

ROE v. WADE (1973)

BACKGROUND

In 1970, a Texas statute dating back to the mid-19th Century made it a crime to “procure” or “attempt” an abortion, except when necessary to save the life of the mother.

There were similar statutes in a majority of states (29), some more, some less restrictive. Three states made no exception, not even to save the mother’s life.

In 1970, Jane Roe, aka Norma McCorvey, a single woman who was unmarried and pregnant, filed suit in Federal District Court alleging that the Texas statute was “unconstitutionally vague” (since it was too difficult in many cases to determine whether a woman’s pregnancy posed a risk to her life) and violated her right to personal privacy protected by the 1st, 4th, 5th, 9th, and 14th Amendments.

John and Mary Doe, a married couple, filed a companion complaint against a less restrictive Georgia statute that allowed exceptions for

the life of the mother
the health of the mother
serious birth defects
rape

The Does also complained that the GA statute included unconstitutional procedural requirements regarding hospital accreditation and a GA residency requirement.

ROE’S ARGUMENTS

Roe argued that she had a constitutional right to choose whether or not to terminate her pregnancy, and that this right was included in:

1. The right to liberty protected by the DP Clause (Griswold-Harlan)
2. The right to personal privacy protected by the Bill of Rights or its “penumbras” (Griswold-Douglas)
3. The rights reserved to the people by the 9th Amendment (Griswold-Goldberg)

HISTORY OF RESTRICTIVE CRIMINAL ABORTION LAWS

Such laws were all relatively recent (mid-19th C.)

Under Common Law, pre-quickening abortion (before 16th-18th week of pregnancy) was not an indictable offense.

Under traditional Christian theology (until mid-19th Century), the point of “animation” (acquisition of a soul) was taken to be 40 days for a male, 80 days for a female. Abortion of a quick fetus was a misdemeanor, not a crime.

NY Statute: 1828

Pre-quickening abortion: misdemeanor
Post-quickening abortion: 2nd-degree manslaughter
Exception to save the mother's life

In the 19th C, the pre-/post- quickening distinction slowly disappeared from state statutes, and was replaced by a variety of exceptions, with some states accepting many, others fewer, and some none.

Common Exceptions: life, health, birth defects, rape, incest

BLACKMUN'S ARGUMENT

Although “the Constitution does not explicitly mention any right of privacy”, 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”.

The roots of this right could be held to lie in the penumbras of the 1st, 4th & 5th Ams. (Douglas), the 9th Am. (Goldberg), or the DP Clause of the 14th Am. (Harlan). Blackmun followed Harlan.

The right of personal privacy protected by the DP Clause includes only those rights that “can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’” (*Palko*).

The right of personal privacy extends to activities relating to marriage (*Loving*), procreation (*Skinner*), contraception (*Eisenstadt*), family relationships (*Prince*), and child rearing and education (*Pierce, Meyer*).

The right of personal privacy “is broad enough to encompass a woman's decision whether or not to terminate her pregnancy”.

This decision lies within the relevant “zone of privacy”.

The right to make this decision is fundamental, because of the extent of the physical and psychological harm that denying such a right would cause women to suffer.

Abortion relates to procreation (*Skinner*).

BLACKMUN'S CONCLUSION

Under the DP Clause of the 14th Amendment, every woman (whether married or not) has a *fundamental* right to choose whether or not to terminate her pregnancy.

THE RIGHT OF PRIVACY IS NOT ABSOLUTE

However, the right to choose whether or not to terminate one's pregnancy, as well as the more general right to personal privacy under which it falls, is NOT ABSOLUTE. The State has "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life", interests that become compelling "at some point in pregnancy".

THE PROPER TEST

The test of the Constitutional validity of a State law that infringes a fundamental right protected by the DP Clause is STRICT SCRUTINY.

Texas argued that it had a compelling interest in protecting fetal life because fetuses are "persons" within the "language and meaning" of the 14th Amendment, which protects their right to life.

WHY FETUSES ARE NOT "PERSONS"

Blackmun argued that fetuses are not "persons", within the meaning of the Constitution.

Although "the Constitution does not define 'person' in so many words", "in nearly all instances the use of the word [in the Constitution] has application only post-natally". [Plain Meaning]

Since prevailing legal abortion practices were far freer in 19th C., the Framers could not have intended to use 'person' to refer to fetuses. [Original Intent]

Texas's claim that fetuses are 'persons' is inconsistent with the language of the Statute:

Statute contains an exception to save the life of the mother, but killing an innocent person to save one's own life is murder.

Statute says that women are not "accomplices" to abortions performed by their doctors; but if you conspire to kill an innocent person, then you are an accomplice to murder.

Under the Statute, the penalty for performing an abortion is significantly less than the penalty for murder.

TWO COMPELLING STATE INTERESTS

Blackmun found two "important" state interests that rise to the level of being "compelling" at different stages of a woman's pregnancy:

Interest in the mother's health: compelling starting at the end of the first trimester (the point at which abortion poses a greater risk to the mother's health than does childbirth).

Interest in fetus's potential life: compelling starting at the end of the second trimester (the point of "viability").

BLACKMUN'S CONCLUSION

The Trimester Rule

First Trimester: State regulation of abortion is impermissible. The decision "must be left to the medical judgment of the pregnant woman's attending physician".

Second Trimester: Only those state regulations that are "reasonably related" to the promotion of maternal health are permissible.

Third Trimester: State statutes that regulate or proscribe abortion are permissible, as long as exception is made for protecting the LIFE OR HEALTH of the mother.

THE TEXAS STATUTE IS UNCONSTITUTIONAL

Blackmun concluded that the relevant Texas Statute is unconstitutional, inasmuch as it does not permit a pregnant woman to obtain an abortion unless doing so is necessary to save her life.

Similarly for the Georgia Statute, which, though less restrictive than Texas's, still regulates and, *modulo* certain exceptions, proscribes abortion in the first two trimesters.

REHNQUIST'S DISSENT

Rehnquist accepted that the right to liberty protected by the 14th Amendment includes more rights than are explicitly mentioned in the Constitution, but denied that the right to personal privacy is "so rooted in the traditions and conscience of our people as to be ranked as fundamental".

Evidence of non-fundamentality: "A majority of the States...have had restrictions on abortions for at least a century".

When non-fundamental rights are at stake (as in the case of the right of personal privacy), the proper test of constitutionality under the DP Clause is the Rational Basis Test, not Strict Scrutiny.

Texas's Statute passes the Rational Basis Test, and should therefore be upheld.