

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Journal of Women in Educational Leadership

Educational Administration, Department of

4-2006

Supreme Court Rulings on Abortion: Roe v. Wade and Selected Progeny

Donald F. Uerling

University of Nebraska College of Law, duerling@windstream.net

Follow this and additional works at: <http://digitalcommons.unl.edu/jwel>



Part of the [Educational Administration and Supervision Commons](#), and the [Women's Studies Commons](#)

Uerling, Donald F, "Supreme Court Rulings on Abortion: Roe v. Wade and Selected Progeny" (2006). *Journal of Women in Educational Leadership*. 189.

<http://digitalcommons.unl.edu/jwel/189>

This Article is brought to you for free and open access by the Educational Administration, Department of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Journal of Women in Educational Leadership by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Supreme Court Rulings on Abortion: *Roe v. Wade* and Selected Progeny

Donald F. Uerling

Introduction

Abortion is one of the most controversial and contentious issues of our time. Few topics generate as much public debate or leave as little room for political compromise. This article presents a discussion of selected United States Supreme Court decisions on abortion and the legal reasoning supporting those decisions.

It should be noted initially that laws regulating abortion are enacted by either state legislatures or the Congress. Disputes over abortion arise when a statute that regulates abortion in some way is challenged as being in violation of individual constitutional rights.

Since 1971, there have been 28 Supreme Court decisions that have addressed various issues related to abortion. Most addressed state or federal statutes that provided specifically for abortions; a few involved statutes that addressed broader issues including abortions. Although each decision was of some importance, the major principles of law pertaining to abortion were established in three major decisions -- *Roe v. Wade* (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), and *Stenberg v. Carhart* (2000). The principles and reasoning of these three decisions are the focus of the discussion that follows.

Roe v. Wade (1973)

The Decision

The “landmark” decision was *Roe v. Wade* (1973), which held that a Texas criminal statute imposing restrictions on legal abortions was unconstitutional. Because the statute made no distinction between abortions performed early in pregnancy and those performed later, and it limited to a single reason, “saving” the mother’s life, the legal justification for the procedure, it could not survive the constitutional challenge.

About the Author

Donald F. Uerling is an Associate Professor of Educational Administration at the University of Nebraska-Lincoln. His area of specialization is education law. He also serves as Director of the Bureau of Educational Research and Field Services.

Although this decision was quite controversial and certainly broke new ground in the field of constitutional law, it should be noted that the basic holding was by a 7-2 vote. *See Roe* at 115.

History of Criminal Abortion Laws

The *Roe* opinion provided a thorough discussion of the history of criminal abortion laws. Two points are especially worthy of note:

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century. *Roe* at 129.

[A]t common law, abortion performed *before* "quickening" -- the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy -- was not an indictable offense. *Roe* at 132.

Constitutional Right to Privacy

A constitutional challenge to a statute restricting abortion must rest on some individual right grounded in the Constitution. In *Roe*, the Court found that a woman had a right of privacy that encompassed an abortion decision.

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . , the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.

...

This 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.
Roe at 152-53

Right to Abortion is not Absolute

While *Roe* held that the Constitution protected a woman's right to choose to end a pregnancy, the Court also made clear that this right was not absolute and that a state had important interests in both the health of the mother and the potential life of the unborn child.

[Some] argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. *Roe* at 153.

[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.

...

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation. *Roe* at 154.

Constitutional Protections

When the government seeks to regulate by legislation an individual's exercise of constitutional rights, the burden of justifying such a regulation depends on the nature of the interests involved.

Where 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 express only the legitimate state interests at stake. *Roe* at 155.

[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and . . . it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling." *Roe* at 162-63.

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, . . . , that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the

abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like. *Roe* at 163.

This means, on the other hand, that, for the period of pregnancy prior to this “compelling” point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State. *Roe* at 163.

With respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother. *Roe* at 164.

Roe established the basic constitutional principles pertaining to the regulation of abortion, and these principles remained essentially unchanged through ensuing years.

Planned Parenthood of Southeast Pennsylvania v. Casey (1992)

The Decision

The next major abortion decision was *Planned Parenthood of Southeast Pennsylvania v. Casey* (1992). *Casey* held that four of five provisions in a Pennsylvania statute regulating abortion were constitutionally permissible.

Casey was basically a five to four decision. There were five separate opinions -- the Opinion of the Court, two concurring in part and dissenting in part, and two dissents. The opinion of the Court was an unusual “joint opinion” by three justices.

Reaffirming *Roe v. Wade*

In *Casey*, the Supreme Court reaffirmed the basic principles of *Roe v. Wade* (1973). The Court emphasized the importance of its institutional integrity and the rule of stare decisis.

After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed. *Casey* at 845-46.

Roe's essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is 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. These principles do not contradict one another; and we adhere to each. *Casey* at 846.

[I]t is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted. *Casey* at 869.

Evolution of the Law

The *Casey* decision did make two significant adjustments to the analytical approach articulated in *Roe*. The Court (1) abandoned the trimester approach in favor of the concept of viability to determine when the interests of the state can override the constitutional interests of the woman and (2) established the undue burden standard to determine when a state law unconstitutionally interferes with the woman's liberty interest. The language of the *Casey* opinion is quite instructive:

We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of *stare decisis*. Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it. . . . Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe's* statement that the State has a legitimate interest in promoting the life or potential life of the unborn, . . . , the central premise of those cases represents an unbroken

commitment by this Court to the essential holding of *Roe*. It is that premise which we reaffirm today. *Casey* at 870.

The second reason is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. See *Roe v. Wade*, 410 U.S. at 163. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, see *supra*, at 860, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child. *Casey* at 870.

The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce. . . . Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.' [citation deleted] That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. *Casey* at 871.

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. *Casey* at 873. . . . Only where state regulation imposes an undue burden on a woman's ability to make this [abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. *Casey* at 874.

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty. *Casey* at 876.

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to

further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. *Casey* at 877.

Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden. *Casey* at 877-78.

The Court's Summary

The Court summarized its ruling in *Casey* by setting out several important principles:

- (a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.
- (b) We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as 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. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.
- (d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. 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) We also reaffirm *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.” *Casey* at 878-79.

The Pennsylvania Statute

At issue in *Casey* were five provisions of the Pennsylvania Abortion Control Act of 1982. The Court’s rulings on those provisions provide a useful overview of some major restrictions on access to abortion:

- A provision 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, was ruled constitutional;
- A provision mandating the informed consent of one parent for a minor to obtain an abortion, but providing a judicial bypass procedure, was ruled constitutional;
- A provision defining a “medical emergency” that will excuse compliance with the foregoing requirements, was ruled constitutional;
- Provisions imposing certain reporting requirements on facilities providing abortion services, was ruled constitutional; but,
- A provision commanding that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband, was ruled unconstitutional.

The Importance of *Casey*

Casey is perhaps the most important Supreme Court abortion decision subsequent to *Roe v. Wade*. As a review of subsequent cases from courts at all levels shows, *Casey* is cited often as the controlling authority.

Stenberg v. Carhart (2000)

The Decision

Stenberg v. Carhart (2000) struck down a Nebraska statute that criminalized “partial birth abortion.” *Stenberg* was a five to four decision, with eight separate opinions -- the opinion of the Court, three concurrences, and four dissents.

The Conflicts

Justice Breyer, in delivering the Opinion of the Court, explained succinctly the nature of the social and legal conflicts over abortion:

We again consider the right to an abortion. We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. *Roe v. Wade*, 410 U.S. 113 [parallel citations deleted] (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 [parallel citations deleted] (1992). We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case. *Stenberg*, at 920-21.

Established Principles

The Court noted that three established principles determined the issue before it and set them forth in the language of the joint opinion in *Casey*.

First, before "viability . . . the woman has a right to choose to terminate her pregnancy." 505 U.S. at 870 (joint opinion of O'Connor, Kennedy, and Souter).

Second, "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" is unconstitutional. 505 U.S. at 877. An "undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Ibid*.

Third, "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." 505 U.S. at 879 (quoting *Roe v. Wade*, 410 U.S. at 164-165). *Stenberg* at 921.

The Nebraska Statute

The Nebraska statute at issue in *Stenberg* prohibited any “partial birth abortion” unless that procedure is necessary to save the mother’s life. It defined “partial birth abortion” as a procedure in which the doctor “partially delivers vaginally a living unborn child before killing the . . . child.”

Holdings

The Supreme Court held in *Stenberg* that Nebraska’s statute that criminalized the performance of “partial birth abortions” violated the Federal Constitution, as interpreted in *Casey* and *Roe*.

- The Nebraska statute lacked the requisite exception for an abortion “necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” The State may promote but not endanger a woman’s health when it regulates the methods of abortion.
- The Nebraska statute’s language prohibiting “partial birth abortion” did not track the medical differences between D&E and D&X, but covered both. Using the law’s statutory terms, it was impossible to distinguish between D&E (where a foot or arm is drawn through the cervix) and D&X (where the body up to the head is drawn through the cervix). Both procedures can involve the introduction of a “substantial portion” of a still living fetus, through the cervix, into the vagina -- the very feature of an abortion that leads to characterizing such a procedure as involving “partial birth.” Physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions, would fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman’s right to make an abortion decision.

Partial-Birth Abortion Ban Act of 2003

The federal *Partial-Birth Abortion Ban Act of 2003* presents a basic issue similar to that involved in the Nebraska statute struck down in *Stenberg v. Carhart* (2000). The federal Act makes criminal the performance of a “partial birth abortion” that results in the death of a fetus. The Act contains an exception allowing the performance of “a partial-birth abortion that is necessary to save the life of the mother.” *Id.* § 1531(a). The Act does not, however, contain an exception for the preservation of the health of the mother.

Three federal courts of appeal have ruled on constitutional challenges to the Act, *Carhart v. Gonzales* (2005), *cert. granted* (2005); *Planned Parenthood Federation of America v. Gonzales* (2006); *National Abortion Federation v. Gonzales* (2006). All three have held that the Act is

unconstitutional because it does not include an exception for abortions necessary to preserve the health of the mother.

The Supreme Court has agreed to hear the case from the Eighth Circuit and may also hear the cases from the Second Circuit and the Ninth Circuit. Given that *Stenberg v. Carhart* (2000) requires the inclusion of a health exception whenever “substantial medical authority” supports the medical necessity of the abortion procedure, it seems likely that the Court will hold that the federal Act is unconstitutional.

Conclusions

A review of the legal principles discussed above leads to a number of conclusions about statutory and constitutional law pertaining to abortion.

- Both state legislatures and Congress will continue to enact statutes that regulate access to abortion. Any such statutory provisions, however, must be consistent with Supreme Court holdings, or the legislative efforts will be pointless.
- The basic holding of *Roe v. Wade* (1973) will not be overturned. The Court will continue to recognize the right of a woman to choose to have an abortion before viability and to obtain that abortion without undue interference from state or federal statute. The rule of *stare decisis* will hold.
- While the State may impose some conditions on access to abortions even before viability, those conditions must not impose an undue burden on the woman’s right to choose.
- There will be more emphasis on the State’s power to restrict abortions after viability, so long as the law provides exceptions for pregnancies that endanger the woman’s life or health.
- Much future litigation will be centered on these two issues:
 - ✓ Does a specific statutory restriction pose an undue burden on a woman’s access to a previability abortion?
 - ✓ Does a specific pregnancy so endanger a woman’s health that she may not be compelled to forego a postviability abortion?

Abortion will continue to be a controversial and contentious topic in American society. When “Freedom of Choice” is pitted against “Right to Life,” there is little room for compromise.

References

United States Supreme Court Cases

Roe v. Wade, 410 U.S. 113 (1973)

Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833 (1992)

Stenberg v. Carhart, 530 U.S. 914 (2000)

United States Court of Appeals Cases

Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, - U.S. - (2005)

Planned Parenthood Federation of America v. Gonzales, --- F.3d --- (9th Cir. 2006)

National Abortion Federation v. Gonzales, --- F.3d --- (2nd Cir. 2006)

United States Statute

Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531)