

Notes on Roe v. Wade

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In the landmark Supreme Court decision, Roe v. Wade, Justice Blackmun's majority opinion diligently attempts to resolve several broad questions while balancing the interests of a pregnant woman, a fetus (or embryo), and the State. The result is, like most noteworthy public policy treatises, a document of calculated compromises.

After reviewing the differing opinions and the legal logic employed to assert such positions, I researched the origins of each Justice's input in context and found that the document was stronger for its inconsistencies and somewhat cantilevered rationales. Indeed, the Court was acutely aware of the importance of the decision and modified its process somewhat to account for the normally divisive nature of the core issue. For example, the Justices did not cast vote at the initial conference but rather expressed views in hopes of finding common ground to evolve into a decision. The Court also employed increased document security, and notably lobbied one another to gain support for their points of view, a tactic usually reserved for the legislative arena (Brethren 233).

While the Court is, by its nature, independent from the Executive and Legislative branch, one is naive to assume that political posturing and pressure (albeit indirect) were absent from the proceedings. Additionally, in this pivotal issue, the Justice's own personal beliefs were a factor that shouldn't be ignored. Indeed, in the nomination procedure of new Justices, the candidate's feeling's on Roe v. Wade are a crucial determining factor as sitting Presidents aim to effect a legacy reflecting their religious or moral stance on abortion.

At the time of the Roe v. Wade decision, Chief Justice Warren E. Burger had been appointed by President Nixon to bring a more conservative, moral and "law and order" approach to the Court in

contrast to the liberal and “lenient” attitude displayed the Warren court. At the same time, Burger wanted to affirm his leadership abilities in the new court by being in the majority if at all possible, even to the point of lobbying for consensus and/or vacillating on his approach to resolution.

Justice Blackmun (also recently having been recently appointed by Pres. Nixon), an old friend of C.J. Burger, was selected to write for the majority based on his predication for research coupled with his experience in the medical sphere as chief counsel for the famous Mayo Clinic. From the outset, the constitutional reasoning proved to be elusive and somewhat hodge-podge, even for the Justice’s who sought the same result (overturning the Texas District Court decision and in effect the Texas anti-abortion law), and required myriad revision in which many Justices participated through memos and comments.

The end result was based on the fourteenth amendment’s clause, which states, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

To reach this conclusion, the Court relied on previous decisions that concluded the “liberty” suggested in the Fourteenth amendment afforded a zone of privacy in decisions such as birth control (Griswold, Eisendrat). Roe v. Wade further defined this “zone” to include a pregnant woman’s relationship with a physician to decide personal medical choice and effect them as chosen.

The book “The Brethren” (a journalistic look at the Burger Court by Woodward and Armstorg) describes Justice Brennan diplomatically assisting J. Blackmun in revising the logic used to reach the intended result. J. Brennan, being the Court’s lone Catholic, was apprehensive to take a leadership role but was firm in his support for overturning the District court’s ruling. As the author of previous decisions forming a foundation for Roe v. Wade, he was instrumental in shifting the opinion. J. Blackmun’s initial opinion focused on the fetus’s rights (if any) and advances in

medical technology (which make abortion safer) but J. Brennan's input emphasized the woman's rights to privacy within the confines of her body - thus determining that the woman's right to liberty took precedence over the fetus (Brethren 231) - this reasoning strengthened the Fourteenth amendment claim.

Justice Rehnquist's dissent, and in some respects Chief Justice Burger in concurring opinion, had little to do with abortion but rather, jurisdictional concerns, notably State's rights. J. Rehnquist expressed his view that the jurisdictional applicability of the case was invalid since such laws could be legitimately made by the individual states.

Further, J. Blackmun's majority opinion, and Justice Douglas's concurring opinion, both also cited the Ninth amendment, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" as additional basis for determining the validity of this zone of privacy.

Justice White, also in dissent also felt the jurisdictional grounds were faulty and the Constitution simply had no basis on which decide the issue,

'I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers [410 U.S. 222] and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.'

Additionally, Rehnquist argued that the appellant had no standing to bring the case as she was no longer pregnant at the time the case was brought before the court thus was not personally affected by the decision – an argument that ignores the human gestation period and court caseload timeline. Incidentally, he based his reasoning on the standing issue on the Sierra Club case in which none of the co-appellants seeking injunctive relief from planned development in a wilderness area had actually visited the region they wished to save thus giving them no standing to bring the case.

Most significant of the compromises is the declaration of “trimester” demarcation lines - which I agree with Rehnquist makes the court the “an ex officio medical board.” In particular, Justice Thurgood Marshall objected to the trimester scheme citing concerns that poor and rural folks did not have the same access to timely medical care as wealthy or urban people, and thus were disadvantaged by the scheme (Brethren 232). His input resulting in a less specific range of dates defining the stages of pregnancy.

I think it likely that the trimester approach was designed to temper the tension betwixt state and federal preferences, and also a means to “hedge the blow” of the decision for the more conservative elements of the Court who knew that a public backlash would be forthcoming. Indeed C.J. Burger’s concurring opinion sounded like an apology in suggesting that little had changed and state’s still retained considerable rights to control abortion as he says,

“Of course, States must have broad power, within the limits indicated in the opinions, to regulate the subject of abortions, but where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible. For my part, I would be inclined to allow a State to require the certification of two physicians to support an abortion, but the Court holds otherwise. ...Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.”

Additionally there is a (apparently deliberate) contradiction, in which the court carefully bows out of deciding when life begins but does declare that a *human in process* (italics mine), is not a “person” constitutionally speaking. The careful declaration that a fetus was “not a person” was insisted upon by Justice Potter Stewart who argued that, unless such clarification were included, the opinion could be invalidated if the Court later determined that a fetus was indeed “a person,” and thus afforded Fourteenth amendment right of its own (Bretheren 233). This element has been a lightning rod for further debate on the issue.

Justice Douglas seemed to be the force espousing privacy as the crux of the decision and in his (rather stirring and eloquent) concurring opinion, he outlines for the record what he feels liberty entails, citing case notes and reasoning behind each of the hallmarks.

“First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.

Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.

Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.”

All these opinions came together to create a document which is revered and hated both for what it says and how it says it. As Kennedy and Alderman suggest in “The Right to Privacy,” the right to privacy is receiving a lower value in the current court make-up and it is primarily the principle of *stare decisis* which has prevented the Court from reserving the decision outright. Justice Scalia points out regarding privacy, “We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining (Right to Privacy 66).”

I respectfully disagree with J. Scalia. Rather I feel that the societal repercussions of Court decisions regarding privacy demonstrate that the Court has a legitimate interest to dutifully consider difficult issues related to privacy and liberty. Indeed society is benefited by a succinct and rational Court decision before issues are confused and corrupted. Additionally, I suggest that the Court has an obligation to society to work diligently (together as needed), to form opinions, based on constitutional reasoning, which address contemporary societal conditions in a practical manner, as was specifically accomplished in *Roe v. Wade*.