

SUPREME COURT DECISION: ROE v. WADE

Roe v. Wade is one of the most controversial decisions in the last century. The Court ruled that a woman has the right to an abortion up through the first six months of pregnancy and possibly beyond. Justice Harry A. Blackmun argued for the majority opinion that there is a right to privacy implied in the Constitution's Bill of Rights. Liberty cannot be protected without a right to privacy that includes rights relating to marriage, procreation, contraception, and child rearing. A woman's decision whether or not to terminate her pregnancy is a private decision protected by the Constitution.

The majority conceded that it could not determine whether the fetus is a person. Nevertheless, the state has a legitimate interest in protecting the potential life of the fetus and the health of the woman. Because modern medical science has progressed, an abortion in the first trimester is safer than childbirth and, therefore, should be allowed. During the second trimester, the state has the right to regulate the abortion to protect the health of the woman. In the third trimester, when the fetus reaches viability, individual states may prohibit abortion to protect the potential life of the fetus, except in cases where the mother's health is involved.

Justices Byron White and William Rehnquist disagreed with the majority decision. They argued that to allow a woman to have an abortion for any reason she wishes at the expense of the life of the fetus puts a greater value on a woman's convenience than on human life. They also argued that there is no right to privacy in the Constitution. They concluded that it would be more democratic for individual states to decide this issue than have the Court's view imposed upon them.

Vocabulary:

Antisepsis:	ability to keep something entirely clean and free from germs
Dilatation and Curettage:	a surgical procedure in which the uterine lining is scraped for diagnostic or therapeutic purposes
Amici:	friends
Appellant:	one who appeals a court decision
Supra:	above
Inferentially:	drawn from an inference or conclusion
Interposing:	putting in between, as a barrier

Concepts:

Right of personal privacy:
Tri-mester system:
Compelling points:
Viability:

Questions:

1. *What were the three reasons the court gave to explain historically the enactment of criminal abortion laws in the 19th century?*
2. *How did the court conclude that the word “person” in the U.S. Constitution does not apply to the fetus?*
3. *What is the compelling point and its reasoning during the first trimester?*
4. *What is the compelling point and its reasoning during the third trimester?*
5. *What are the reasons given by Justice Byron White in his dissenting opinion?*

Majority Opinion in *Roe v. Wade*

Justice Harry A. Blackmun

It is apparent that common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most states today. At least with respect to the early stage of pregnancy, and very possibly

without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy. ...

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however,

does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. ...

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. This was particularly true prior to the development of antiseptics. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940s, standard modern techniques such as dilatation and curettage were not nearly so safe as they are today. Thus it has been argued that a state's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that places her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellant and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of first trimester, although not without its risk, is now relatively safe.

Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the state's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is performed at a late stage of pregnancy.

The third reason is the State's interest — some phrase it in terms of duty

— in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area needs not stand nor fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the state's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life. Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws

can no longer be justified by any state interest. There is some scholarly support for this view of original purpose. The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus. ...

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford* (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment, ...in the Fourth and Fifth Amendments ... in the penumbras of the Bill of Rights ... in the Ninth Amendment ... or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. ...These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," ... are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, ... procreation, ... contraception, ... family relationships, ... and child rearing

and education. ...

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. ...

... [A]ppellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellants' arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, is unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a state may properly assert important interests in safe-guarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the

abortion decision. The privacy right involved, therefore, cannot be said to be absolute. ...

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. ...

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach. ...

The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the

Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the fourteenth Amendment. ...

All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn. ...Indeed, our decision in *United States v. Vuitch* (1971) inferentially is to the same effect, for we therefore would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

...As we have intimated above, it is reasonable and appropriate for a state to decide that at some point in time, another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout

pregnancy, and that, therefore, the State has a compelling interest in protecting that life after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception or upon live birth or upon the interim point

at which the fetus becomes “viable,” that is, potentially able to live outside the mother’s womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. ...

In areas other than criminal abortion the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. ...In short, the unborn have never been recognized in the law as persons in the whole sense.

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the state does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes “compelling.”

With respect to the State’s important and legitimate interest in the health of the mother, the “compelling” point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact ... that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth. It follows that, from this point, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this “compelling” point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient’s pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the 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. ...

To summarize and repeat:

1. A state criminal abortion statute for the current Texas type, that excepts from criminality only a *life saving* procedure on behalf of the mother, without regard to pregnancy state and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth 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 it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed [here], to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

...The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are avail-

able. ...

Dissenting Opinion in *Roe v. Wade*

Justice Byron R. White

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are nevertheless unwanted for any one or more of a variety of reasons — convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court, for the most part, sustains this position: during the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.

With all due respect, I dissent. I

find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against a spectrum of possible impacts on the mother on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life which she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men

may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

It is my view, therefore, that the Texas statute is not constitutionally infirm because it denies abortions to those who seek to serve only their convenience rather than to protect their life or health.

...

From the U.S. Supreme Court, 410 U.S. 113, 1973.