

Chapter 20: Abortion, Privacy, and Values in Conflict

 annenbergclassroom.org/resource/the-pursuit-of-justice/pursuit-justice-chapter-20-abortion-privacy-values-conflict

May 4, 2017

Roe v. Wade (1973)

Abortion has roiled the waters of modern American life as few other issues have. Beneath this debate are simmering differences over basic values: the rights of the unborn and the related matter of when life begins, the rights of women to control their reproductive functions and preserve their health, the expectation that women's most important role is to bear children, and the role of the state in selecting among these values.

The resulting conflicts have haunted American history, and today they are an exceptionally tense social and political issue. In colonial times and in the nation's early years, abortion was unregulated, in large measure because giving birth was at least as, if not more, dangerous than having an abortion. Under such circumstances state lawmakers concluded that it made little sense to declare abortion a crime. That position was reinforced by the English common law, which allowed abortions until the point of "quickening," the first time a pregnant woman felt the movement of an unborn fetus, usually in the fourth or fifth month of a pregnancy.

By 1860 this lack of attention began to change, and lawmakers in twenty of the thirty-three states in the Union had criminalized abortion. These new laws, collectively known as the Comstock laws, and named after Anthony Comstock, a politician and postal inspector, did not punish women seeking abortions, but instead levied fines and jail terms against doctors and others who performed the procedure. The reasons for doing so were complex and varied. With the advent of scientific medicine and the rise of the medical profession, doctors sought to burnish their professional image by distancing themselves from the growing ranks of poorly trained abortionists. Doctors also turned increasingly to the portion of the ancient Hippocratic Oath, from the fourth century B.C., which barred them from assisting women "to produce abortion."

Historically, the law had treated abortion and birth control as separate issues. By 1965, for example, all but one of the states, Connecticut, had fully legalized birth control. By the same year, every state in the Union had outlawed abortion in most circumstances. Rather than stopping abortions, however, these stricter laws drove the procedure "underground," so that pregnant women, especially lower-income women, suffered at the hands of unqualified practitioners in often unsanitary conditions. The well-to-do, on the other hand, had other options. In the 1960s, with the advent of the sexual revolution, women—especially those who wanted to terminate an unwanted pregnancy but who had to do so

through clandestine and illegal means—placed increasing public pressure on existing abortion statutes. As a result, some states began to moderate their laws. Between 1965 and 1970 some fourteen legislatures passed laws that permitted abortion when pregnancy resulted from rape or when the child was likely to be severely disabled. Three states, New York, Alaska, and Hawaii, repealed their abortion laws, making the procedure readily available.

The rubella, or German measles, epidemic in the 1960s revived arguments over the abortion issue. Rubella in a pregnant mother often led to birth defects in her baby. Similarly, the use of the sedative thalidomide resulted in severe deformities in children whose mothers had taken the drug while pregnant. However, some women who were pregnant at the time these side effects were being discovered were unable to terminate their pregnancies. In 1967, the American Medical Association, a group that had historically opposed abortion, called for the liberalization of abortion laws to allow more exceptions.

Arrayed against the pro-abortion advocates were a variety of fundamentalist Protestant groups and, perhaps most important, the Catholic Church. It urged its millions of adherents in the United States to view abortion as a moral issue involving a fetus's right to life. Leaders of the antiabortion movement believed that life begins at conception and that all life is sacred. They also believed that the embryo is supremely important and the mother must make sacrifices to give birth to the child.

Roe v. Wade

- 410 U.S. 113 (1973)
- Decided: January 22, 1973
- Vote: 7–2
- Opinion of the Court: Harry A. Blackmun
- Concurring opinions: Warren Burger, William O. Douglas, and Potter Stewart
- Dissenting opinions: Byron W. White and William H. Rehnquist

The modern constitutional debate over abortion emerged from this powerful cultural brew. By the 1960s the political issue of abortion was transformed into a pivotal constitutional struggle with the right to privacy as its fulcrum.

The concept of a right to privacy had been debated in American law for more than seventy years. Future Supreme Court justice Louis D. Brandeis and his colleague Samuel Warren's influential 1890 essay in the *Harvard Law Review*, "The Right to Privacy," argued that every American had a right "to be let alone," free from the meddling of government and other individuals in a person's private matters.

One of the first important tests of this idea came in the Supreme Court case *Griswold v. Connecticut* (1965). The case concerned an 1879 Connecticut statute that prohibited the use of any drug, instrument, or article to prevent contraception. By 1965 the law was unique; it was the last surviving statutory limit on birth control in the nation.

In his majority opinion in *Griswold*, Justice William O. Douglas concluded that the Constitution contained a right to privacy that included access to and use of birth control. His opinion broke new ground through a novel reading of the Bill of Rights. Douglas noted that although there was no right to privacy written into the Constitution, such a right could be implied as part of the First, Third, Fourth, Fifth, and Ninth Amendments. Justice Arthur Goldberg, who was joined in a concurring opinion by Chief Justice Earl Warren and Justice William J. Brennan Jr., staked out an even more expansive view of the right to privacy, finding that the Ninth Amendment's wording ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people") permitted the Court to protect rights that were "so rooted in the traditions and conscience of our people as to be ranked fundamental."

This new right to privacy had another distinguished constitutional source. For more than a century the Court had developed the idea of substantive due process of law, a concept that emerged first in the mid-nineteenth century and then reached its apogee in *Lochner v. New York* (1903). The concept means that certain rights are so fundamental that the state could take them away only under the most extraordinary circumstances. Initially, substantive due process had been applied to strike many state and federal efforts to regulate the economy through, for example, maximum hours and minimum wage laws. In 1937, however, with the ruin of the Great Depression all around, the justices backed away and accepted that government could aggressively regulate economic affairs. Though the justices disposed of the economic uses of substantive due process, they retained the broad concept itself and began to apply it in new areas, notably matters of civil rights and equality generally and privacy and abortion specifically.

The key constitutional issue became centered on the due process clause of the Fourteenth Amendment and its provision that "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law." The question became whether a substantive reading of that due process clause could be used to establish a right to privacy, even though such a right was not explicitly stated. The justices seized the *Griswold* case as an opportunity to define the right to privacy. Eight years later the Court extended it in *Roe v. Wade*.

The *Roe* case developed amid a particularly fractious era of American history. The 1960s were years marked by intense social and political ferment. Women entered the workplace in large numbers; blacks and whites engaged in an aggressive civil rights movement; and discontent over the Vietnam War in particular and distrust of government in general grew. New, permissive sexual standards also generated intense intergenerational conflict.

Abortion rights groups had been seeking test cases to challenge the constitutionality of state bans on abortion. In Texas, attorneys Sarah Weddington and Linda Coffee found Norma McCorvey, a pregnant carnival worker who wanted an abortion because she could not afford to raise a child. Weddington and Coffee were young lawyers committed to the advancement of women's rights. Weddington strongly believed in the right to abortion, and years later she revealed in her autobiography that she herself had had a secret abortion. Coffee had clerked for federal district court judge Sarah T. Hughes, herself a pioneer in developing the constitutional bases of women's rights.

In her search for a way to end her pregnancy, McCorvey agreed to participate in the suit against the Texas abortion ban, which dated back to 1854, as long as she could be anonymous. In the suit, therefore, she was called Jane Roe. McCorvey originally told Weddington and Coffee that she had been raped, but in fact her pregnancy resulted from a consensual relationship. McCorvey unrealistically believed that her lawsuit would be resolved in time for her to have an abortion. Instead, she had the baby and placed it for adoption before the Supreme Court acted.

In 1970, Roe sued Dallas County district attorney Henry Wade, who was responsible for enforcing the state's abortion laws in Dallas. Wade was widely known for his prosecution of Jack Ruby for the murder of Lee Harvey Oswald, the alleged assassin of President John F. Kennedy. He disliked prosecuting abortion cases and often overlooked the activities of abortion counseling clinics.

The Court consolidated Roe's case with the case of *Doe v. Bolton*, which involved a married couple from Georgia who sought an abortion to avoid possible medical difficulties. The couple appealed to the Court to overturn a Georgia statute from 1968 that permitted abortion when, in the judgment of a woman's doctor, backed by two other physicians who had independently examined her, the pregnancy endangered her life or seriously threatened her health. The statute also made an allowance when a newborn would have serious mental or physical defects and when the pregnancy resulted from rape. The 1968 Georgia statute had replaced one from 1876 that was almost identical to the Texas law.

Lower federal courts in Texas and Georgia struck down all or parts of these states' laws. The court in Texas held that single and married persons had the right to decide whether or not to have children based upon the Ninth and Fourteenth Amendments. While these lower courts accepted the constitutional arguments in support of the right to abortion, they refused to issue injunctions—legal orders directing someone to cease doing something—that would actually forbid the states from enforcing their antiabortion laws. They refused because the cases were decided after the children had been born, seemingly making it impossible to provide an injunction. So, even though they had won their constitutional arguments in the lower courts, both Roe and Doe decided to appeal to the Supreme Court.

They wanted the justices to affirm the constitutional support for abortion and also to establish the precedent that lower federal courts were required to issue an injunction against the states to block enforcement of the antiabortion laws.

Roe was both Weddington and Coffee's first appearance before the Supreme Court. They argued that pregnancy unduly burdened women, and that the ban on abortion in Texas had a negative impact on their well-being. Drawing on *Griswold*, they also argued that a right to an abortion was included in the Ninth Amendment and extended to *McCorvey* through the due process and equal protection clauses of the Fourteenth Amendment. Women had a fundamental right to an abortion, and Texas had no compelling interest to deny such a right. Jay Floyd, the assistant attorney general for Texas, represented *Wade*. Floyd's two superiors, Robert Flowers and Crawford Martin, were outspoken critics of abortion, which they publicly denounced as the equivalent of murder. The case before the Court was moot, Floyd insisted, because *Roe* was no longer pregnant and the Court had long ago held that it would not decide cases that failed to present an immediate need for a remedy. Moreover, Floyd argued, women made their choice before they became pregnant by deciding to live in Texas and under its abortion laws. States such as Texas had a compelling interest in protecting fetal life at all times, he continued, because life begins at the moment of conception.

Because of two vacancies on the Court, only seven justices heard the first argument in the case on December 13, 1971. Chief Justice Warren Burger initially assigned the task of writing the opinions in both *Roe* and *Doe* to Justice Harry A. Blackmun, who labored on a draft for more than five months. Blackmun's slowness angered Justice Douglas, who had wanted to write the opinion in *Doe* and expected the Court as a whole to take the broadest possible position in support of a woman's right to an abortion. Douglas considered *Doe* to be the more important of the two cases because striking down the new Georgia reform statute would send a stronger message than overturning the antiquated Texas law.

Even Blackmun was not certain why he had been chosen to write the opinion. Burger and Blackmun were childhood friends from Minnesota; they had double-dated in high school, and Burger had lobbied to secure Blackmun's appointment to the high court. They were so personally tied to one another that the press often referred to them as the "Minnesota twins." Blackmun was also the former legal counsel for the Mayo Clinic, where he had worked closely with doctors, an experience that shaped his approach to *Roe*. In the end, however, Burger, whose political instincts made him more sensitive than the other justices to the volatile nature of the cases, probably was counting on his old friend to deliver a narrowly focused and uncontroversial opinion. Burger guessed wrong, and for the rest of their time together on the bench the relationship between the "Minnesota twins" was strained.

Blackmun's first draft opinion pleased Burger because it asserted that the Texas law was unconstitutionally vague and should be set aside on those grounds. Justices Brennan and

Douglas, however, were so displeased with the narrow basis of Blackmun's draft and his reliance on the concept of vagueness that they refused to sign it. Unlike Blackmun, they wanted a strong statement in favor of women's rights generally. They believed that the vagueness theory was analytically weak. Unable to gather a significant majority in favor of his opinion, Blackmun successfully urged Burger to set the case for reargument in the fall of 1972, when the Court's two newest justices, William H. Rehnquist and Lewis Powell, could participate. In the meantime, Blackmun returned to the Mayo Clinic during the summer to conduct extensive research on the history of abortion.

The case was argued a second time on October 11, 1972, before a full bench. The Court that decided *Roe* was a mix of Democratic and Republican appointees, senior and junior justices. Brennan and Douglas believed that *Roe* presented an opportunity to grant women a fundamental right to an abortion based on the concept of privacy. Douglas had hoped to persuade Burger to allow him to prepare the opinion for the Court in *Doe*, but his chilly relationship with the chief justice thwarted those ambitions. Thurgood Marshall and Potter Stewart joined them in believing the Court should make abortion a fundamental right. Newly appointed Justice Powell was a moderate, but during the second *Roe* argument a story circulated that at Powell's Richmond law firm he had helped a young man avoid prosecution for assisting an older woman to obtain an illegal abortion. Powell concluded that antiabortion laws simply increased the number of illegal and dangerous abortions.

On the other side of the issue were Byron White and William Rehnquist. Both insisted that there was no constitutional right to privacy, that the justices had fabricated such a right to the detriment of the fetus, and that abortion should be left where it had historically been lodged—in the states. The justices, they concluded, should not substitute their views for those of state legislators.

Chief Justice Burger was of two minds. He supported the broad concept of civil rights but believed that state legislatures were the best places to make decisions about such matters, not courts. At the same time, Burger also concluded that the Texas statute was simply too vague to stand constitutional scrutiny and should be overturned. Burger did not want to go as far as Brennan and Douglas, but he knew that he could not embrace Rehnquist and White's positions and hold his court together.

Burger once again turned to Blackmun. Blackmun's opinion quickly disposed of the question of whether the case was moot. He reasoned that simply because a pregnancy might end before the Court could reach a decision did not mean that the controversy itself would go away. Other pregnancies would occur. The parties and the states were thus owed a decision. Blackmun then proceeded to mix history, science, and a concern for the professional independence of physicians into a decision that overturned the Texas law. Historically, Blackmun noted, the common law had accepted abortion, and well into the nineteenth century women had been able to secure abortions. Even after the act of abortion

was criminalized, the punishments visited on those who performed abortions were less if they occurred early in a pregnancy. Nevertheless, the states had regulated abortion, and those regulations worked to the disadvantage of women and limited the professional judgement of physicians.

Was the fetus a person?, Blackmun asked. His answer was clearly “no.” After reviewing the history of the word “person” in the Fourteenth Amendment, Blackmun concluded that its framers did not mean to include the unborn. This point was particularly telling, Blackmun noted, because the Fourteenth Amendment explicitly applied to “all persons born” in the United States, not simply conceived there.

Blackmun refused to take on the question of when life begins. Again, he stepped outside the law for his arguments. After combing works of theology, history, medicine, and philosophy, the justice concluded that there was no consensus on the question. “[T]he judiciary at this point in the development of man’s knowledge,” Blackmun observed, “is not in a position to speculate as to the answer.”

From there Blackmun reached the major point of his opinion. A pregnant woman had a fundamental right to privacy under *Griswold* and control over whether or not to have a baby was part of that right. The right, however, was not absolute; the state did have an interest in protecting the public health. The balance between that interest and the rights of women shifted during the course of a pregnancy, with abortions later in a pregnancy posing a greater threat to the health of the woman and the well being of the fetus. At a certain point in a woman’s pregnancy, the interests of the state became compelling and its ability to regulate abortions was firm.

To make his point, Blackmun drew on the old common law concept of quickening. Up to the end of the first trimester, abortion is safer than childbirth in terms of the woman’s health. However, as the pregnancy progresses past the first trimester, regulations on the availability of abortion that reasonably related to the mother’s health were permitted. When the fetus reached viability, then the state’s compelling interest in protecting both the health of the woman and the life of the fetus became paramount. Viability was defined as the ability of the fetus to live outside the mother’s womb, somewhere near the end of the second trimester. After viability, Blackmun concluded, states could regulate and even fully ban abortions, unless that procedure was required to protect the life or health of the woman.

Chief Justice Burger worried that by engaging the issue of privacy so directly, Blackmun had gone far beyond the narrow decision he had expected. Burger’s concurring opinion emphatically stated that “the Court today rejects any claim that the Constitution requires abortions on demand.”

Burger's concurrence was also directed toward the two dissenters, Rehnquist and White. The chief justice feared that the sweeping consequences the dissenters attributed to Blackmun's opinion would in fact make it more significant than it actually was. They charged Blackmun with inventing a right not contained in the Constitution and dividing pregnancy into a trimester scheme that was unsupportable. If the state had a legitimate interest in fetal health, it clearly began at conception and continued throughout the pregnancy. They insisted that Blackmun's opinion placed the convenience of the pregnant woman above the life of the fetus. Such a position was not supported by anything in the Constitution. By dividing pregnancy into three terms and then varying the rights of women accordingly, the Court was acting as a legislative body rather than as a tribunal charged with interpreting the Constitution.

On the same day, with Justice Blackmun again writing for the same 7–2 majority, the Court also struck down the more liberal Georgia abortion statute in *Doe v. Bolton*. Burger, who had originally planned to vote in favor of the Georgia statute, wrote another concurring opinion in which he emphasized the limited scope of the Court's actions.

The *Roe* decision became part of a national dialogue. Most women's rights groups applauded the decision as a step forward for gender equality. Ironically, Justice Blackmun, whose views on gender issues had been very traditional and whose own daughter had become pregnant out of wedlock, found himself suddenly viewed as a defender of women's rights, a role he never sought but one to which he warmed considerably during the remainder of his career. The Catholic Church launched a blistering attack on the decision, on Blackmun, and especially on Justice Brennan, with some Catholic magazines demanding he be excommunicated. Blackmun became the target of demonstrators and death threats, and for the rest of his time on the bench he received round-the-clock security. Even liberal academics who supported a woman's right to abortion blasted the justice's opinion for lacking appropriate support in the text of the Constitution and in legal history. They insisted that the opinion had actually placed civil rights generally and the rights of women especially in greater danger because of its seemingly unprincipled nature.

Roe also generated a grassroots "right to life" movement that lobbied legislatures and gained considerable power within the Republican Party. Republican Presidential candidates beginning with Ronald Reagan promised that they would not appoint justices to the Court who supported *Roe*. Instead of toeing the constitutional line, legislators in many states began passing laws designed to blunt the ruling's impact. They made adult women's access to abortions and their doctors' ability to perform the procedure more burdensome and required that teenage girls notify and receive permission from their parents for an abortion. Antiabortion groups such as the National Right to Life Committee and Operation Rescue began to picket abortion clinics, often resorting to force and intimidation to keep pregnant women from using them.

The number of abortion cases appealed to the Court skyrocketed. From 1973 to 1986, when

Rehnquist replaced Burger as chief justice, the Supreme Court followed a predictable pattern: it distinguished between obstacles to the choice of abortion and refusals to facilitate the choice. The justices generally invalidated the former and upheld the later.

In recent years the Court has expanded the government's power to restrict abortion. For example, in *Webster v. Reproductive Health Services* (1989), a closely divided Court concluded that a statutory ban the state of Missouri placed on the use of public employees and facilities to perform abortions was constitutional. But the most serious threat to *Roe* emerged in *Planned Parenthood v. Casey* (1992). The state of Pennsylvania had passed a law restricting access to abortions. The statute required women to wait at least twenty-four hours for an abortion after a doctor provided them with specific information about the nature of the procedure, the development of the fetus, and the possibility of putting the newborn child up for adoption. The law also required, on threat of criminal penalties for doctors, that a minor have the consent of one parent before a doctor could perform an abortion. It also mandated that married women inform their husbands that they were about to have an abortion.

The administration of President George H. W. Bush joined the case in support of the state of Pennsylvania and asked the justices specifically to overturn *Roe*. By 1992 abortion had become heavily politicized, much beyond anything Justice Blackmun had anticipated. The Court had undergone significant change as well, not only with Rehnquist becoming chief justice but with Antonin Scalia and Clarence Thomas, both strongly antiabortion, joining the bench. A bitterly divided Court voted 5 to 4 in *Casey* to sustain *Roe*. The opinion for the Court was unique. It was authored by three justices: Sandra Day O'Connor, the first woman to sit on the high court and an appointee of Republican President Ronald Reagan, and Justices Anthony Kennedy and David Souter.

For the first time, the Court imposed a new standard to determine the validity of laws restricting abortions. That standard asked whether a state abortion regulation imposed an "undue burden," which it defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Under this new standard, the only provision to fail the undue-burden test was the Pennsylvania law's requirement that a woman notify her husband. Four of the justices—Rehnquist, Scalia, Thomas, and White—wanted to go even further; they insisted that the Court should overturn *Roe* on constitutional grounds. Since *Casey* the Court has heard other cases involving the abortion issue, although the justices have refused to address directly the constitutional soundness of *Roe*.

Abortion remains a vexing constitutional issue. Each new vacancy on the Court raises the possibility that a new justice appointed by a conservative Republican President will form a majority to overturn *Roe*. Perhaps like the desegregation of public schools, this public policy issue will be laid to rest only when the justices can reach an unshakable unanimity that reflects something like a national consensus. Until then the justices, who are

themselves divided over the issue of abortion, will continue to shape the constitutional debate over when life begins, the rights of the unborn, the rights of women, and their own power to even decide such matters.

Why Roe Should Be Overturned

The Supreme Court systematically limited the scope of *Roe* in several cases, the most important of which was *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). Planned Parenthood sued Pennsylvania's governor, Robert Casey, claiming that a state law violated the fundamental right of a woman to have access to an abortion. The law had four important provisions. An "informed consent" rule required doctors to provide woman with information about the health risks of having an abortion before one could be performed. The "spousal notification" rule required women to give prior notice to their husbands; a "parental consent" rule required minors to receive consent from a parent or guardian prior to an abortion. The fourth provision imposed a twenty-four-hour waiting period before obtaining consent.

Several members of Congress submitted an amicus curiae (friend of the court) brief in *Casey* to provide their perspective on the legal basis by which the Court could strike down such a significant precedent as *Roe v. Wade*.

The amici, Members of Congress and Senators, have substantial interests in the disposition of this case. Congressional debates on legislation with provisions similar to the challenged sections of the Pennsylvania Abortion Control Act often center on the constitutionality of such requirements . . . Congress is keenly interested in the Court's answer as it holds the key to restoring the essential balance between legislative authority and judicial review under the federal Constitution.

This Court's recent decisions have begun the process of dismantling "the mansion of constitutionalized abortion-law, constructed overnight in *Roe v. Wade*." . . . A majority of the Court has questioned or repudiated *Roe*'s trimester framework; has recognized compelling state interests in maternal health and fetal life throughout pregnancy; and has employed a more relaxed standard of review in evaluating the constitutionality of abortion regulations. *Roe* is an impaired decision. Some lower federal courts have begun to recognize, and the country increasingly understands, that *Roe* has been limited. Overruling *Roe v. Wade* would not represent an abrupt about-face in the Court's abortion jurisprudence but rather would be the final step in a journey that began several years ago. [Precedent, as] a doctrine of diminished importance in the field of constitutional law, provides no basis for declining to overrule the multiple errors of *Roe v. Wade*. On 214 occasions this Court has overturned previous decisions. In nearly three-fourths of those cases, the Court overruled because the earlier decision had wrongly interpreted the Constitution.

The reasons for this self-correction—the difficulty of addressing constitutional error through amendment or legislation; the primacy of the text of the Constitution over the interpretations placed upon it; and the inappropriateness of the nation’s highest tribunal perpetuating constitutional error—apply with special force to *Roe*. Moreover, the interests furthered by [precedent] are not served by retaining *Roe*; indeed, they are at cross-purposes. The doctrines of *Roe* have caused great instability and unpredictability in the law. Recent decisions of this Court exacerbate this uncertainty. Statements from the lower federal courts, as well as state and federal elected representatives, amply demonstrate the confusion resulting from attempts to read this Court’s recent abortion decisions against the backdrop of *Roe v. Wade*.

Overruling *Roe* also would be consistent with past willingness to admit error. This Court has corrected decisions which, like *Roe*, have misinterpreted the “liberty” clause of the Fourteenth Amendment by placing an unwarranted strait-jacket on legislative authority. And it has renounced the role of “super-legislature,” sitting in judgment on the wisdom of state statutes.

Doctrines on which long-standing social institutions and conventions were established have been overturned, as have doctrines on which scores of criminal convictions were predicated. The overturning of such decisions has often caused change, some of it disruptive. But in appropriate circumstances it also has returned to the political branches of government their rightful authority to respond to the pressing moral and social issues at the root of such change. *Roe*, contrary to this tradition, has usurped the legislative function, and has aggravated the social turmoil over abortion.

Finally, although this Court has shown a proper reluctance to overrule constitutional decisions where a less severe remedy is available, it is appropriate to overrule *Roe v. Wade* in this case. *Roe* is no longer viewed as stable or fully intact; this uncertainty concerning a decision so demonstrably unworkable and devoid of constitutional basis divests the decision of any rightful sway over the Court’s decision here. *Roe* is constitutional error of the most radical variety, and the traditions of this Court call for such error to be dispatched without ambiguity or equivocation.

Abortion as a Fundamental Right

Both critics and supporters of Justice Harry Blackmun’s opinion in *Roe v. Wade*, below, have faulted it for being too dependent on non-legal sources of authority and for a problematic reading of the history of abortion and the medical profession. Critics have also charged that Blackmun attempted to establish a fundamental right that was not based on a careful reading of the Constitution. Blackmun, according to his biographers, was most

concerned with protecting doctors, with whom he had worked closely his entire professional life, from being treated as criminals in the exercise of their professional judgment about when a woman could have an abortion.

When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman . . . Modern medical techniques have altered this situation. Appellants and various *amici* [friends of the Court] refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the 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 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 areas 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 aftercare, and to adequate provision for any complication or emergency that might arise . . . 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 proposed at a late stage of pregnancy.

The . . . State's interest—some phrase it in terms of duty—[is also] in protecting prenatal life. Some of the arguments for this justification rest 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 carried within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or 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 . . .

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . 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 . . .

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 . . . 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. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved.

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child . . . In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant 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. Appellant's 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, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some regulation in areas protected by that right is appropriate . . . 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 . . . [This] right, nonetheless, is not absolute and is subject to some limitations; and . . . at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant . . .

While certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest" . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake . . .

In the recent abortion cases, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable . . .

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 would then be guaranteed specifically by the Amendment . . . [but] no case [can] be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define “person” in so many words. Section 1 of the Fourteenth Amendment contains three references to “person.” The first, in defining “citizens,” speaks of “persons born or naturalized in the United States.” “person” is used in other places in the Constitution. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

All this, together with our observation . . . that throughout the major portion of the nineteenth 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 . . .

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . . 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 urged 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 from and 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 . . .

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, . . . 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, referred to above, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after 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 . . .

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.

Measured against these standards . . . the Texas Penal Code, in restricting legal abortions to those “procured or attempted by medical advice for the purpose of saving the life of the mother,” sweeps too broadly. The statute made no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, “saving” the mother’s life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.