

## **Roe v. Wade (1973)**

**Argued:** December 13, 1971

**Reargued:** October 11, 1972

**Decided:** January 22, 1973

### **Background**

The Constitution does not explicitly guarantee a right to privacy. The word privacy does not appear in the Constitution. However, the Bill of Rights includes protections for specific aspects of privacy, such as the Fourth Amendment's "right of the people to be secure in their persons, houses, papers and effects" from unreasonable government searches and seizures and the Fifth Amendment's right to be free of compelled self-incrimination in criminal cases. In early rulings about privacy, the Supreme Court connected the right to privacy to particular locations, with emphasis on a person's home as a private space where the government could not intrude without a warrant. During the 21st century, the Court began interpreting the Constitution, including the Due Process Clause of the 14th Amendment, as providing a broader right to privacy protecting people as well as places. Over the decades the Court interpreted this right to privacy to include decisions about child rearing, marriage, and birth control. This is a case about whether that constitutionally-protected right to privacy includes the right to obtain an abortion.

In the 19th and early 20th centuries, most states adopted laws banning or strictly regulating abortion. Many people felt that abortion was morally or religiously wrong, and so many states outlawed abortion except in cases where the mother's life was in jeopardy. But illegal abortions were widespread and often dangerous for women who underwent them because they were performed in unsanitary conditions. Wealthier women could travel to states or other countries with looser laws to obtain abortions, while poorer women often did not have that option. In the 1960s, a movement to make abortion legal gained ground. The movement advocated for changes in state laws (and four states did repeal their bans) and brought cases in courts challenging the abortion bans as unconstitutional.

### **Facts**

In 1969, an unmarried and pregnant resident of Texas known as Jane Roe (a pseudonym used to protect her identity) wanted to terminate her pregnancy. Texas law made it a felony to abort a fetus unless "on medical advice for the purpose of saving the life of the mother." Roe and her attorneys filed a lawsuit on behalf of her and all other women who were or might become pregnant and seek abortions. The lawsuit was filed against Henry Wade, the district attorney of Dallas County, Texas, and claimed that the state law violated the U.S. Constitution.

A three-judge federal district court ruled the Texas abortion law unconstitutional under the Ninth Amendment, which states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In particular, the district court

concluded that “[t]he fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment,” which applies to the states through the 14th Amendment. The case was then appealed directly to the U.S. Supreme Court, which agreed to hear it.

### **Issue**

Does the U.S. Constitution protect the right of a woman to obtain an abortion?

### **Constitutional Amendments and Supreme Court Precedents**

- **Ninth Amendment to the U.S. Constitution**

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

- **14<sup>th</sup> Amendment to the U.S. Constitution**

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United 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.”

- ***Griswold v. Connecticut* (1965)**

A married couple sought advice about contraception from a Planned Parenthood employee named Griswold. Connecticut law criminalized providing counseling to married people for the purpose of preventing conception. The Supreme Court ruled that the Connecticut law violated the Constitution because it invaded the privacy of married couples to make decisions about their families. The Court identified privacy as an important value, fundamental to the American way of life, and to the other basic rights outlined in the Bill of Rights (including the First, Third, Fourth, and Ninth Amendments). Seven years later, the Court decided a case that extended access to contraception to unmarried persons, as well.

- ***U.S. v. Vuitch* (1971)**

Washington, DC, had a law that prohibited abortions unless a woman’s life or health was endangered by the pregnancy. Dr. Vuitch was arrested for violating that law, and he argued that only a doctor (not a prosecutor) could determine whether an abortion was necessary to protect a woman’s life or health. The Supreme Court did not overturn the DC law. Instead it ruled that “health” should include both psychological and physical well-being.

### **Arguments for Roe**

- A woman’s right to privacy is implicitly guaranteed in the First, Fourth, Fifth, Ninth, and 14th Amendments. As the Court ruled in *Griswold*, there are certain matters—including the decision about whether or not to have a child—that are individual decisions protected by the Constitution.
- Many women had unwanted pregnancies, which had a major impact on their lives. In the 1970s, women could be asked to leave their jobs if they became pregnant, and most employers did not provide maternity leave. Women could be endangering their careers or finances in addition to their psychological and physical health by being forced to carry a pregnancy to term.
- Women in Texas who wish to have an abortion must either travel to another state where abortion is legal or undergo an illegal abortion where conditions could be unsafe. Travel is costly and inconvenient, thus making access to a safe, legal abortion more difficult for poor women. Illegal abortions put women’s life, health, and well-being at risk.
- The law criminalizes a safe medical procedure, and it is too vague for doctors to know what they may or may not do. Doctors must determine that a woman’s life is at risk in order to perform a legal abortion, and their decision and professional interpretation of “at risk” could land them in jail.
- An unborn fetus is not recognized as a person and does not have rights equal to the mother. Abortions were more common in the 19th century, so it is clear that the framers of the 14th Amendment did not intend to include fetuses in the definition of “persons.” No Supreme Court case has established that a fetus is a person and, therefore, entitled to constitutional rights.

### **Arguments for Wade**

- There is no right to abortion guaranteed in the Constitution. It is mentioned nowhere in the text, and there is no reason to believe that those who wrote the 14th Amendment intended to protect that right.
- A fetus, from the date of conception, is a person and has constitutional rights. The state has an important interest in protecting its future citizens. The right to life of the unborn child is superior to the right to privacy of the mother. The balancing of the two interests should favor the most vulnerable, the unborn child.
- In previous decisions where the Court protected individual or marital privacy, that right was not absolute. All protected rights are subject to reasonable regulation, and Texas has a strong interest in protecting life and protecting women’s health, so the abortion restrictions are reasonable.

- Abortion is different from contraception, so the Court’s decision in *Griswold v. Connecticut* does not apply here. Contraception prevents creation of life whereas abortion destroys existing life.
- Abortion is a policy matter best left to the state legislatures to decide. As elected officials, legislators make laws that reflect the popular will and morality of the people—as they have done here. The prohibition against abortion in Texas has existed since 1854.

### **Decision**

In a 7–2 decision, the U.S. Supreme Court decided in Roe’s favor. Justice Blackmun wrote the opinion of the Court, which recognized that a woman’s choice whether to have an abortion is protected by the Constitution. Chief Justice Burger and Justices Stewart and Douglas wrote concurring opinions. Justices White and Rehnquist wrote dissenting opinions.

### **Majority**

The majority rooted a woman’s right to decide whether to have an abortion in the Due Process Clause of the 14th Amendment, which prohibits states from “depriv[ing] any person of ... liberty ... without due process of law.” According to the majority, the “liberty” protected by the 14th Amendment includes a fundamental right to privacy. The majority began by surveying the history of abortion laws, and concluded that “the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage,” and “are not of ancient or even of common-law origin.” The Court then held that “[t]his 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, as the District Court determined, 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.” Further, after considerable discussion of the law’s historical lack of recognition of rights of a fetus, the majority concluded “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” A woman’s right to choose to have an abortion falls within this fundamental right to privacy and is protected by the Constitution.

While holding that “the right of personal privacy includes the abortion decision,” however, the Court also emphasized that “this right is not unqualified and must be considered against important state interests in regulation.” In particular, the Court noted, “[w]here 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 protect only the legitimate state interests at stake.” The Court recognized that “the State does have an important and legitimate interest in preserving and protecting the health of a pregnant woman” and “still another important and legitimate interest in protecting the potentiality of human life.” Striking a balance between a woman’s fundamental right to privacy and these state interests, the Court set up a framework laying out when states could regulate and even prohibit abortions.

Under that framework, in the first trimester (the first three months of the pregnancy), a woman's right to privacy surrounding the choice to have an abortion outweighs a state's interests in regulating this decision. During this stage, having an abortion does not pose a grave danger to the mother's life and health, and the fetus is still undeveloped. The state's interests are not yet compelling, so it cannot regulate or prohibit her from having an abortion. During the second trimester, the state's interests become more compelling as the danger of complications increases and the fetus becomes more developed. During this stage, the state may regulate, but not prohibit, abortions, as long as the regulations are aimed at protecting the health of the mother. During the third trimester, the danger to the woman's health becomes the greatest and fetal development nears completion. In the final trimester, the state's interests in protecting the health of the mother and in protecting the life of the fetus become their most compelling. The state may regulate or even prohibit abortions during this stage, as long as there is an exception for abortions necessary to preserve the life and health of the mother.

### **Concurrences**

Three Justices filed concurring opinions in the case. Justice Stewart emphasized that the Court was basing its holding on the so-called "substantive" component of the Due Process Clause of the 14th Amendment. Justice Douglas rejected Justice Stewart's invocation of "substantive" due process, but agreed that the constitutional right at issue was based in the term "liberty" in the Due Process Clause of the 14th Amendment. Chief Justice Burger underscored that "the Court today rejects any claim that the Constitution requires abortions on demand."

### **Dissents**

Two Justices filed dissenting opinions. In his dissenting opinion, Justice White, joined by Justice Rehnquist, argued that he found "nothing in the language or history of the Constitution to support" the right to an abortion. He characterized the decision as "an extravagant and improvident exercise of the power of judicial review that the Constitution extends to this Court," and noted that the decision prevents the people and the legislatures of the states from "weighing the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand." Justice Rehnquist filed a separate dissenting opinion, arguing that abortion did not fit within the right of "privacy" recognized in the Court's previous cases and characterizing the decision as "partak[ing] more of judicial legislation than ... a determination of the intent of the drafters of the Fourteenth Amendment."