

## 4.6: PLANNED PARENTHOOD OF SOUTHEASTERN PA. v. CASEY

### COURT CASES:

The following are landmark cases that have had an impact various aspects of our lives:

#### Planned Parenthood of Southeastern Pa. v. Casey

505 U.S. 833 (1992)

(Case Syllabus edited by the Author)

At issue are five provisions of the Pennsylvania Abortion Control Act of 1982:

§ 3205 requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed;

§ 3206 mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure;

§ 3209 commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband;

§ 3203 defines a “medical emergency” that will excuse compliance with the foregoing requirements;

§§ 3207(b), 3214(a), and 3214(f) impose certain reporting requirements on facilities providing abortion services.

Before any of the provisions took effect, the petitioners, five abortion clinics and a physician representing himself and a class of doctors who provide abortion services, brought this suit seeking a declaratory judgment that each of the provisions was unconstitutional on its face, as well as injunctive relief. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Third Circuit Court of Appeals affirmed in part and reversed in part, striking down the husband notification provision, but upholding the others.

Held: The Third Circuit Court of Appeals decision is affirmed.

Justice O’Connor, Justice Kennedy, and Justice Souter delivered the opinion of the Court with respect to Parts I, II, and III, concluding that:

1. Consideration of the fundamental constitutional question resolved by *Roe v. Wade*, 410 U.S. 113, principles of institutional integrity, and the rule of stare decisis require that *Roe*’s essential holding be retained and reaffirmed as to each of its three parts:

(1) a recognition of a woman’s right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose pre-viability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman’s effective right to elect the procedure;

(2) a confirmation of the State’s power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman’s life or health; and

(3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

(a) A reexamination of the principles that define the woman’s rights and the State’s authority regarding abortions is required by the doubt this Court’s subsequent decisions have cast upon the meaning and reach of *Roe*’s central holding, by the fact that The Chief Justice would overrule *Roe*, and by the necessity that state and federal courts and legislatures have adequate guidance on the subject.

(b) *Roe* determined that a woman’s decision to terminate her pregnancy is a “liberty” protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment. Neither the Bill of Rights, nor the specific practices of States at the time of the Fourteenth Amendment’s adoption, marks the outer limits of the substantive sphere of such “liberty.” Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual’s liberty and the demands of organized society.

(c) Application of the doctrine of stare decisis confirms that *Roe*’s essential holding should be reaffirmed.

(d) Although Roe has engendered opposition, it has in no sense proven unworkable, representing as it does a simple limitation beyond which a state law is unenforceable.

(e) The Roe rule's limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The 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. 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 for people who have ordered their thinking and living around that case be dismissed.

(f) No evolution of legal principle has left Roe's central rule a doctrinal anachronism discounted by society. If Roe is placed among the cases exemplified by *Griswold v. Connecticut*, 381 U.S. 479, it is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the liberty recognized in such cases. Similarly, if Roe is seen as stating a rule of personal autonomy and bodily integrity, akin to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection, this Court's post-Roe decisions accord with Roe's view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.

(g) No change in Roe's factual underpinning has left its central holding obsolete, and none supports an argument for its overruling. Although subsequent maternal health care advances allow for later abortions safe to the pregnant woman, and post-Roe neonatal care developments have advanced viability to a point somewhat earlier, these facts go only to the scheme of time limits on the realization of competing interests. Thus, any later divergences from the factual premises of Roe have no bearing on the validity of its central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.

(h) A comparison between Roe and two decisional lines of comparable significance — the line identified with *Lochner v. New York*, 198 U.S. 45, and the line that began with *Plessy v. Ferguson*, 163 U.S. 537 — confirms the result reached here. Those lines were overruled by, respectively, *West Coast Hotel Co. v. Parrish*, 330 U.S. 379, and *Brown v. Board of Education*, 347 U.S. 483 — on the basis of facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. The overruling decisions were comprehensible to the Nation, and defensible, as the Court's responses to changed circumstances.

(i) Overruling Roe's central holding would not only reach an unjustifiable result under stare decisis principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.

Justice O'Connor, Justice Kennedy, and Justice Souter concluded in Part IV that an examination of *Roe v. Wade*, 410 U.S. 113, and subsequent cases, reveals a number of guiding principles that should control the assessment of the Pennsylvania statute:

(a) To protect the central right recognized by Roe, while at the same time accommodating the State's profound interest in potential life, the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

(b) Roe's rigid trimester framework is rejected. To promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion, but may not impose unnecessary health regulations that present a substantial obstacle to a woman seeking an abortion.

(d) Adoption of the undue burden standard does not disturb Roe's holding that regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) Roe's holding that "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 judgment, for the preservation of the life or health of the mother" is also reaffirmed.

Justice O'Connor, Justice Kennedy, and Justice Souter delivered the opinion of the Court with respect to Parts V-A and V-C, concluding that:

1. As construed by the Court of Appeals, § 3203's medical emergency definition is intended to assure that compliance with the State's abortion regulations would not in any way pose a significant threat to a woman's life or health, and thus does not violate the essential holding of *Roe*.

2. Section 3209's husband notification provision constitutes an undue burden and is therefore invalid. A significant number of women will likely be prevented from obtaining an abortion just as surely as if Pennsylvania had outlawed the procedure entirely. The fact that § 3209 may affect fewer than one percent of women seeking abortions does not save it from facial invalidity, since the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant. Furthermore, it cannot be claimed that the father's interest in the fetus' welfare is equal to the mother's protected liberty, since it is an inescapable biological fact that state regulation with respect to the fetus will have a far greater impact on the pregnant woman's bodily integrity than it will on the husband.

Justice O'Connor, Justice Kennedy, and Justice Souter, joined by Justice Stevens, concluded in Part V-E that all of the statute's recordkeeping and reporting requirements, except that relating to spousal notice, are constitutional. The reporting provision relating to the reasons a married woman has not notified her husband that she intends to have an abortion must be invalidated because it places an undue burden on a woman's choice.

Justice O'Connor, Justice Kennedy, and Justice Souter concluded in Parts V-B and V-D that:

1. Section 3205's informed consent provision is not an undue burden on a woman's constitutional right to decide to terminate a pregnancy. Requiring that the woman be informed of the availability of information relating to the consequences to the fetus does not interfere with a constitutional right of privacy between a pregnant woman and her physician, since the doctor-patient relation is derivative of the woman's position, and does not underlie or override the abortion right.

The premise behind Akron I's invalidation of a waiting period between the provisions of the information deemed necessary to informed consent, and the performance of an abortion, is also wrong. Although § 3205's 24-hour waiting period may make some abortions more expensive and less convenient, it cannot be said that it is invalid on the present record and in the context of this facial challenge.

2. Section 3206's one parent consent requirement and judicial bypass procedure are constitutional.

Justice Blackmun concluded that application of the strict scrutiny standard of review required by this Court's abortion precedents results in the invalidation of all the challenged provisions in the Pennsylvania statute, including the reporting requirements, and therefore concurred in the judgment that the requirement that a pregnant woman report her reasons for failing to provide spousal notice is unconstitutional.

The Chief Justice, joined by Justice White, Justice Scalia, and Justice Thomas, concluded that:

1. Although *Roe v. Wade*, 410 U.S. 113, is not directly implicated by the Pennsylvania statute, which simply regulates and does not prohibit abortion, a reexamination of the "fundamental right" *Roe* accorded to a woman's decision to abort a fetus, with the concomitant requirement that any state regulation of abortion survive "strict scrutiny," is warranted by the confusing and uncertain state of this Court's post-*Roe* decisional law.

2. The *Roe* Court reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390; *Loving v. Virginia*, 388 U.S. 1; and *Griswold v. Connecticut*, 381 U.S. 479, and thereby deemed the right to abortion to be "fundamental." None of these decisions endorsed an all-encompassing "right of privacy," as *Roe* claimed.

3. The undue burden standard adopted by the joint opinion of Justices O'Connor, Kennedy, and Souter has no basis in constitutional law, and will not result in the sort of simple limitation, easily applied, which the opinion anticipates. The standard presents nothing more workable than the trimester framework the joint opinion discards, and will allow the Court, under the guise of the Constitution, to continue to impart its own preferences on the States in the form of a complex abortion code.

4. The correct analysis is that set forth by the plurality opinion in *Webster*: A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.

5. Section 3205's requirements are rationally related to the State's legitimate interest in assuring that a woman's consent to an abortion be fully informed. The requirement that a physician disclose certain information about the abortion procedure and its risks and alternatives is not a large burden, and is clearly related to maternal health and the State's interest in informed consent. The

requirement that information be provided about the availability of paternal child support and state-funded alternatives is also related to the State's informed consent interest and furthers the State's interest in preserving unborn life. The waiting period helps ensure that a woman's decision to abort is a well-considered one, and rationally furthers the State's legitimate interest in maternal health and in unborn life. It may delay, but does not prohibit, abortions; and both it and the informed consent provisions do not apply in medical emergencies.

6. The statute's parental consent provision is entirely consistent with this Court's previous decisions involving such requirements.

7. Section 3214(a)'s requirement that abortion facilities file a report on each abortion is constitutional because it rationally furthers the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act, while keeping the reports completely confidential.

Justice Scalia, joined by The Chief Justice, Justice White, and Justice Thomas, concluded that a woman's decision to abort her unborn child is not a constitutionally protected "liberty" because (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.

O'Connor, Kennedy, and Souter, JJ., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI, in which Blackmun and Stevens, JJ., joined, an opinion with respect to Part V-E, in which Stevens, J., joined, and an opinion with respect to Parts IV, V-B, and V-D. Stevens, J., filed an opinion concurring in part and dissenting in part. Blackmun, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. Rehnquist, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which White, Scalia, and Thomas, JJ., joined. Scalia, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C. J., and White and Thomas, JJ., joined.

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