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17.245 The Supreme Court, Civil Liberties, and Civil Rights  
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## Discussion 19: Fundamental Rights, part II

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### Discussion of Roe v. Wade, 1973

Pregnant woman challenges the constitutionality of Texas statutes banning abortion. A three-judge panel of the District Court ruled that the Texas statutes were overly broad and curtailed fundamental rights guaranteed by the 9<sup>th</sup> and 14<sup>th</sup> Amendments. The issue then reaches the Supreme Court.

The Supreme Court rules that abortion is a fundamental right, but allows some level of state regulation of abortion consistent with the state's increasing interest in protecting the life of the fetus as pregnancy matures.

The Court's ruling provided that:

*"3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 147-164.*

*(a) 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. Pp. 163, 164.*

*(b) 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. Pp. 163, 164.*

*(c) 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. Pp. 163-164; 164-165." (Ruling in Roe v. Wade, [www.findlaw.com](http://www.findlaw.com))*

Issues:

- scope and application of fundamental rights
- whether state action impinges a right to privacy (and what the right to privacy entails)
- how SCOTUS protects the right to privacy without relying on Lochner-type reasoning (no due process clause)

Other class comments:

Wade's arguments:

1. We don't know how late into her pregnancy Roe was. If this case was brought in her late stages of pregnancy the challenge may have been rejected.
2. The child has rights – according to the 14<sup>th</sup> amendment no state shall make or abridge the rights of citizens or persons without due process of law.
3. Roe does not have a right to murder her unborn child.

Roe's arguments:

1. Roe's decision is protected by the right to privacy, which extends to marriage (Eisenstadt); Roe's right to privacy encompasses the choice whether to bear the child
2. This is a fundamental right within the meaning of the 9<sup>th</sup> Amendment and implicit in the rest of the Bill of Rights.
3. The fetus is not a life until the child is born
  - Constitution defines citizens as "natural-born citizens", which implies that someone must be born before his rights can be protected
  - Fetuses have never before been counted in the census

### **Further Discussion of Roe v. Wade**

The decision was 7-2, with Blackmun's majority opinion joined by Burger, Douglas, Brennan, Stewart, Marshall, and Powell. Rehnquist and White file dissenting opinions.

The Roe majority identifies several sources for a fundamental right to choose to have an abortion:

1. Right to personal privacy implicit in the 1<sup>st</sup> Amendment
2. Right to be free from governmental intrusion implicit in the 4<sup>th</sup> Amendment
3. Right to liberty prescribed by the 5<sup>th</sup> Amendment
4. Right to decide whether to have children guaranteed by the 9<sup>th</sup> Amendment
5. The concept of personal liberty embodied in the 14<sup>th</sup> Amendment due process guarantees.

Deriving privacy rights from 14<sup>th</sup> Amendment "liberty" guarantees could be problematic logic because of the Court's prior decision rejecting Lochner and substantive due process. However, these may be more relevant to economic rights than personal privacy rights.

The Court ultimately finds that a right to privacy applies and merits protection in this context:

*"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. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation."*  
(Blackmun, majority opinion in *Roe v. Wade*, [www.findlaw.com](http://www.findlaw.com))

### **Discussion of Cruzan v. Director, MDH, 1990**

Family of Nancy Cruzan, a woman in a persistent vegetative state, sues to exercise her right to be cut off from her life-sustaining treatment. The family could not produce clear and convincing evidence that she would want to die, but felt that past conversations with Cruzan made her wishes apparent. The Supreme Court affirms State Court decision to err on the

side of preservation of life in the absence of clear proof that the patient would have wanted to refuse treatment.

This case deals with the controversy over who should be able to decide the fate of an individual in the absence of a living will describing the patient's wishes in a particular set of circumstances.

Should the person closest to the patient be able to decide? Who would determine which person is closest? How is this determined?

Should the state always err on the side of preserving life?

Should financial considerations be taken into account? If the patient survives, then she becomes financially responsible. If not, the state pays.

State has finite resources to support people. However, if a hospital removes a feeding tube, it is ultimately liable.

The Court errs on the side of preserving life and determines that a state may require substantial proof of patient intent by close family or friends in order to allow withdrawal of life-sustaining treatment.

*"We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute. But not only does the standard of proof reflect the importance of a particular adjudication, it also serves as "a societal judgment about how the risk of error should be distributed between the litigants." Santosky, supra, at 755; Addington, supra, at 423. The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment, at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction." (Rehnquist, majority opinion in Cruzan v. Director, MDH)*

### **Discussion of Planned Parenthood v. Casey, 1982**

In this case, the Court reconsidered its holding in Roe v. Wade. The Court decides to retain its essential holding in Roe in the name of stare decisis. The Court retains the following three essential components of Roe:

1. A fundamental right to privacy and choice exists before fetal viability, and the state may not impose an undue burden on women wishing to exercise this right to choose.
2. States may regulate abortions after fetal viability provided exceptions exist to allow preservation of the health of the mother
3. The state has legitimate interests in protecting the health and lives of both the fetus and the mother.

The Court (per Kennedy, J.) develops a justification of the stare decisis doctrine and explains past deviations from the doctrine, as in Brown v. Board and West Coast Hotel v. Parrish. The Court explains that past reversals of precedent were justified by fundamental changes in the facts or in the Court's understanding of the facts.

J. Kennedy claims that if the court shifted its position on Roe v. Wade, the public would lose confidence in the court. The public has come to rely on the right to choose an abortion (i.e., there exists a whole generation of women who have made important life decisions that would be altered by a change in constitutional law). Further, abortion is an especially polarizing and politicized issue. If a Court with a different composition of justices begets a different ruling, that would suggest a rule of persons rather than rule of law. The Court would appear in a political light, which risks the populace viewing the judicial system as just another policy-making body. There is also the balance of power between the branches of government to consider: the political branches could pack the Courts, giving them much more power.

In opposition to the stare decisis argument: we do not want the Court to feel unable to make correct decisions just because it has made a mistake in the past. In addition, the natural evolution of the Court and its decisions should correlate with changes in social values—the Court should be indirectly responsive to social opinion.

Roe v. Wade involves conflicting rights claims, not factual evidence, which is why it would be difficult to overturn.