



NARAL
Pro-Choice America

Roe v. Wade and the Right to Choose

This right of privacy . . . 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.¹

U.S. Supreme Court Justice Blackmun
Roe v. Wade

Abortion in the United States Before *Roe*

When *Roe v. Wade* was decided in January 1973, abortion except to save a woman's life was banned in nearly two-thirds of states.² Laws in most of the remaining states contained only a few additional exceptions.³ An estimated 1.2 million women each year resorted to illegal abortion,⁴ despite the known hazards of frightening trips to dangerous locations in strange parts of town, whiskey as an anesthetic, doctors who were often marginal or unlicensed practitioners, unsanitary conditions, incompetent treatment, infection, hemorrhage, disfiguration, and death.⁵

During my tenure as house officer of OB/GYN, I would see at least one criminal abortion a night, at least one, and often ten on weekends. All were infected. . . . Most required surgery of some type, and many required blood replacement. If these unfortunate women survived, they were often sterile as a result of infection.⁶

-Dr. Robert Prince
Dallas, NARAL Pro-Choice Forum, May 9, 1991

The Constitutional Development of the Right to Privacy

During the half century leading up to *Roe*, the Supreme Court decided a series of significant cases in which it recognized a constitutional right to privacy that protects important and deeply personal decisions concerning "bodily integrity, identity, and destiny" from undue government interference.⁷ Citing this concern for autonomy and privacy, the court struck down laws which had severely curtailed the role of parents in education, mandated sterilization, and prohibited marriages between people of different races.⁸

Important aspects of the right to privacy were established in *Griswold v. Connecticut*,⁹ decided in 1965, and in *Eisenstadt v. Baird*, decided in 1972.¹⁰ In these cases, the Supreme Court held that

state laws that criminalized or hindered the use of contraception violated the right to privacy. These cases recognized the right of the individual “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹¹ Following these cases, the court held in *Roe* that the right to privacy encompasses the right to choose whether to end a pregnancy.¹²

The court has reaffirmed *Roe*’s central holding on multiple occasions throughout the past 40 years,¹³ noting in 1992 that “[t]he soundness of this . . . analysis is apparent from a consideration of the alternative.”¹⁴ Without a privacy right that encompasses the right to choose, the Constitution would permit the state to override not only a woman’s decision to terminate her pregnancy but also her choice to carry the pregnancy to term.¹⁵

The *Roe* Compromise

Although *Roe* invalidated restrictive abortion laws that disregarded women’s right to privacy, the court recognized a state’s valid interest in potential life.¹⁶ That is, the court rejected arguments that the right to choose is absolute and always outweighs the state’s interest in imposing limitations.¹⁷ Instead, the court issued a carefully crafted decision that brought the state’s interest and the woman’s right to choose into balance.

The court held that a woman has the right to choose abortion care until fetal viability, but that the state’s interest generally outweighs the woman’s right after that point.¹⁸ Accordingly, after viability—the time at which a fetus can survive outside the woman’s body—the state may ban any abortion not necessary to preserve a woman’s life or health.¹⁹ Indeed, 41 states have laws that address post-viability abortion.²⁰

42 Years of *Roe*: A Better Life for Women

By striking down laws that forced women to resort to back-alley abortion, *Roe* saved many women’s lives. According to one estimate made before 1973, “more than five thousand women may have died [per year] as a direct result [of criminal abortions]. Many deaths from illegal abortion may go unlabeled as such because of careless or casual autopsies and the lack of experience and ability of autopsy surgeons.”²¹

Since abortion was legalized in 1973, the safety of the procedure has increased dramatically. The number of deaths per 100,000 legal abortion procedures declined from 4.1 to 0.6 between 1973 and 1997.²²

In addition, *Roe* has improved the quality of many women’s lives. Although most women welcome pregnancy, childbirth, and the responsibilities of raising a child at some period in their lives, few events can more dramatically constrain a woman’s opportunities than an unplanned pregnancy. Because childbirth and pregnancy substantially affect a woman’s educational prospects, employment opportunities, and self-determination, restrictive abortion laws

narrowly circumscribed women's role in society and hindered women from charting their paths through life in the most basic of ways.²³ In the more than 40 years since *Roe*, the variety and level of women's achievements have reached unprecedented heights. The Supreme Court observed 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."²⁴

*It took tremendous courage for the heroes of yesterday's civil rights battles to stand on the front lines of the struggle for full citizenship for blacks. It will take enormous courage for America's pro-choice majority to face down powerful opponents of choice at the clinics and in the state houses, the Congress and the White House. But we can afford to do no less.*²⁵

- Rep. John Lewis (D-GA)

How the *Casey* Decision Imperiled *Roe*

In 1992, the court rendered one of its most important decisions on abortion rights since *Roe*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the court reaffirmed *Roe*, while at the same time sharply restricting its protections. In *Casey*, the court abandoned the strict scrutiny standard of review and adopted a less protective standard that allows states to impose restrictions as long as they do not "unduly burden" a woman's right to choose. Under this new standard, the court approved state restrictions that it had previously found to violate the right to privacy and effectively invited states to impose barriers on women's access to abortion.²⁶ Indeed, under *Casey*'s looser standard, courts have allowed a multitude of state restrictions to be imposed upon reproductive freedom and choice. *Casey* opened the floodgates to a relentless, purposeful effort on the part of anti-choice forces to erode and burden the right to choose—rendering it unavailable for many and more difficult and dangerous for others.

As the pro-choice community strives to fulfill the promise of *Roe* for all women by working to secure better access to effective methods of contraception, comprehensive sex education, and quality health and child care, we remain locked in a struggle against efforts to eliminate the right to choose altogether.

In June 2000, the Supreme Court issued its most significant ruling on the right to choose since *Casey*. Emphatically maintaining the centrality of women's health and striking down Nebraska's ban on abortion care as early as the 12th week in pregnancy, the court's ruling in *Stenberg v. Carhart* was won by the slimmest of margins, 5-4, with Justice O'Connor casting the deciding vote.²⁷

With the retirement of Justice O'Connor and the passing of Chief Justice Rehnquist in 2006 President Bush appointed Chief Justice John Roberts and Justice Samuel Alito, shifting the court's balance further to the right. The 2007 outcome of the Federal Abortion Ban cases of

Gonzales v. Planned Parenthood Federation of America and *Gonzales v. Carhart*²⁸ illustrated the anti-choice, anti-woman direction in which the Roberts court had moved. In upholding a nationwide ban on a safe second-trimester abortion method with *no* exception to protect the health of the woman, the court paved the way for further setbacks to reproductive freedom and personal privacy.

The court experienced additional change when, in 2009 and 2010, President Obama had the opportunity to appoint two new justices, Justice Sonia Sotomayor, succeeding Justice Souter, and Justice Elena Kagan, succeeding Justice Stevens. These additions to the court proved to be instrumental in reclaiming some of this lost ground in the *Whole Woman's Health v. Hellerstedt* case (described below).

At the same time the justices joined the court, however; at the state level, anti-choice legislators steadily passed laws to lay the groundwork for a Supreme Court case to challenge and possibly reverse *Roe v. Wade*. Between 1995 and 2016, states enacted 932 anti-choice legislative measures.²⁹ In particular, beginning in 2010, 17 states enacted a pre-viability abortion ban that prohibits access to abortion care after 20 weeks. While this ban rests rhetorically on the claim of fetal pain, its sponsors readily admit it is intended as a challenge to *Roe v. Wade*. For over four decades, the Supreme Court has held that a woman has the right to choose abortion care until the point of fetal viability, and under the *Roe* standard states may regulate, but not ban, abortion before this point. With this new ban that ignores the standard of viability, anti-choice activists are pressing the court to abandon this long-established constitutional framework of abortion rights. And if *Roe* is overturned, many states are poised to ban abortion outright; as of 2016, 13 states had near-total bans on abortion care, some of which could become enforceable if *Roe* falls.³⁰

Then, beginning in 2015, states began enacting a ban on D&E—the most common type of second-trimester abortion procedure—attempting to again place another restriction on the availability of abortion care, broadly.³¹ This type of ban is even more radical than 20-week bans, as it would deny abortion care to some women even earlier in pregnancy.

The Promise of *Whole Woman's Health v. Hellerstedt*

After years of litigation working through the courts—testing just how far a state could go in erecting barriers to women's ability to get abortion care—the Supreme Court agreed to hear *Whole Woman's Health v. Hellerstedt*, a case about two of Texas' TRAP (Targeted Regulation of Abortion Providers) laws that required every abortion provider to have admitting privileges at a nearby hospital and that required every abortion provider to needlessly convert its practice into a surgical center—at great expense and without any medical justification for doing so. The law had a devastating impact: it succeeded in shuttering more than half of the abortion clinics in Texas before it was struck down.

In the most consequential ruling since *Casey*, the court found in a 5-3 decision that the law was

unconstitutional. The court ruled that the law violated the undue-burden standard because:

...neither of these provisions offers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, *Casey, supra*, at 878 (plurality opinion), and each violates the Federal Constitution. Amdt. 14, §1.1

The decision was less an action that set new precedent and more a ruling that reaffirmed the existing undue-burden standard—drawing a bright line between what constitutes a state’s right to “protect life” and a woman’s right to get a pre-viability abortion—without political interference. Since the decision, several similar cases have either been dropped or the laws at issue have similarly been found unconstitutional.³²

Even after such a favorable decision and the fact that *Roe*’s protections remain a bulwark of freedom for American women, our rights have been eroded to such a degree that our ability to get a safe, legal abortion remains in grave peril. Today, abortion access is more determined by a woman’s income, zip code, and source of health insurance than any other factor. Sadly, today more than ever, the full vision of reproductive freedom remains elusive for too many women. NARAL Pro-Choice America recommits to protecting *Roe*, repealing restrictions on it, and working to secure the full spectrum of reproductive rights for all women.

January 1, 2017

Notes:

¹ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

² *Roe*, 410 U.S. at 118-119 n.2.

³ See, e.g., DEL. CODE ANN., tit. 24, §§ 1790-1793.

⁴ Willard Cates, Jr. et al, *Comment: The Public Health Impact of Legal Abortion: 30 Years Later*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 25 (2003); Willard Cates Jr., *Legal Abortion: The Public Health Record*, 215 SCIENCE 1586 (1982); Richard Schwarz, SEPTIC ABORTION 7 (1968).

⁵ Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 117 (Nov. 1989).

⁶ National Commission on America Without *Roe*, *Facing A Future Without Choice: A Report on Reproductive Liberty in America*, at 16 (1992).

⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 927 (Blackmun, J., concurring and dissenting).

⁸ See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967).

Notes, cont.

⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁰ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹¹ *Eisenstadt*, 405 U.S. at 453.

¹² *Roe*, 410 U.S. at 153.

¹³ See, e.g., *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Casey*, 505 U.S. 833 (1992), cf. *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁴ *Casey*, 505 U.S. at 859.

¹⁵ *Casey*, 505 U.S. at 859.

¹⁶ *Roe*, 410 U.S. at 159.

¹⁷ *Roe*, 410 U.S. at 153-54.

¹⁸ *Roe*, 410 U.S. at 163-65.

¹⁹ *Roe*, 410 U.S. at 163-64.

²⁰ See generally NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUNDATION, *Who Decides? The Status of Women's Reproductive Rights in the United States* (25th ed. 2016), available at www.WhoDecides.org. (41 states have laws restricting post-viability abortion on the books, though some of these laws have been enjoined by courts and are therefore unenforceable. NARAL Pro-Choice America supports the legal framework established in *Roe v. Wade* and does not oppose restrictions on post-viability abortions that contain adequate exceptions to protect the life and health of the woman.)

²¹ The estimated number of deaths per year from illegal abortion services (e.g. 5,000) has been derived from the findings of several studies. The following is a summary of these studies: "Difficulty as it is to accumulate statistics in this area, a surprising similarity has been noted in various studies independently made within the last thirty years. If general trend observed is accepted, without becoming sidetracked in disputes over exact numbers of methodology, we must consider the probability that more than one million criminal abortions will have been performed in the United States in 1962, and more than five thousand women may have died as a direct result." Zad Leavey & Jerome M. Krummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 124 (1962) (citing to Gebhard, et al, PREGNANCY, BIRTH AND ABORTION 136-137 (1958); Frederick Taussig, ABORTION SPONTANEOUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS 25 (1936); Marie Kopp, BIRTH CONTROL IN PRACTICE 222 (1934); Stix, *A Study of Pregnancy Wastage*, 13 MILBANK MEMORIAL FUND QUARTERLY 347, 355 (1935); MODEL PENAL CODE § 207.11, comment, p. 147 (Tent. Draft No. 9, 1959.). "It has been estimated that as many as 5,000 American women die each year as a direct result of criminal abortion. The figure of 5,000 may be a minimum estimate." Richard Schwarz, SEPTIC ABORTION 7 (1968) (citing to Taussig, 23-28, which discusses the original mathematical formula used for determining that somewhere between 8,000 and 10,000 women died each year from illegal abortion.); "One recent study at the University of California's School of Public Health estimated 5,000 to 10,000 abortion deaths annually." Lawrence Lader, ABORTION 3 (1966) (also citing to Edwin M. Gold et al, *Therapeutic Abortions in New York City: A Twenty-Year Review*, in New York Dept. of Health, Bureau of Records and Statistics (1963), which discussed Dr. Christopher Tietze's estimate of nearly 8,000 deaths from illegal abortion annually in the United States. The estimate was based on the number of illegal abortions in

Notes, cont.

New York City, the only major municipality keeping abortion statistics.); “[M]ore than five thousand women may have died as a direct result [of criminal abortion in the United States in 1962].” Zad Leavy & Jerome M. Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123, 124 (1962); “Taussig and others have concluded that the abortion death rate during the late 1920s was about 1.2% and amounted to over 8,000 deaths per year.” Russell S. Fisher, *Criminal Abortion*, in Harold Rosen, THERAPEUTIC ABORTION, MEDICAL PSYCHIATRIC, LEGAL, ANTHROPOLOGICAL, AND RELIGIOUS CONSIDERATIONS 8 (1954).

²² Laurie D. Elam-Evans et al., Centers for Disease Control and Prevention, *Abortion Surveillance – United States, 1999*, 51 MORBIDITY & MORTALITY WEEKLY REP., at 28, tbl. 19 (2002).

²³ *Casey*, 505 U.S. at 928 (Blackmun, J., concurring and dissenting).

²⁴ *Casey*, 505 U.S. at 856.

²⁵ National Commission on America Without Roe, *Facing A Future Without Choice: A Report on Reproductive Liberty in America*, at viii (1992).

²⁶ *Casey*, 505 U.S. at 881-87.

²⁷ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

²⁸ *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America*, 127 S. Ct. 1610 (2007).

²⁹ See NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUNDATION, *Who Decides? The Status of Women’s Reproductive Rights in the United States* (26th ed. 2017), available at www.WhoDecides.org.

³⁰ See NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUNDATION, *Who Decides? The Status of Women’s Reproductive Rights in the United States* (26th ed. 2017), available at www.WhoDecides.org, Near-Total Abortion Bans: unconstitutional and unenforceable near-total criminal bans on abortion and “trigger” bans.

³¹ In 2015, KS and OK enacted such bans. In 2016, AL, LA, MS, and WV enacted similar bans.

³² June 30, 2016 Interested Parties memo located in the NARAL Pro-Choice America offices.