The Supreme Court and Abortion Access

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Understanding Roe v. Wade and its Historical Context

The 1973 U.S. Supreme Court decision in Roe v. Wade, 410 U.S. 113, appeared to ensure that American women would have access to abortion, ruling out any legislative interference in the first trimester of pregnancy and putting limits on abortion restrictions that could be passed during the later stages of pregnancy. The decision followed a long history of women seeking and obtaining abortions – but with a shift in the legal status of the procedure over time. Abortion had been legal in the United States at the time the Constitution was adopted, with many early laws and church doctrine focused on “quickening” when the initial motion of the fetus can be felt by the pregnant woman. At that time, abortions before quickening were openly advertised and commonly performed. However, between 1850 and 1900, many states enacted strict bans, and death and injury from illegal and self-induced abortion became a serious public health problem.

In the 1960s, states began reforming their strict anti-abortion laws, so that when the Supreme Court made abortion legal nationwide, legal abortions were already available in 17 states under a range of circumstances beyond those necessary to save a woman’s life. In Roe, seven justices held that access to abortion is a fundamental constitutional right that government may not restrict without a very strong reason – a state interest that must be “compelling.” The High Court concluded that there is no compelling state interest -- and thus – no limitations are permissible until the end of the first trimester. Only after the first trimester does the state’s interest in protecting maternal health provide a sufficient basis to justify state regulation of abortion, and then only to protect a woman’s health. The state’s interest in the potential life of the fetus becomes “compelling” at the point of viability, which occurs roughly at the end of the second trimester. Following viability, the state’s interest permits it to regulate and even outlaw abortion except to preserve the life or health of the woman.

The companion case, Doe v. Bolton, 410 U.S. 179 (1973), extended Roe by warning that just as states may not prevent abortion by making the performance a crime, states may not make abortion unreasonably difficult to obtain by prescribing elaborate procedural barriers. Doe defined health to include mental as well as physical conditions.

Post-Roe Decisions Address Scope of Abortion Rights

Rather than settling the issue, the Court’s rulings since Roe and Doe have kindled heated debate and precipitated a variety of governmental actions at the national, state, and local levels designed either to nullify the rulings or limit their effect. These governmental regulations have, in turn, spawned further litigation in which resulting judicial refinements...
in the law have not succeeded in dampening the controversy. The possibility that Roe opened was that no woman in the U.S. would have to bear a child unless she wanted to. But that possibility -- never a reality -- lasted only 4 years. In Maher v. Roe, 432 U.S. 464 (1977), and Harris v. McRae, 448 U.S. 297 (1980) the Court said the government could discourage abortion by denying funding for it while paying for low-income women's prenatal and childbirth expenses. From then on, federal and many state government health insurance programs have refused to cover abortion, even those that are medically necessary.

Subsequent decisions (Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) for example) further limited Roe, and Webster v. Reproductive Health Services, 492 U.S. 490 (1989), strongly suggested that the Court would soon overrule it. Instead, the Court compromised, shrinking the status of abortion access as a constitutional right, allowing government to erect numerous barriers to it, but holding that the barriers could not be so large as to “prohibit any woman from making the ultimate decision to terminate her pregnancy.” Abortion bans would be struck down, the Court promised, if their “purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” In Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), the Court once again confirmed that any abortion restriction must include an exception to safeguard women's health, ruling that the Pennsylvania law that required spousal notification prior to obtaining an abortion was invalid under the Fourteenth Amendment because it created an undue burden on married women seeking an abortion. At the same time, the Court upheld the constitutionality of requirements for parental consent, informed consent, and a 24-hour waiting period.

Next, in Stenberg v. Carhart, 530 U.S. 914 (2000), the Court considered a case brought by a Nebraska abortion provider against Don Stenberg, the Attorney General of Nebraska, regarding the constitutionality of a state law purportedly banning a particular abortion method. Supporters of the law claimed the statute banned a specific procedure they referred to as “partial birth abortion.” The challenged abortion procedure is used by some physicians for late-term abortions because they think it is safer for women in general and the only safe procedure for women with certain conditions. Nebraska, however, argued that the procedure is inhumane, never necessary for women's health, and should be banned.

In 2000, the Supreme Court issued its 5-4 decision finding Nebraska’s statute unconstitutional because it lacked an exception for women's health and because it imposed an undue burden upon a woman’s right to choose because it described the prohibited procedure too vaguely to distinguish it from the majority of abortion procedures used early in pregnancy and thus failed to put doctors on notice of the crime.

**Where are We Now, Given the 2007 Supreme Court Decision in Gonzales v. Carhart**

Following the 2006 appointments of John Roberts and Samuel Alito to replace Justices Rehnquist and O’Connor, respectively, the Court upheld a federal law that banned the abortion procedure at issue in Stenberg. In Gonzales v. Carhart and Gonzales v. Planned Parenthood, the Court issued a 5-4 decision, 127 S.Ct. 1610 (2007), on April 18, 2007, that upheld the Federal Abortion Ban. Accepting congressional findings that the procedure is never necessary, the Court dropped its 33-year old requirement that abortion regulations
must contain a health exception. Instead, the Court expressed a concern for women’s emotional and moral well-being, which it believes abortion puts at risk. It also reflected that, should Congress be wrong on the issue of health, an individual woman could approach the lower courts to try to prove her particular needs. The Court did not find the federal statute too vague to warn physicians of potential legal violations, nor find that it created an undue burden for a woman seeking an abortion or placed a substantial obstacle in her path.

Joining the majority were Chief Justice John Roberts and Justices Alito, Kennedy, Scalia, and Thomas. Justices Breyer, Ginsburg, Souter, and Stevens dissented, contending that the ruling ignored Supreme Court abortion precedent; makes no distinction between pre-viability and post-viability abortions; contains no woman’s health exception and that it “tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG).”

Justice Thomas filed a concurring opinion, joined by Scalia, contending that the Court’s prior decisions in Roe v. Wade and Planned Parenthood v. Casey should be reversed, and also noting that the Federal Abortion Ban Act may exceed the powers of Congress under the Commerce Clause.

What the Decision Means for U. S. Women

- No doctor in the United States may use the second-trimester abortion method called D & X (dilation and extraction), except to save a patient’s life.
- A patient whose doctor thinks she will be injured—but probably not die—from other methods must get a judge’s permission for a D & X.
- For the first time, Congress and the Supreme Court seem to judge a woman’s liberty interest in abortion access to be less important than government’s interest in non-viable fetal life.
- The Court’s majority has embarked on trying to protect women from themselves. In this case, by permitting new limits on abortion, it purports to “save” women from decisions perceived to be made with insufficient information and resulting in remorse and depression.
- Fewer doctors will be willing to perform second-term abortions for several reasons: they are no longer free to choose what may be the best medical procedure for a patient; they cannot be sure when starting an abortion which method will be safest; they risk criminal penalties; observers of a procedure can disagree about the doctor’s intention; no one knows how much risk to a patient’s life legally justifies a procedure; and doctors fear prosecution even if they do not expect to be convicted.
- The Court has invited states to restrict abortion further by various means including enacting state laws forbidding certain medical procedures.
- With this decision the Supreme Court makes it harder to get an abortion under certain circumstances and suggests that abortion access may become even harder in the near future, either through direct reversal of Roe v. Wade or further erosion of its breadth.