criminal abortion law. The challenged Texas law made it a criminal offense to procure/attempt an abortion, save circumstances associated with an abortion for the purpose of "saving the life of the mother." Roe claimed the Texas statute was unconstitutionally vague and that it abridged her "right of personal privacy," secured by the 1st, 4th, 5th, 9th, and 14th Amendments. The District Court held, among other things, that the "fundamental right" of single women to have children is protected by the 9th Amendment (through the 14th Amendment), and that the Texas statute was unconstitutionally vague and constituted an "overbroad" infringement of Roe's 9th Amendment rights.

Constitutional Issue(s):

[1] Whether District Court properly concluded that the Texas law unconstitutionally infringes upon a woman's constitutionally protected "fundamental right" to terminate her pregnancy, as embodied in either (i) the concept of personal liberty in the Due Process Clause of the 14th Amendment; (ii) the "personal privacy" rights embodied by the Bill of Rights or its penumbras; or (iii) among the rights reserved to the States by the 9th Amendment.

[A] If such right is recognized as "fundamental," whether it is "absolute" and unqualified, in that a woman is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.

[B] If such right is recognized as "fundamental," whether, at some point during a woman's pregnancy, the State's interests—including those in protecting human life, its medical profession, etc.—become sufficiently compelling, so as to justify its infringement upon the woman's fundamental right to terminate her pregnancy, provided such infringement is sufficiently tailored to protect the sufficiently compelling interests.

Opinions:

Majority (J. Blackmun):

Justice Blackmun begins his opinion with a sprawling overview of the historical evolution of society's view on the right to and the criminality of abortions. Justice Blackmun's historical analysis ranges from ancient attitudes to modern medical/legal viewpoints, and covers opinions in both the statutory and non-statutory sense. Blackmun spends goes to considerable length to discuss the historical distinction between pre-'quickening' abortions and those performed thereafter, ultimately concluding that, at common law, pre-'quickening' abortions were typically not punishable and, if they were, only as a minor offense. Blackmun also highlights the emerging view—supported by State statute, emerging medical opinion, and legal professionals—that a woman's right to abortion is viewed unfavorably, and subject to criminal punishment (except where necessary to protect the mother's health/life).
Blackmun begins his constitutional analysis by recognizing the Constitution does not explicitly mention a “right of privacy,” which, as mentioned supra, is the fundamental basis of Roe’s contention. However, tracing through lines of cases interpreting rights under the 1st, 4th, 5th, 9th, and 14th Amendments, Blackmun argues that “personal rights” can be deemed fundamental or implicit in the concept of “ordered liberty.” Furthermore, these rights have extension to marriage, procreation, contraception, and child rearing. This “right of privacy,” according to Blackmun, whether founded in the 14th Amendment’s concept of personal liberty (as the Court concludes), or the 9th Amendment’s “rights to the people” (as the District Court concluded) is broad enough to encompass a woman’s decision on whether to terminate her pregnancy. Said right is “fundamental” for several reasons, including: (i) the familial burden of additional offspring, i.e., the potential for “distressful” life; (ii) distress caused by an unwanted/unplanned child; (iii) the mental/financial inability to care for a child; and (iv) the stigma associated with unwed motherhood. The Court limited its conclusion, however, in finding that such right is not “unqualified”—at some point during pregnancy, the State’s interests (introduced supra) because sufficiently weighty (read: “compelling”) so as to sustain its constitutional authority to regulate an abortion decision.

Where “fundamental rights” are concerned, the Court has held that regulation thereof may be justified only by a “compelling” State interest, and that legislative enactments thereunder must be “narrowly drawn” to express said compelling interest. While the Court ultimately ‘punts’ on the question of when life/personhood biologically begins (for purposes of the 14th Amendment’s protection of liberty), it nonetheless argues (1) such decision is not outcome-determinative for purposes of this case, and (2) that pregnant women cannot be isolated in their privacy. For purposes of the Court’s holding, its argument that the State’s interests grow (quite ‘punny’) substantially as the woman approaches term (she, too, ‘growing’) and, at a point during pregnancy, those interests become “compelling,” Blackmun concludes his opinion by arguing that there is evidence that the historical risks associated with abortions are substantially less during the first-trimester. Yet, the State may regulate first-trimester abortions—to promote its interests in preservation and protection of maternal health. According to Blackmun, such regulation may not include an outright prohibition on abortions, but only regulation covering qualifications of physicians, licensing, facility location, standards thereof, and the like. Thereafter, however, Blackmun argues that abortion procedures begin to infringe upon the State’s compelling interests and, hence, State regulation on a woman’s right to abortion is constitutional, if narrowly tailored (see infra).

Concurrence (J. Stewart):

Justice Stewart’s concurrence adds very little, arguing only that Justice Blackmun’s opinion “thoroughly demonstrates” that the State’s interests in regulation abortions cannot support a “broad” abridgment of personal liberty. It seems that Justice Stewart wrote separately only to highlight the breadth and expansiveness that the 14th Amendment’s Due Process Clause affords “personal liberties.”
Dissent (J. Rehnquist):

Ignoring Justice Rehnquist's argument on the facts (as dictated by the Majority), Rehnquist's argument is that a "right of privacy" is infringed by the Texas statute, i.e., that privacy is impossible to invoke in a transactional setting as between a woman and her physician.

Even accepting the Majority's "right to privacy" position, Rehnquist argues the Court's "sweeping" invalidation of the State's right to deny first-trimester abortions substitutes for a rational basis test the Court's own legislative judgment. Rehnquist continues by arguing that the Court transposes the proper inquiry associated with the Equal Protection Clause to this case arising under the Due Process Clause.

Continuing with his "separation of powers" argument, Rehnquist urges that by breaking a pregnancy into three distinct terms—each outlining permissible State restrictions—the Court partakes in "judicial legislation," rather than determine the intent of the drafters of the 14th Amendment. As such, the scope of the 14th Amendment, according to Rehnquist, has been expanded to a range of issues completed unknown to the drafters.

Result(s):

[1] YES (Judgment Affirmed)—The District Court properly concluded that the Texas law unconstitutionally infringes upon a woman's constitutionally protected "fundamental right" to terminate her pregnancy; however, said right is protected by the Due Process Clause of the 14th Amendment, rather than the rights reserved to the States by the 9th Amendment.

[A] NO—A woman's fundamental right to terminate her pregnancy is not unqualified, as the State's interests become sufficiently compelling as the woman proceeds towards term.

[B] YES—At some point during a woman's pregnancy, the State's interests become sufficiently compelling so as to constitutionally justify its regulation of a woman's right to terminate her pregnancy, i.e., having the constitutional authority to restrict such right to those circumstances necessary to protect the health/life of the mother.

Held: The Texas criminal law banning abortions, except in circumstances to save the mother's life, without regard to pregnancy stage and without recognition of the other interests involved, violates the Due Process Clause of the 14th Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Facts:

Texas statutes Arts. 1191-1194 and 1196 of the State’s Penal Code make it a crime to “procure an abortion,” except with respect to “an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.” Jane Roe, a single woman, alleged that she was unmarried and pregnant, and sought to terminate her pregnancy. Roe was unable to get an abortion in Texas because her life was not threatened by the continuation of the pregnancy, and thus her securing an abortion for a non-lifesaving means was illegal. Roe also stated that she could not afford the traveling costs of going to another state to get an abortion. Roe brought suit, on her behalf and all other women, claiming the Texas statutes were unconstitutionally vague, and abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

James Hubert Halford, a licensed physician, was granted leave to intervene in Roe’s action. In his complaint, he stated that he had patients come to him for an abortion, and he was unable to determine whether the case fell within or out of the limits set forth in Article 1196. As a result, he claimed that the statutes were vague and uncertain, and also violated his and his patients’ right to privacy in the doctor-patient relationship, a right he claimed was guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe, a married couple, as filed a complaint with Roe. The Does stated that Mrs. Doe suffers from a “neural-chemical” disorder, and that her physician advised her to avoid pregnancy until her condition approved. The Does stated that if Mrs. Doe were to become pregnant, she would want to have an abortion, which she would be unable to secure because there was no serious risk to her life. The Does’ complaint brought suit on behalf of themselves and all couples similarly situated.

Procedural Overview:

These actions were consolidated into one case and heard together by the District Court. The court held that Roe and members of her class, along with Dr. Halford, had standing to sue and presented justiciable controversies. The Does, however, had failed to allege facts sufficient to state a present controversy and thus did not have standing to sue. The District Court held that “the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment." Furthermore, the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs’ Ninth Amendment rights. The court dismissed the Does’ complaint, and declared the abortions statutes void.

Constitutional Issue:

Does the constitutional right of privacy include a woman’s right to choose to have an abortion?
Decision:

Standing issues: Roe had standing to undertake litigation. Dr. Halford complaint is dismissed and the District Court’s grant relief is reversed. The Does are not the appropriate plaintiffs in this case, and their complaint dismissal by the District Court is affirmed.

Art. 1196 is unconstitutional and the Texas abortion statutes, as a unit, must fail.

Holding:

A state criminal abortion statute that excepts from criminality only a lifesaving procedure, without any regard to the pregnancy stage, is violative of the Due Process Clause of the Fourteenth Amendment. For the stage prior to the end of the first trimester, the decision must be left to the medical judgment of the pregnant woman’s physician. For the stage subsequent to the end of the first trimester, the State may choose to regulate the abortion procedure in a way reasonably to maternal health. For the states subsequent to viability, the State may choose to regulate, or even proscribe abortion where it sees necessary for the preservation of the life or health of the mother.

Reasoning:

Majority Opinion: Justice Blackmun

[The Court goes through a long survey of the history of abortion and anti-abortion laws]. The Court states that there are three main reasons to explain the enactment of criminal abortion laws in the 19th century and their continued existence in various states such as Texas. First, some have argued that the criminal abortion laws are the result of Victorian social concern to discourage illicit sexual conduct. Texas, however, does not adopt this theory as the justification for its criminal abortion law. Second, a major reason of the early abortion laws was because of the risk of the medical procedure, with early forms of the procedure being hazardous to the woman. Thus, the State’s concern in enacting criminal abortion laws is to protect the pregnant woman from submitting herself to a procedure that may cause her serious injury. However, modern medical data suggests that an abortion in the early stages of pregnancy [i.e. prior to the end of the first trimester] while not without risk, is relatively safe. Consequently, the State would have an interest in regulating abortion practices to ensure that they are done by the proper medical staff and the State would also have an interest in protecting the woman’s health when an abortion is proposed at a late stage of pregnancy. Third, it is argued that the State has an interest in protecting prenatal life. Thus, the Court must take in these State concerns when it analyzes the right of women to have abortions.

While the Constitution does not explicitly mention any right of privacy, the Court has recognized the right of personal privacy, or a guarantee of certain zones of privacy, does exist under the Constitution. Prior decisions make the clear distinction that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty” are included in the right of personal privacy. The Court states that this right of personal privacy is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. However, the Court does not agree that a woman has the right to terminate her pregnancy at any time, and her privacy right is not absolute. The State
Professor Gowder  
Constitutional Law II – Fall 2015  
Student #

has an interest and a right to assert important interests in safeguarding health, maintaining medical standards, and protecting prenatal life. The State has an interest in protecting the mother from the potential dangers of a late abortion and has an interest in the development of the fetus as a potential person, and these interests outweigh the woman’s right to privacy as the pregnancy gets to later stages.

**Concurrence - Justice Stewart**

Several of the Court’s past decisions have made it clear that freedom of personal choice in the matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. It is clear that right also includes the right of a woman to decide whether or not to terminate her pregnancy. It is evident that the Texas abortion statute infringed on that right directly. The State does have a legitimate interest in protecting the health and safety of the pregnant woman and potential future human life, but it cannot impose broad, vague laws that deny a woman the right to have an abortion at a proper time.

**Dissent – Justice Rehnquist**

There is no constitutional right to privacy in the present case. The Texas statutes bans a licensed physician from performing a specific medical procedure on a woman. This is a transaction and it is not at all “private” in the traditional sense. Consequently, the Texas statute should be treated similar to other economic or social regulations, and upheld if it has a rational relationship to a valid and compelling state interest or objective. Under this test, the Due Process Clause of the Fourteenth Amendment would limit any state from prohibiting all abortions. However, the majority’s sweeping invalidation of any restrictions on abortions during the first trimester of pregnancy ignores any State interest in potential life of the fetus and would not pass a rational basis standard. The trimester standard set forth by the majority is more of a legislative judgment rather than a judicial one. The majority mistakenly creates a right not guaranteed by the Fourteenth Amendment and overbears their judicial role. Any regulation of abortion should be left to be decided by the state legislatures.