

PLANNED PARENTHOOD v. CASEY (1992)

BACKGROUND

Pennsylvania Abortion Control Act of 1982 (amended '88-'89)

1. Informed Consent: Except in cases of “medical emergency”, a woman seeking an abortion must give her informed consent prior to the abortion procedure, and must be provided with certain information at least 24 hours before the abortion is performed.

2. Parental Consent for Minors: Except in cases of “medical emergency”, a minor cannot obtain an abortion without the informed consent of one of her parents; judicial bypass option if the minor does not wish to or cannot obtain a parent's consent.

3. Husband Notification: Except in cases of “medical emergency”, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion.

4. Recordkeeping and Reporting: Recordkeeping and reporting requirements on facilities that provide abortion services.

Five abortion clinics and a class of physicians filed suit in Federal Court alleging that all four requirements violate pregnant women’s rights under the DP Clause of the 14th Amendment. The District Court struck down all four requirements. The Third Circuit Court of Appeals upheld all but the Husband Notification requirement. The Supreme Court granted *certiorari*.

THE DECISION

O’Connor, Kennedy, and Souter (joined by Blackmun and Stevens in respect of most sections) delivered the opinion of the Court.

Rehnquist, White, Scalia, and Thomas concurred in part and dissented in part.

The majority opinion upheld central portions of *Roe* while rejecting *Roe*’s “Rigid Trimester Framework”:

The State may not place a “substantial obstacle” in the path of a pregnant woman seeking an abortion before viability.

The “Husband Notification” Regulation is unconstitutional.

RE-AFFIRMING *ROE*

The Court upheld three central aspects of *Roe*:

A woman has the right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State.

A State has the power to restrict abortions after fetal viability if the law contains exceptions for pregnancies which endanger the woman's life or health.

The State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the potential life of the fetus.

PRINCIPLE

The DP Clause protects all “fundamental” rights from “invasion by the States”.
[see *Palko*]

Among these “fundamental” rights is the right of personal privacy: “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter”.

The right of personal privacy includes the right to make personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.

“These 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. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

The Court concluded, as it had in *Roe*, that the DP Clause protects a woman’s right to choose whether or not to terminate her pregnancy, even though this right is nowhere explicitly mentioned in the Constitution (see Black) and was not protected by law at the time the 14th Amendment was ratified (see Scalia).

STARE DECISIS

A rule R announced in a past case should be overturned if

- (a) R has been found to be unworkable, or
- (b) The law's growth in the intervening years has left R a doctrinal anachronism,
or
- (c) Facts have so changed, or come to be seen so differently, as to have robbed R
of significant application or justification,

as long as
- (d) R could be removed without serious inequity to those who have relied upon it
or significant damage to the stability of society.

APPLYING STARE DECISIS

The Court held that none of (a), (b), (c), (d) applies to the central rules announced in *Roe*. These rules are not unworkable, they are doctrinally consistent with a long line of past cases, the only facts that have changed concern the exact point of viability (from ~28 to ~24 weeks), and they could not be removed without serious inequity to those who have come to rely on them.

AND IF ROE WERE OVERRULED...?

The Court added that overruling *Roe* would endanger its legitimacy and the Nation's commitment to the rule of law. Judicial flip-flopping suggests that the Court is responding to political or social pressure, rather than to legal principle and sound argument, and hence that its decisions carry no legal authority. Especially in a matter as politically charged as the abortion issue, overruling *Roe* would require "the most convincing justification under accepted standards of precedent". Such a justification is not forthcoming here.

DRAWING THE LINE AT VIABILITY

The Court upheld *Roe*'s holding that a State's interest in protecting potential life is significant enough to justify permitting State proscription of abortion after fetal viability, as well as *Roe*'s holding that this State interest is not significant enough to justify proscription of abortion before fetal viability.

WHY DRAW THE LINE AT VIABILITY?

The *Roe* Court, applying Strict Scrutiny, held that a State's interest in protecting potential life becomes compelling at the point of viability.

Two reasons for drawing the line at viability

Stare Decisis, despite the fact that the line "may seem somewhat arbitrary".

"The independent existence of [a] second life can...be the object of state protection."

INFRINGING v. RESTRICTING THE EXERCISE OF A RIGHT

In moral theory, we can distinguish between (a) infringing a right, and (b) restricting its exercise.

Example: Suppose I have a right to teach, that I have been criticizing the present administration, and that the State is interested in making it difficult for me to get my message across to you. The State could either (a) prevent me from giving my lecture (thereby infringing my right to teach) or (b) deny me the use of a classroom (thereby restricting its exercise).

THE "UNDUE BURDEN" TEST

In trying to determine the conditions under which the DP Clause would permit a State to restrict the exercise of a fundamental right, the Court introduced a new "Undue Burden" Test:

A State law that restricts the exercise of a fundamental right violates the DP Clause only if the regulation imposes (or is designed to impose) an "undue burden" on (by placing a "substantial obstacle" in the path of) those who seek to exercise it.

APPLYING THE "UNDUE BURDEN" TEST

Recall the PA regulations at issue in Casey:

Informed Consent
Parental Consent for Minors with Judicial Bypass
Reporting and Recordkeeping
Husband Notification

The Court found that only the Husband Notification requirement represented an “undue burden” on pregnant women seeking to exercise their right to choose to terminate their pregnancies before viability (risk of spousal abuse represents an undue burden).

STEVENS/BLACKMUN

Stevens and Blackmun thought that the Court should also have invalidated the Informed Consent requirement, in large part because it violates an adult woman’s decisional autonomy.

Blackmun worried that the Court was abandoning Strict Scrutiny as the Test to apply to laws that infringe fundamental rights. Was he right to worry?

THE DISSENTERS

Rehnquist, White, Scalia and Thomas argued that a woman’s right to choose to terminate her pregnancy is not fundamental (since it necessarily involves the destruction of potential life, and since it is not “rooted in the traditions and conscience of our people”), and hence that the PA regulations should be subjected to the Rational Basis Test.

Since all of the PA regulations pass the Rational Basis Test, they should all be upheld.

BLACKMUN’S FEAR

“Three years ago, in *Webster*, four Members of this Court appeared poised to ‘cas[t] into darkness the hopes and visions of every woman in this country’ who had come to believe that the Constitution guaranteed her the right to reproductive choice. All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. But now, just when so many expected the darkness to fall, the flame has grown bright. I do not underestimate the significance of today’s...opinion. Yet...I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.”

Then: Rehnquist, White, Scalia, Thomas

Now: Scalia, Thomas, Roberts, Alito?