

# Roe v. wade case according to women's rights problem

Law



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## **Challenges to Roe v. Wade – women’s right to privacy?**

**We want abortion, so we will no longer have to have abortions**

### **Second-Wave Women’s Movement, Italy**

Thirty years have passed since the Supreme Court of United States stated its opinion in the Roe v. Wade case, which later became known as the landmark case that legalized abortion in the U. S. The Court held that a woman’s right to an abortion falls within the right to privacy protected by the 14th Amendment (Amendment XIV), and this right is “ broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” (Roe v. Wade, 1973). However, irrational as it may seem, the following years have brought new challenges towards women’s constitutional right to privacy, introducing restrictions which would likely lead to complete ban to abortion. The most recent – and the most threatening for abortion advocates – is the so-called “ Partial-Birth Abortion Ban”, signed into law by US George W. Bush on November 5, 2003 . By doing so he put Roe v. Wade indeed in danger of reversal, which as a matter of fact is now just a step away. With a brief discussion of the most important legal cases challenging women’s right to abortion through their right to privacy (both in the explicit or implicit way) that preceded or followed the Roe v. Wade case, I would like to show how woman’s right to privacy was reflected in court cases and the challenges the partial-abortion ban imposes on the women’s constitutional right to privacy.

According to the Center for Reproductive Rights, “ reproductive rights, the foundation for women’s self-determination over their bodies and sexual lives, are critical to women’s equality. [...] Laws and policies that protect and

advance these rights are essential, and there is no legal decision more fundamental to protecting a woman's reproductive freedom than Roe v. Wade, the landmark 1973 case that legalized abortion in the U. S." (The Center, 2003, p. 3). However, Roe v. Wade was not the first case about the right to privacy. We could trace it in courts as back as in the end of 19th century, when Union Pacific Railway Co. v. Botsford was held (The Center, 2003, p. 25). The first challenge to the right to be let alone took place there, when the United States Supreme Court could not compel the plaintiff to undergo a surgical examination. The court stated its opinion in the following manner: "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law" (The Center, 2003, p. 26).

This right to be let alone was questioned again in Olmstead v. United States (1928), where it was regarded as "the most comprehensive of rights and the right most valued by civilized men" (The Center, 2003, p. 26).

Following that there is the case Skinner v. Oklahoma (1942), where the court in a unanimous opinion held that forcing a prisoner to undergo sterilization is the violation of the equal protection clause of the 14th amendment (The Center, 2003, p. 26).

This decision was based on the idea that all people have a fundamental right to make a choice about marriage and procreation.

One of the most famous cases connected with the right to privacy is *Griswold v. Connecticut* (1965), where the Court held that the right to privacy is constitutional, derived from the penumbras and emanations of the Bill of Rights (*Griswold v. Connecticut*, 1965). Consequently, The Court annulled a Connecticut statute that restricted married couples from using of birth control, arguing that the right to marital privacy guarantees married couples' access to contraceptives.

1971 is marked in the history of the cases being reviewed as the year when *Roe v. Wade* was first argued before the Supreme Court. It was followed by second arguing in 1972 and it was not until 1973 when both *Roe v. Wade* and the closely related case *Doe v. Bolton* were decided by the Court on the same day. Meanwhile one more case named *Eisenstadt v. Baird* was held in 1972 (*Eisenstadt v. Baird*, 1972). Like *Griswold v. Connecticut*, this case touched upon the access to contraceptives, though this time not only for married but for unmarried adults as well. The Court decided that prohibiting access to contraceptives for unmarried couples while providing it to married violated the equal protection notion of the 14th amendment. The decision was that “[the right to privacy] ... is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” (*Eisenstadt v. Baird*, 1972). One can see that the ground was already well prepared for the Court’s decision in *Roe v. Wade*, which was decided in the following year.

Roe v. Wade provided that a woman's right to an abortion falls within the right to privacy protected by the 14th Amendment, and the restrictions on it must be narrowly elaborated to serve compelling state interest. Moreover, according to the judgement, the state's interest in the life of fetus is not compelling before its viability, and even after viability the state must not restrict women from access to the abortion whenever it has vital importance for the life or health of the pregnant woman. More concretely, the Court decided:

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.

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.

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 necessary, in appropriate medical judgment, for the preservation of the life or health of the mother (The Center, 1973).

Not only is Roe v. Wade an important case for establishing women's right to getting access to abortion, but it also juxtaposed women's reproductive

choices with other fundamental rights, i. e. freedom of speech and freedom of religion, as it granted women the right to choice.

In Doe v. Bolton the Court identified “ health” as a concept including “ all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient” (The Center, 2003). Doe is frequently cited exactly for this definition of health, encompassing a broad circle of aspects and defining general maternal well-being as a justification for the legalization of abortion in the last trimester of pregnancy (Horan et al., 1987, p. 265).

The next important privacy case is Planned Parenthood of Central Missouri v. Danforth (1976). Two key decisions were stated by the Court: first, the statute that would force a married woman to obtain her husband’s consent for an abortion was rejected as a requirement that would grant “ unconstitutional veto power to a third party”; and second, because of the same reason the statute that granted minors abortion only after providing a written consent of at least one parent, was found unconstitutional (Planned Parenthood v. Danforth, 1976). The minors’ access to birth control was expanded further the next year in the case Carey v. Population Services International, when minors under 16 were granted the right to obtain contraceptives. Thus, the right to privacy was spread even to minors to the great extent (Carey v. Population Services, 1977).

Sadly enough, year 1977 is marked in the history of privacy and access to abortion not by the last case discussed above, but mostly by the three similar cases (Maher v. Roe, Beal v. Doe and Poelker v. Doe), all of them

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related to either Roe or Doe and providing restrictions to the access to abortion by limiting public funding for abortions . By that very fact the right to privacy was patently offended, at least for low income women, who were denied access to state's funding for abortions that were not " medically necessary" (The Center, 2003, p. 33). Thus, these three cases were backlash court rulings related to the privacy issue in abortion cases.

Several other cases reiterated the idea of restricting use of federal funds for abortion, including *Harris v. McRae* (1980) (NOW, 2002) and *Williams v. Zbaraz* (1980) (*Williams v. Zbaraz*, 1980). Nevertheless, it was not until 1981 when the next significant restriction was imposed on female minors. I have in mind *H. L. v. Matheson* (1981) (The Center, 2003, p. 37), when the statute requiring notification of parents before proceeding with an abortion on unemancipated minors was upheld. Thus the Court drew a distinction between " unmarried, immature minor who was living with and dependent upon her parents" and " mature or emancipated minors" (The Center, 2003, p. 37). This decision was upheld in *Planned Parenthood Association of Kansas City v. Ashcroft* (1983), when for the first time the Court approved obtaining parental consent " that contained a judicial bypass mechanism" (The Center, 2003, p. 39). A requirement of pathology report for each abortion was also supported.

Thus, by that time some pregnant women - minors and women from low-income families - had already encountered restrictions concerning discontinuing of unwanted pregnancies. However, another case had to decide whether to place more burdens on the access to the abortion or not,

this time encompassing not only targeted groups but all pregnant women. This happened in Akron v. Akron Center for Reproductive Health (1983), where the Court rejected Akron City Council's decision to put considerable obstacles (24-hour waiting period, prejudiced informed consent etc.) on the way of an abortion-seeking woman (Akron v. Akron, 1983). This was one more positive achievement of pro-choice activists.

However, pro-life justices continued struggle to introduce new impediments for women seeking abortion. By doing so, they frequently demanded Court to entirely abandon the decision made in Roe v. Wade. This happened, for instance, in Thornburgh v American College of Obstetricians and Gynecologists (1986). This notwithstanding, the Court stated that the statute discussed " wholly subordinate[d] constitutional privacy interests and concerns with maternal health [to the State's] effort to deter a woman from making a decision that, with her physician, is hers to make" (The Center, 2003, p. 40). Thus, woman's right to privacy under 14th amendment was once more protected. Yet, the next court Webster v. Reproductive Health Services (1989) upheld Missouri enacted legislation that placed a number of restrictions on abortions, including the ban to use public employees and public facilities to perform or assist abortions unless it is necessary for saving the mother's life (Webster v. Reproductive Health Services, 1989). This once more reiterated restriction of low-income women's access to the abortion, which by it means that they were excluding from being able to exercise their privacy rights.



In addition to the reproductive rights, freedom of speech and the right to privacy were widely discussed at *Rust v. Sullivan* (1991). Here, the Court held that a directive that prohibited recipients of family planning funds to be provided counseling about or referred for abortions (the Gag Rule) violated neither freedom of speech nor the right to privacy (*Rust v. Sullivan*, 1991). Oddly enough, in the country claiming freedom of speech among other universal personal freedoms, doctors were denied to discuss abortion among the range of options with their patients.

Pro-choice activists did not have to wait long after Webster case for further challenges to their privacy rights. The next major change occurred after three years from Webster in *Planned Parenthood of Southeast Pennsylvania vs. Casey* (1992). This concerned parental notification of a minor's abortion, informed consent, a 24-hour waiting period and confidential reporting. Despite denying a spousal notification requirement, this case obviously challenged "Roe vs. Wade" by rejecting Roe's trimester scheme and explicitly extending compelling state's interest in protecting fetal life and maternal health throughout the pregnancy. It fundamentally rejected the right to privacy and adopted a new "freedom" standard. Nevertheless, these restrictions would not apply if they would place "undue burden" on women's right to abortion. Besides, the definition of "health" remained, and thus abortion remained legal until birth (The Center, 2003, p. 18).

After the Casey decision, exercising granted flexibility, many states passed laws limiting abortions by requiring parental consent for the abortion of a minor, informed consent of women, abortion clinic regulations, limiting fetal

experimentation and aid for adoption (Willke, 1998). Meanwhile the Court in *Stenberg v. Carhart* (2000) found unconstitutional a Nebraska's ban on so-called "partial-birth abortion", stating that it violated *Roe* and *Casey* (*Stenberg v. Carhart*, 2000).

"Partial-birth abortion" bans are "extreme and deceptive attempts to outlaw abortion - even early in pregnancy - that jeopardize women's health. The Court's decision has rendered similar bans in over 30 states and Congress unconstitutional or unenforceable." (Partial Birth Abortion Bans, 2000). However, the recent decision of president Bush to sign into law partial-birth abortion ban clearly indicates the threat to the women's universal right to privacy granted them 30 years ago by *Roe*.

Restricting women from obtaining legal abortion does not improve the overall abortion situation. Numerous women die yearly from unsafe and illegal abortions and lots of women suffer complications from unsafe abortions (The Ross Institute, 1996-1999). Before *Roe*, tens of thousands of women faced death or serious medical problems as a result of trying to self-induce their abortions or as a result of approaching untrained practitioners who used primitive methods or performed abortions in unsanitary conditions. Listening to a specialist practicing at a county hospital before *Roe v. Wade* brings light to the issues discussed above:

[Hospitals] had to have beds all up and down the hallways. They were always full [because of illegal abortions]. They must have had one hundred and forty beds in those wards...in [a twenty four hour] period, you'd get ten to twelve admissions. They walked into the emergency room bleeding. The first thing

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the doctor down there did was send them for an X-ray to see what was in their belly-to see if there were knitting needles, hooks, catheters up their belly.” (Joffe, 1995)

Hesitating in providing access to abortion by endorsing partial-abortion bans (as well as providing other legally supported restrictions to women’s free choice) engenders both the misunderstanding in key vital issues of women’s right to privacy and thus to their decision-making in the abortion issues, and threatening attitude towards pro-choice activists. Increasingly, clinic bombings, physical attacks, and even murders endanger abortion providers and create a hostile environment for women seeking abortions. Anti-abortion extremists perpetrated an unprecedented level of violence in 1993 with the first murder of an abortion provider. Since then, more than ten people have been shot and either killed or seriously wounded by anti-abortion extremists (The Ross Institute, 1996-1999).

Whether to provide access to the abortion or to limit and even restrain it, still remains one of the most controversial issues of the modern society .

However, I strongly believe every person has to have a right to decide himself how to dispose with his/her life. German second-wave feminists delivered this opinion clearly in their slogan “ Kids, yes or no; it’s our choice alone”. Italians gave another, in no way less beautiful formulation of it: “ We want abortion, so we will no longer have to have abortions”.

Laurie Graeme insists correctly, that “ neither liberty nor autonomy can properly fulfill their function or potential in protecting individuals and their interests without a concomitant commitment to a respect for privacy”

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(Graeme, 2002, p. 83). The personal right to privacy and freedom of choice has been stated and reiterated in laws and constitutions as well as in numerous Human Rights instruments (including United Nations documents such as Charter of United Nations; Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Convention on the Elimination of All Forms of Racial Discrimination; International Convention on the Elimination all forms of Discrimination Against Women) (UN Treaty Database). The right to choose abortion is fundamental in order to guarantee to autonomy in freedom from discrimination, reproductive choice, and protection of health and life.

Each year several ten million women have to face unwanted pregnancies. Each of these women has her own factors including but not limited to their relationships, expectations for the future, economic situations and health matters to decide that her pregnancy is unwanted. Obviously, they have to make the decision whether the abortion is the mean to solve their uneasy condition, and the only person authorized to make this decision is to be the pregnant woman herself. This notion was clearly stated in the Court's decision in landmark case Roe v. Wade, that legalized abortion in US in 1973. Sadly enough, since then pro-life activists have been trying to reassess and devalue the Court's ruling in Roe, providing numerous obstacles for pregnant women to obtain abortion. The last threat to restrict women's universal right to privacy is President George W. Bush's signing into law the federal ban on abortion, despite a June 2000 U. S. Supreme Court ruling that found such bans to be unconstitutional. However, just as simply, as the truth that men can not be representatives of women (Squires, 2000), nobody can be a

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representative of a pregnant woman, but this latter herself. This is the universal human right and no woman should be discriminated against it whatever reason is provided.