Roe v Wade. 1973

Excerpts from the summary by Merle Weiner, for the **Oxford Constitutions** series.

5. Until the decision in Roe v Wade, women in the United States did not have a constitutional right to an abortion. Rather, each state had the ability to regulate abortion within its borders. …

6. Most states criminalized abortion at the time of Roe v Wade. Although abortion performed before 'quickening' had been legal at the nation's founding ('quickening' refers to the time when the mother can first feel fetal movement), the American Medical Association, starting in the 1850s, promoted the criminalization of abortion, except to save the mother's life (Greenhouse and Siegel 2035). Texas, the state whose law was challenged in Roe v Wade, made abortion criminal in 1854, and a majority of US states had similar laws at the time the Supreme Court decided Roe v Wade (Roe v Wade 118 n.2; Doe v Bolton 181–82). Consequently, prior to the decision, illegal abortions were common in the United States, with estimates of 1,000,000 a year or 'one to every four births' (Calderone 950). The danger of the procedure differed by class. Many doctors 'secretly performed abortions for women whom they knew and who could pay', while other women were relegated to 'unsafe circumstances' (Garrow (1999) 834).

7. Roe v Wade reached the Supreme Court as part of a growing movement in the US to liberalize abortion law. Liberalization was promoted on the political front with arguments centred on public health, overpopulation, sexual freedom, and feminism (Greenhouse and Siegel 2036–2046). Colorado, North Carolina, and California had, for example, adopted 'liberalization statutes' in 1967 (Garrow (1999) 834). The movement to liberalize abortion law was similarly occurring overseas, in places such as Sweden, France, Denmark and the United Kingdom, and activists drew upon each other's advances (Ernst et al 755, 759).

17. Roe v Wade was decided on 22 January 1973. Justice Blackmun authored the seven-to- two majority opinion.

19. The decision established a woman's constitutional right to an abortion. The Court framed the discussion by acknowledging the sensitive, deeply held, and diverse views on the topic of abortion. However, it suggested, not without criticism by some scholars (Myers 1029 and n. 29), that the law historically was more permissive regarding abortion, especially for abortion performed during the early stages of pregnancy (Roe v Wade 140– 41). The Court canvassed Greek and Roman law, English and US statutes, and the medical and legal establishments' positions on abortion. This analysis supported the Court's trimester framework set forth later in the opinion (ibid 165). The references to English statutory and case law, in particular, 'bolstered its own case that the US Constitution created a right to an abortion, even though the Court never explained why foreign law ought to control the meaning of the Fourteenth Amendment' (Calabresi and Zimdahl 872).

20. The Court also explored the states' historical reasons for regulating abortion. It rejected the idea that abortion laws were meant 'to discourage illicit sexual conduct'. After all, the laws applied to married women as well as unmarried women (Roe v Wade 148). In addition, Texas did not justify its law on this basis (ibid 148).

21. Instead, the Court focused on the state's interests in protecting women's health and fetal life, both of which were sufficient reasons to regulate abortion (ibid 162). These 'separate and distinct' interests 'grow in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling"'. (ibid 162–63).

22. With regards to women's health, the Court acknowledged that abortion used to be 'hazardous . . . for the woman', especially before the arrival of antisepsis (ibid 148–49). But foreign experiences, specifically

in England and Wales, Japan, Czechoslovakia, and Hungary, suggested that the danger was minimal, at least for abortion performed prior to the end of the first trimester (ibid 149 and n. 44). While the risks were few, the government still had an interest in ensuring abortion is performed 'under circumstances that insure maximum safety for the patient' (ibid 149–50). In addition, as 'the risk to the woman increases as her pregnancy continues . . . the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy' (ibid 150).

23. The Court also acknowledged the state's interest in protecting potential human life (ibid 150), although the Court mentioned 'some scholarly support' for the view that this was not originally a purpose of these laws (ibid 151). Nevertheless, the Court noted that the pregnant woman was not 'isolated in her privacy'. Consequently, 'it is reasonable and appropriate for a State to decide that, at some point in time another interest, that of . . . potential human life becomes significantly involved' (ibid 159).

24. The Court did not resolve when life begins, noting 'the wide divergence of thinking on this most sensitive and difficult question' (ibid 159–60). The Court instead focused on 'viability'—the 'interim point' between conception and birth when the fetus is 'potentially able to live outside the mother's womb, albeit with artificial aid' (ibid 159). In 1973, viability was 'usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks' (ibid 160). The Court also did not call the unborn fetus 'a "person" within the language and meaning of the Fourteenth Amendment', because the Constitution lacked a definition of person, the Constitution used the word 'person' in a way that suggested it did not include the unborn, and the history of abortion practices suggested a different interpretation was appropriate (ibid 156–58).

25. While the government had legitimate interests in regulating abortion, the Court recognized that an unwanted pregnancy affected a woman's life tremendously. The Court identified a range of harm, including 'specific and direct harm' to her health, 'a distressful life and future' from additional children, 'psychological harm', health implications from caring for children, distress from bearing an unwanted child, and the stigma of unwed motherhood (ibid 153). Consequently, the right of privacy, 'founded in the Fourteenth Amendment's concept of personal liberty', was 'broad enough to encompass a woman's decision whether or not to terminate her pregnancy' (ibid 153, 164).

26. The 'fundamental' right of privacy, which after Roe v Wade encompassed the abortion decision, was itself a court-created concept. As the Court acknowledged, 'The Constitution does not explicitly mention any right of privacy. . . . [H]owever, 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 Court cited cases that found 'the roots of that right' in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, as well as in the penumbras of the Bill of Rights. One such case was Griswold v Connecticut; that case had invalidated a criminal law that prohibited married couples from using contraceptives and made their doctors liable for aiding and abetting. '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' (ibid 152).

27. The woman's right to an abortion was not absolute. Rather it 'must be considered against important state interests in regulation' (ibid 154). Yet the right of privacy could be limited only if the laws were 'narrowly drawn to express only the legitimate state interests at stake' (ibid 155). Because a woman's right to an abortion was a fundamental right, only a compelling interest would do. 'At some point in the pregnancy', the government's 'important interests in safeguarding health, in maintaining medical standards, and in protecting potential life . . . become sufficiently compelling to sustain regulation of the factors that govern the abortion decision' (ibid 154).

28. Using 'present medical knowledge', the Court determined that the state's interest in the mother's health became compelling 'at approximately the end of the first trimester'. Until that point, women experienced less mortality from abortion than childbirth (ibid 163). After that time, a state could regulate the abortion procedure to protect maternal health, such as by requiring that abortion providers be qualified and facilities be appropriate (ibid 163). The state's interest in potential life became 'compelling'

at 'viability'. At that point, the state could even 'proscribe abortion . . . , except when it is necessary to preserve the life or health of the mother' (ibid 163–64). The Court articulated a tripartite framework to guide the states:

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 judgement, for the preservation of the life or health of the mother (ibid 164–65).

29. In light of the foregoing, the Court struck down Art. 1196 of the Texas Penal Code because that provision violated the Due Process Clause of the Fourteenth Amendment (ibid 166; → due process). The law restricted abortion too broadly. The statute did not distinguish between pre- and post-viability abortions and only made an exception to save the mother's life, failing to recognize the mother's other interests (ibid 164). The Court also said, however, that Texas could define the term 'physician' as one 'currently licensed by the State', and could require abortion to be performed only by a doctor (ibid 165). The Court did not address whether the Texas statute was too vague (ibid 164).

37. According to polls, most Americans held views that aligned with Roe v Wade at the time it was decided: '64 percent of Americans believed that abortion should be a personal decision to be made by a woman and her physician' (Faux 304). Nonetheless, opponents of the decision tried to reverse Roe v Wade with congressional legislation (Emerson 129–30), with a constitutional amendment (Faux 318), and with litigation before the Inter-American Court of Human Rights (IACtHR) (Baby Boy Case 18(h), 30–31). All of these efforts failed.

38. More limited efforts to cabin [limit] the effects of Roe v Wade proved successful, however. In 1976, Congress passed the Hyde Amendment, which barred federal Medicaid funds for abortion and thereby made abortion inaccessible for many poor women, at least in those states without state funds for such purposes. A narrowly divided Supreme Court upheld the law in Harris v McRae. Opponents of abortion also advanced other laws that impeded access to abortion to varying degrees …

40. [In 1992 the Court in Planned Parenthood v Casey adjusted the Roe logic]. It swept away the trimester framework; instead, [the Court] adopted the 'undue burden' test to evaluate restrictions on abortion prior to viability. An undue burden would exist if the law 'has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus' (ibid 877). …

43. Grounding the right to abortion in the Fourteenth Amendment and in the concept of substantive due process (Roe v Wade 153, 164) was, and still is, one of the most controversial aspects of Roe v Wade. Justice Stewart concurred in Roe v Wade mainly to pay homage to substantive due process and the Court's willingness to invoke it so explicitly after having seemingly put the doctrine to rest in Ferguson v Skrupa. Justice Stewart noted that Griswold v Connecticut should itself be understood as a substantive due process case, although the case did not rest expressly on that basis.

44. Justice Rehnquist, one of two dissenters in Roe v Wade, took issue with the new right. He thought the right to an abortion was a form of 'liberty' protected by the Fourteenth Amendment, but the Fourteenth Amendment imposed a procedural requirement, not a substantive one. The right, therefore, was only protected against its deprivation without due process of law (Roe v Wade 173). He disagreed that abortion was part of a right to privacy because neither the abortion procedure was private, as abortion involved a doctor, nor was abortion connected to the 'privacy' associated with the Fourth Amendment's protection

against unreasonable searches and seizures (ibid 172). Moreover, although Justice Rehnquist conceded that due process protected some substantive rights, he thought abortion was not among those because approximately 36 state and territorial legislatures limited abortion at the time the Fourteenth Amendment was adopted (ibid 174–75). He preferred a rational basis test that would permit more deference to the legislature, especially for some restrictions on first-trimester abortions. He thought the 'compelling state interest' test was inappropriate: it was borrowed from Equal Protection cases and would leave 'this area of the law more confused' (ibid 173), and it would trample upon the legislature's judgment (ibid 174). He called the Court's tripartite framework 'judicial legislation' not reflective of the founders' intent (ibid 174).

45. Justice White also dissented. He focused on the claims of women who had no threat to their life or health from carrying a fetus to term, like the plaintiffs before the Court, and noted that they wanted to end the pregnancy potentially for 'convenience, sham or caprice' (ibid 221). He thought the resolution of the competing interests 'should be left with the people and to the political processes' because 'nothing in the language or history of the Constitution' required otherwise (ibid 221–22)

51. Today the 'pro-choice' position in the United States is associated with the Democratic Party and the 'pro-life' position with the Republican Party (Greenhouse and Siegel 2068). However, the year before Roe was decided, more Republicans (68 percent) than Democrats (59 percent) thought that abortion should be a decision between a woman and her physician (Greenhouse and Siegel 2031). In addition, Republican presidents nominated five of the seven justices in the Roe v Wade majority (Justices Blackmun, Burger, Powell, Brennan, Stewart). The opinion also seemed to be influenced by the abortion decisions of Judge Jon O Newman, then a judge for the District of Connecticut, who was also nominated by a Republican president (Hurwitz 236–39, 242–45). Some scholars explain that Roe v Wade embodied 'conservative views' because it was a 'family planning case', embodying the views '[t]hat social stability is threatened by excessive population growth; and that family stability is threatened by unwanted pregnancies, with their accompanying fragile marriages, single-parent families, irresponsible youthful parents, and abandoned or neglected children' (Grey 88).

52. After Roe v Wade, a gradual party realignment occurred. By the end of the 1980s, Republicans were more 'pro-life' than Democrats (Greenhouse and Siegel 2069). However, it is 'simply and utterly wrong' to attribute the anti-abortion movement and the resulting political division to Roe v Wade (Garrow (1999) 841). Prior to Roe v Wade, 'political party realignment' had already started because the Catholic Church was involved in opposing legislative efforts at abortion liberalization, and Republicans were already trying to attract Catholic voters (Greenhouse and Siegel 2032–33, 2047–67). The extent to which Roe v Wade accelerated the political polarization on the issue abortion in the United States, and by how much, is an open question.