ROE V. WADE

Roe v. Wade (1973) is at the heart of Jamal Greene's book *How Rights Went Wrong*, my next book. It marks the apogee of the trajectory of the Warren Court, though it was decided after he retired. The opinion was handed down during my last year in law school, and I must have read it then, but I hadn't read since. The name, if not the reasoning, became an icon for our understanding of our rights. And then, the current SCOTUS majority reminded us that they're in charge of our liberty, and not some ancient version of SCOTUS from 50 years ago.

In this post, I'll discuss the holding and reasoning of the Roe majority, written by Harry Blackmun. I'll skip over the preliminary holdings, including standing, justiciability, and procedural issues.

Introductory context

Blackmun begins his analysis by stating that the Court is aware that the abortion is "sensitive" and "emotional", and that people hold "deep and seemingly absolute convictions" the subject. People's views on the subject are influenced by a wide variety of factors, ranging from religious doctrine to worries about population. But he has a job to do.

> Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.

Facts and legal claims

Jane Roe was a single woman residing in Texas. Texas law made abortion a crime with exceptions "… for an abortion by. 'medical advice for the purpose of saving the life of the mother.' ". At the time she filed Roe was pregnant and wanted a safe abortion in Texas because she couldn't afford to go to a state where it would be legal.

Roe claimed that the Texas statutes were unconstitutionally vague, and "… that they

abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."

Context and interests

Blackmun begins with a history of abortion laws from ancient times to the present "for such insight as that history may afford us". He doesn't mention the witch-hunter Matthew Hale. He then describes the past and current positions of three professional associations, the American Medical Association, the American Bar Association, and the American Public Health Association. These lay out the general legal and health situation at that time and the recommendations of those bodies.

Blackmun says there are three justifications for criminalizing abortion.

a) to discourage illicit behavior. Texas doesn't make this argument.

b) to protect the pregnant woman. At the time of adoption of criminal punishment the procedures were dangerous, with a high mortality rate. With modern procedures, that is no longer the case, and abortions, at least in the early months, are safer than normal childbirth. Blackmun notes that there remain important health and safety issues that are properly the function of states. The interest of the states in protecting the woman's health and safety increase as the pregnancy progresses.

c) to protect pre-natal life. Texas argues that "Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail." Blackmun says that "as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone."

The Roe side argues that there is no reason to think that any of these statutes were intended to protect the fetus. There is no legislative history to support that view, and what there is

discusses the health of the pregnant woman. The same is true for the case law.

These are the interests at stake.

The right to privacy

Blackmun says that there is a line of SCOTUS cases in which the Court recognized a zone of privacy for individuals, and lists cases in which provisions of the Bill of Rights were applied to create individual rights to be let alone, including *Griswold v. Connecticu*t, the birth control case. He doesn't repeat the analysis of *Griswold*, merely pointing out its roots in the 9th Amendment.

Blackmun holds that the a woman's decision to get an abortion is within this zone of protection. He recites some of the burdens that Texas imposes on women, and the damage it does to them and their families. But that's not the end of the discussion.

He's already said that Texas has an interest in protecting the health of the woman, and in maintaining medical standards, and in protecting potential life. The right to privacy is not absolute. There are other interests that must be protected, and at some point the interests of that the state rightfully claims become dominant. He says this is the general position taken by most of the courts that have ruled on the issue.

Fetal personhood

In Section IX, Blackmun takes on the question of whether a fetus is a "person" within the meaning of the 14th Amendment. Blackmun recites every use of the word person in the Constitution. He says that none of them can be read to include "prenatal application." Other courts agree. But that doesn't fully exhaust the interests asserted by Texas.

Texas claims life begins at conception. Blackmun says that doctors and scientists can't answer that question and gives examples Therefore the

judiciary certainly can't.

Blackmun says that to override a woman's right to privacy Texas must show a compelling state interest.

> We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, … and that 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.'

This leads to the three part rule of Roe. In the first trimester, the dominant interest is that of the woman, and the state cannot show a compelling interest in her decision or in the means of effectuation. In the second trimester, the risk increases, justifying reasonable regulation related to the life and health of the woman.

After viability, roughly at the end of the second trimester, the interest of the state in protection of the fetus becomes dominant, and reasonable regulation to protect the fetus is justified, so long as it doesn't impact the life or health of the mother.

Discussion

1. In *Dobbs v. Jackson Women's Heath Organization*, Alito claims that Roe is badly reasoned. Alito doesn't like the history, maybe because it doesn't mention any witch-hunters. He thinks Blackmun was required to show there were prior legal case recognizing a Constitutional right to abortion. He doesn't like the three part regime. And he doesn't like the idea of the zone of privacy at all.

Alito states that there is no basis in the

Constitution for a right to an abortion. He says that whatever the privacy interests are, the states can evaluate them without regard to the Constitution. He flatly denies the existence of a constitutionally protected zone of privacy. He thinks the only limit on governmental intrusion is something he calls the principles of ordered liberty, which he doesn't define, or something deeply rooted in our history and traditions. Alito says no new constitutional rights can ever exist, and we're locked into a regime dominated by slavers and those willing to compromise with slavers; a regime where dominant males said women were second class citizens, despite the Reconstruction Amendments. Alito thinks federal and state governments can intrude into any area of private life with few exceptions.

Alito's views are at the very beginning of his interminable opinion, and there's a syllabus, a brief synopsis, at the beginning of the link. See for yourself.

Query: which opinion makes better sense of the world we live in?

2. After we go through Greene's book we'll take another look at this case.