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Roe v Wade Case (US) **United States [us]**

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A. Main Text and Assessment

1. *Roe v Wade* is a landmark case in US constitutional law. The case both established → *abortion* as a federal constitutional right and reflected a methodology that was, and still is, controversial. While the → *Supreme Court of the United States* has refined the constitutional law governing abortion since deciding *Roe v Wade*, the case still has a strong influence in US law (see also → *reproductive rights*; → *rights of women*).

2. The case has interested many comparatists. Considerable attention has been paid to parallel German and US developments with their different emphases (see eg Gorby and Jonas; Kommers; Glendon; Miedel; Werner; Levy and Somek; Lange; Siegel). Others have used the case to reflect upon developments in countries as diverse as Spain, South Africa, Russia, and Taiwan (see eg Stith; Davis; Johnson; Hung).

3. The case has influenced jurists outside the United States. Judges have cited the decision in judgments that liberalize abortion law. For example, this has happened in Canada (see *R v Morgentaler* (Dickson, CJ at 46; Beetz, J at 113; Wilson, J at 169–171, 181) (holding that Section 251 of the Criminal Code, which restricted access to nontherapeutic abortion, infringed a woman's right to personal security under § 7 of the Canadian Charter of Rights and Freedoms), in South Africa (see *Christian Lawyers Association of South Africa and Others v Minister of Health and Others* (upholding legislation permitting abortion during the first twelve weeks of pregnancy; → *right to life* provision in the constitution did not apply to the fetus); *Christian Lawyers Association v National Minister of Health and Others* (upholding legislation allowing those under the age of 18 to get an abortion without consent of their parents or guardians)), and in Colombia (see Decision C-355/06 (striking as unconstitutional a statute that barred abortion in all instances)). Jurists who have dissented from decisions that restrict abortion have also cited *Roe v Wade*, such as in Germany (see *Schwangerschaftsabbruch I* (dissenting opinion of Rupp-von Brünneck, J and Simon, J)). At times, adjudicators have cited the case when they have decided issues outside the abortion context. Examples exist in England (see *Rance v Mid-Downs Health Authority and Another* (citing *Roe v Wade's* summary of English common law in evaluation of plaintiff's wrongful birth tort claim)) and India (see *Gobind v State of M.P* (citing *Roe v Wade's* privacy language when deciding a constitutional challenge to surveillance law); *Naz Foundation v Govt of NCT of Delhi* (citing *Roe v Wade's* privacy language when invalidating as unconstitutional a criminal law prohibiting homosexual conduct in private), *rev'd Suresh Kumar Koushal v Naz Foundation*).

4. While *Roe v Wade* has influenced jurists outside of the United States, foreign law affected the US Supreme Court's construction of the right to abortion in the United States, as described below (Calabresi and Zimdahl 872).

B. The Factual Backdrop: Access to Abortion in the United States Prior to *Roe v Wade*

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. The US Congress could not enact abortion legislation because the federal government lacked the constitutional authority to do so.

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).

8. Both in the US and abroad, constitutional courts had an important role in defining the permissible limits of legislative attempts to regulate abortion. In the US, a ‘nationwide movement of young lawyers’ sought to use the courts to secure a woman’s constitutional right to an abortion (Garrow (1999) 836–37). Because abortion was regulated at the state level in the United States, *Roe v Wade* and its companion, *Doe v Bolton*, ‘were only two of approximately fifteen to twenty roughly simultaneous cases’ percolating through the courts at the time. When the Supreme Court heard *Roe v Wade* and *Doe v Bolton*, approximately a dozen such cases were on its docket (ibid 836–37). Abroad, cases in Austria, France and Italy reached the constitutional courts of those nations in 1974, 1975, and 1975, respectively (Ernst et al 759–60; Siegel 357).

C. The Case Facts and the Procedural History

9. ‘Jane Roe’ was the pseudonym for Norma McCorvey, an unmarried pregnant woman. McCorvey wanted an abortion, but Texas criminalized its procurement, or an attempt to procure one, except when necessary to save the mother’s life. McCorvey’s personal situation did not qualify her for the exception.

10. McCorvey’s life circumstances caused her to seek an abortion. McCorvey had only a ninth-grade education (Witchel C9). The pregnancy for which she sought an abortion was her third. Her mother allegedly took her first child from her and placed the child for adoption when her mother discovered that McCorvey was gay (McCorvey and Meisler 65, 68–70, 79). McCorvey’s second child, by a different father, was also put up for adoption (ibid 85–86). At age 21, McCorvey found herself pregnant by another man (ibid 101, 106). She claimed her pregnancy resulted from a rape, although it did not, because she thought Texas law might permit an abortion for rape, which it did not (ibid 109, 122).

11. McCorvey agreed to challenge the law because she thought the court’s decision would allow her to have a legal abortion (ibid 123). Using the pseudonym Roe, she sued Henry Wade, the Dallas County district attorney, in federal court. She sought both a declaratory judgment that would proclaim the Texas abortion law unconstitutional and an injunction to stop its enforcement. Her constitutional argument focused on the law’s vagueness and on her → *right to privacy*, which she claimed the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the US Constitution protected.

12. Additional plaintiffs joined Roe’s suit. Dr Hallford intervened because he was being prosecuted for violating the statute. The Does, a married couple, also intervened. Mrs Doe

feared she would need an abortion if she became pregnant because a pregnancy would damage her health (→ *right to health*).

13. The case was heard by a three-judge panel at first instance (Hull and Hoffer 121, citing 28 USC §§ 2281 and 2284). The Does were dismissed from the suit because they lacked standing: an actual case or controversy did not exist for them (*Roe v Wade*, 314 F Supp at 1225). The district court then struck down the law, citing the ‘fundamental right to choose whether to have children’, ‘protected by the Ninth Amendment, through the Fourteenth Amendment’ (ibid 1221–22, 1225). The statute was unconstitutionally overbroad because it prohibited all abortions, except those necessary to save the mother’s life. For example, the law did not merely restrict the abortion of a ‘quickened’ fetus, or prohibit abortions performed by incompetent persons or in inadequate surroundings, ie, scenarios that might have given the state a compelling reason for regulation (ibid 1223). Also, the law was too vague (ibid 1223). Doctors did not have ‘proper notice of what acts in their daily practice’ would ‘subject them to criminal liability’ (ibid 1223). A doctor didn’t know, for example, how likely death must be, how imminent it must be, or whether a threat of suicide counted (ibid 1223). The court declared the statute void, but refused to enjoin its enforcement. Federal courts generally do not interfere with a state’s administration of its criminal laws, but assume that state courts and prosecutors will follow a court’s ruling voluntarily (ibid 1224).

14. Roe was six months pregnant when the trial court issued its decision (Hull and Hoffer 127). However, she never received an abortion because the court refused to issue the injunction. Wade said he would continue to prosecute abortionists (ibid 138). Roe placed her third child for adoption (Witchel C9).

15. Roe appealed the denial of the injunction to the Supreme Court. Wade cross-appealed the grant of declaratory relief. The case went directly to the US Supreme Court, skipping the US Court of Appeals for the Fifth Circuit, because Congress allowed a direct appeal from the decision of a three-judge panel decision that granted or denied a civil injunction (Hull and Hoffer 138, referring to 28 USC § 1253).

16. *Roe v Wade* was originally argued before the US Supreme Court in 1971, but only seven members of the Court heard the argument because Justices Harlan and Black had left the Court. Consequently, the Supreme Court decided not to resolve the case during the 1971–72 term. The case was reargued during the 1972–73 term after Justices Rehnquist and Powell joined the Court.

D. The Decision

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

1. Procedural Issues before the Court

18. The Court quickly and straightforwardly addressed issues of → *justiciability*, → *standing* (*locus standi*), and abstention. For example, the fact that Roe’s pregnancy was over by the time of appellate review did not render the case ‘moot’ because her situation was ‘capable of repetition, yet evading review’, a doctrine recognized by cases dating back to 1911 (ibid at 125). The Court dismissed Dr Hallford from the case since he could raise his constitutional concerns in the pending state criminal proceedings, and his failure to allege governmental harassment or bad faith prosecution meant he lacked a federal claim (ibid at 126–27).

2. The Right to an Abortion and the Trimester Framework

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 antiseptics (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).

3. Doe v Bolton

30. The Supreme Court had consolidated *Roe v Wade* with *Doe v Bolton*, a case decided by a three-judge panel in Georgia. Plaintiff Mary Doe, also known as Sandra Bensing, was a 22-year-old married pregnant woman. Two of her three children were in foster care, and the third had been placed for adoption, because she was unable to care for them. At the time she filed her lawsuit, she and her husband had separated and she was living with her indigent parents and their eight children (*Doe v Bolton*, 410 US at 184). Twenty-three others joined her suit, including physicians, nurses, clergy, and social workers (ibid). She sued the Georgia attorney general, Arthur K Bolton, the Fulton County district attorney, and the Atlanta chief of police (ibid 184–85). Georgia's law was modelled on Section 230.3 of the American Law Institute's Model Penal Code. Georgia law contained more exceptions than Texas law for when abortion was permissible; however, it required that an abortion be performed in an accredited hospital, that two additional doctors confirm the applicable exception, and that the hospital's abortion committee approve the procedure.

31. The district court, in a *per curiam* opinion, held that Doe alone presented a justiciable issue (*Doe*, 319 F Supp at 1054). It then held that the statute violated her right to privacy because the law limited the reasons for an abortion, and the court invalidated those parts of the statute (ibid 1055–56). However, the court upheld the statutory provisions that advanced Georgia's interest in the mother's health and the 'potential of independent human existence', such as the provision that required abortion be performed in a licensed and accredited hospital (ibid 1055). Like the district court in *Roe v Wade*, it too granted a declaratory judgment but refused an injunction (ibid 1057).

32. The US Supreme Court said: 'That opinion [*Doe v Bolton*] and this one [*Roe v Wade*], of course, are to be read together' (*Roe v Wade* 165). The same seven-justice majority invalidated various parts of the Georgia law. Although historians have given *Doe v Bolton* little attention compared to *Roe v Wade*, the decision is important for at least four reasons. First, *Doe v Bolton* arguably prevented the Supreme Court from deciding *Roe v Wade* on the issue of vagueness instead of the issue of privacy. The Georgia law did not raise the same vagueness issues because of its specificity (Hurwitz 240).

33. Second, *Doe v Bolton* illustrated more precisely than *Roe v Wade* the limits of the state's efforts to protect the mother's health. For example, the Supreme Court invalidated the requirement that the Joint Commission on Accreditation of Hospitals approve the abortion facility because such a requirement was not 'based on differences that are reasonably related to the purposes of the Act in which it's found' (*Doe v Bolton*, 410 US at 194–95). The hospital committee process and the need for two physicians to confirm the applicable exception were also unacceptable; no other medical procedure had the same requirements (ibid 197, 199). The residency requirement was unacceptable under the Privileges and Immunities Clause, Const. Art. IV, § 2 (US) (ibid 200). One commentator

thought *Doe* 'extends *Roe* by warning that just as states may not prevent abortions by making their performance a crime, they may not make abortions unreasonably difficult to obtain by prescribing elaborate procedural barriers' (Wasserman 239).

34. Third, *Doe v Bolton* arguably allowed the Court to frame the right as that of the doctor, or that of the doctor and the woman acting together, which some scholars have criticized (Hunter 147, 187, 194). The Court said in *Roe v Wade*:

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. (*Roe v Wade*, 410 US at 165–66).

35. The Supreme Court, contrary to the federal district court in Georgia, found the physicians in *Doe* had standing because they were threatened with criminal prosecution (*Doe v Bolton*, 410 US at 188–89), whereas Dr Hallford in *Roe v Wade* lacked standing because the ongoing state prosecution triggered the abstention doctrine that stops federal courts from intervening in pending state cases.

36. Fourth, *Doe v Bolton* made clear that while a woman does not have an absolute right to an abortion on demand throughout her pregnancy (ibid 189), doctors could easily satisfy statutes that required them to attest that the abortion was necessary for the woman's health. The Court said:

Whether . . . 'an abortion is necessary' . . . is a professional judgment that the . . . physician will be called upon to make. . . . [That] medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health (ibid 192).

E. The Aftermath of *Roe v Wade*

1. The Regulation of Abortion

37. According to polls, most Americans held views that aligned with *Roe v Wade* at the time it was decided: '64 percent of American 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 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 (*Thornburgh v American College of Obstetricians and Gynaecologists* 759), noting that such laws will 'often shut down clinics' (Biskupic). *Roe v Wade* itself signalled that some of these efforts might be permissible by acknowledging the state's interest in maternal health (*Roe v Wade* 165), although *Doe v Bolton* suggested real limits. These efforts caused courts to be 'drawn further and further into an array of

subsidiary technical questions regarding abortion' (Wilkinson 276). As of 2009, the Supreme Court had decided 'more than twenty-five cases involving abortion' (ibid).

39. The 1992 Supreme Court decision in *Planned Parenthood of Southeast Pennsylvania v Casey* was crucial in protecting *Roe v Wade's* longevity. Five members of the Court, noting the importance of *stare decisis*, reaffirmed 'the essential holding of *Roe v Wade*' (*Planned Parenthood of Southeastern Pennsylvania v Casey* 846–53), that the Fourteenth Amendment protects a woman's right to abortion (ibid 861). Justices O'Connor, Kennedy and Souter used the unusual device of a joint opinion to emphasize 'the role and stature and institutional responsibilities of the Supreme Court' (Garrow (1999) 845). They wrote, 'The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe v Wade* for people who have ordered their thinking and living around that case be dismissed' (*Planned Parenthood of Southeastern Pennsylvania v Casey* 856).

40. Nevertheless, *Planned Parenthood of Southeastern Pennsylvania v Casey* also altered *Roe v Wade's* basic framework. It swept away the trimester framework; instead, *Planned Parenthood of Southeastern Pennsylvania v Casey* 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). In addition, *Planned Parenthood of Southeastern Pennsylvania v Casey* indicated that either a concern for the mother's health or for the protection of potential human life could justify the restrictions (ibid 873, 876, 878) (O'Connor, J with Kennedy and Souter, JJ). Therefore, the government's interest in protecting potential life would allow some burdening of the right to abort even before viability, so long as there was no undue burden.

41. After the new test, state regulation of abortion increased (Winter). The fact that the Court in *Planned Parenthood of Southeastern Pennsylvania v Casey* upheld four of the five challenged Pennsylvania regulations suggested that the protection offered by the undue burden test might be rather weak. The Court upheld a 24-hour waiting period, the provision of information about alternatives to abortion, a parental consent requirement, and record-keeping obligations. The Court only invalidated the requirement that married women obtain their husbands' consent. As a consequence of *Planned Parenthood of Southeastern Pennsylvania v Casey*, state constitutional law became more important as an additional source of authority to strike down laws that inhibited access to abortion (Garrow (1999) 849).

42. In 2016, the US Supreme Court decided *Whole Woman's Health v Hellerstedt*, the latest testament to *Roe v Wade's* enduring legacy. Just as in *Roe v Wade*, the Supreme Court held that Texas law was unconstitutional. The law at issue in *Whole Woman's Health v Hellerstedt* required that doctors performing abortions have 'admitting privileges' at a local hospital no more than 30 miles from the clinic, and that abortion clinics satisfy building specifications otherwise required for ambulatory surgical centres. The 2013 law was enacted ostensibly to protect maternal health, but led to the closure of many clinics. In its five-to-three decision (Justice Scalia had recently died), the Court cited *Roe v Wade* for the position that a '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' (*Whole Woman's Health v Hellerstedt* 19). However, citing the plurality decision in *Planned Parenthood v Casey*, the Court emphasized that '[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right' and are unconstitutional (ibid). The Court in *Whole Woman's Health v Hellerstedt* clarified that a court should determine if a burden is 'undue' by weighing the purported benefits against the burdens (ibid 19–21). The

legislature's view about the benefits of a regulation is not determinative; rather, the court itself must make the assessment (ibid 21). Since the two Texas provisions did not confer any health-related benefits, but imposed a substantial obstacle in the path of a woman seeking an abortion, the provisions were unconstitutional (ibid 22, 24, 32).

2. Substantive Due Process as an Enduring, but Contested, Concept

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).

46. Individual justices continued to critique *Roe v Wade* in later cases. For example, in *Planned Parenthood of Southeastern Pennsylvania v Casey*, Justice Scalia said that the Constitution does not limit states' ability to regulate abortion 'because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed' (*Planned Parenthood of Southeastern Pennsylvania v Casey* 980 (Scalia, J, dissenting, joined by Rehnquist, CJ, White, J, and Thomas, J)). In his dissent in *Whole Woman's Health v Hellerstedt*, Justice Thomas, while not blaming *Roe* itself for the Court's 'illegitimate made-up tests' (ibid 12, 14), blamed the Court's 'special treatment of certain personal liberties', including those created through substantive due process, for the wrong outcome in many abortion decisions. This special treatment included the right to privacy that led to *Roe v Wade* itself (ibid 15).

47. Scholars are divided about whether the Court should have created a constitutional right to abortion. John Hart Ely criticized the Court for not explaining why privacy is involved, and argued the right ‘lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine’ (Ely 931–32, 943). Others have echoed this sentiment, calling the Court’s analysis ‘startlingly shoddy’, (Myers at 1027) and ‘outcome-based jurisprudence’ (Lamparello and Swann 2–3). Ronald Dworkin, in contrast, found critics’ distinction between ‘unenumerated rights’ and ‘enumerated rights’ preposterous (Dworkin 390). He applauded the Court’s ability to derive the right to procreative autonomy from a ‘holistic interpretation of the Bill of Rights’ (Dworkin 418–26). Yet others have suggested that the Equal Protection Clause would have been a preferable or an additional justification for the holding (see eg Ginsburg), and that rationale has crept into some subsequent cases. For example, the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v Casey* mentioned that ‘[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives’ (*Planned Parenthood of Southeastern Pennsylvania v Casey* 856). Justice Ginsburg has also mentioned that rationale in later cases (see eg *Gonzales v Carhart* 172 (Ginsburg, J, dissenting)).

48. The implications of the Court’s methodology have pleased some, but not others. For critics of *Roe v Wade*, the decision undermined democracy by putting the abortion issue in the hands of an unelected Court, with the result that ‘centrist’ compromises on abortion have been lost (Brooks A23). Critics also claim that the decision has harmed → *federalism* because decisions about abortion were removed from the state level (Wilkinson 305–11). The decision has also been blamed for undermining the Court’s legitimacy because, critics say, the Court has been ‘motivated by outcomes and ideology, not process and reason’, and this perception, in turn, has politicized the process for nominating Supreme Court justices (Lamparello and Swann 6–7).

49. Those who like *Roe v Wade* claim that substantive due process allows the Court to meet present day challenges. It reflects ‘living constitutionalism’, and is consistent with the drafters’ intent. After all, as Chief Justice Rehnquist has said, somewhat ironically given his position in *Roe v Wade*, ‘Where the framers of the Constitution...used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen’ (Rehnquist 403). Substantive due process has permitted, among other outcomes, constitutional protection for same-sex relationships. In *Lawrence v Texas*, for example, the Court, citing *Roe v Wade* and other cases, held that the criminalization of same-sex intimate conduct violated the Due Process Clause of the Fourteenth Amendment. In *Obergefell v Hodges*, the Court held that the Due Process and the Equal Protection Clauses entitled same-sex couples to marry.

50. As debates about the appropriateness of substantive due process continue, parallels from both English history and other systems may enrich the conversation. For example, Sir Edward Coke invoked the ‘myth’ of the → *Magna Carta (1215)* in the sixteenth and seventeenth centuries in England to check the power of the king and parliament (Gedicks 598–99, 611). Courts in other countries have also developed doctrines to evaluate the → *reasonableness* of governmental action. For instance, comparisons have been made with Germany (Currie), as well as the → *European Court of Human Rights (ECtHR)* (Dzehtsiarou and O’Mahony).

3. Political Polarization

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.

F. Conclusion

53. *Roe v Wade* has had a significant impact in the United States on abortion rights, women’s self-determination, the constitutional notion of privacy, and the Supreme Court’s role in adapting the Constitution to changing conditions. *Roe v Wade* drew on other nations’ experiences and has become, in turn, a reference point for others outside of the United States as they grapple with many of the same issues. The case provides an important source of analysis for comparatists.

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