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ROE V. WADE INVENTION OF RIGHT TO PRIVACY AND RIGHT TO ABORTION IN USA

Authored By- Harris M Fazal¹

Without question, *Roe v. Wade*ⁱ is one of the most controversial decisions. It's a case, but it's also a symbol. It's the only Supreme Court case that most Americans can cite by name. Roe is interesting because it did articulate the right to abortion as a fundamental right. What the Court was saying is that the right to abortion is to be treated in the same level with other sorts of fundamental rights. The right to marry, the right to procreate, the right to take care of one's children etc. The nine justices made abortion largely a private matter.

The US Supreme Court had never before, even vaguely, suggested that restrictions on abortion were constitutionally suspect. There's nothing in the history, text of the Constitution, or really of precedent, that would support the decision. It took what was, really, a crime in most of the states in the United States, and in all, at some point, and it turned it, overnight, into a constitutional right. Jane Roe was a woman in Texas who was pregnant and didn't want to have her baby, but Texas had perhaps the strictest, harshest, anti-abortion law in the country so that, even if you were a documented victim of rape or incest, you still were not allowed to have an abortion. It had the perfect state of facts, even though we now know they were a lie. They claimed that Norma McCorvey was raped, that was not the case. But it seemed to be the most sympathetic possible case.

Until 1973, the idea that abortion was something women had a constitutional right to, and that states had no authority to restrict was really an odd idea. By the time *Roe v. Wade* came down, she'd already had the baby. So, the reason the case continued was because there was a desire, both by litigants and by the Supreme Court, to address the issue, not because there was an individual pressing case that someone brought. The first argument was in the winter of 1971, but two Justices had suddenly died prior to that argument so they were short on the bench. They have the oral argument in Roe, shortly after, they have the oral argument in a case called *Eisenstadt v. Baird*ⁱⁱ, which was about extending the right to use contraception beyond married couples to single people. The right to privacy, as invented by the Supreme Court, is the absolute foundation for the modern jurisprudence on abortion. Privacy is a bit of a lightning rod and had

been a bit of a lightning rod because it is not clearly established in the Constitution. In fact, there's no references to privacy of the sort that would remotely have to do with contraception or other public morals laws of that nature. Substantive due process is not actually described in *Roe*. It's invoked. It's the underlying doctrine that gives us the right to privacy. So, the Fourteenth Amendment has a Due Process Clause, as does the Fifth Amendment. The Fifth Amendment applies to the federal government, the Fourteenth to the states. And it says that "no state shall deprive any person of life, liberty, or property without due process of law." And, basically, substantive due process says that there are some rights that are sufficiently important that the legislature can't take them away, arbitrarily without violating the Due Process Clause.

Eisenstadt v. Baird 1972 and **Griswold v. Connecticut 1965** were key judgments which formed a foundation where *Roe v. Wade* could sit on.

The first opinion to suggest there's a fundamental right to privacy was *Griswold v. Connecticut*,ⁱⁱⁱ which was a 1965 case holding that married couples have a right to use contraception with a doctor's prescription, contrary to a Connecticut law that banned such contraceptive uses. It's a violation of a right to privacy, it's a violation of substantive due process, because this is the kind of intimate decision, no different from who you marry, or whether you have children, or how you raise your children, that should be given to the individual and the state shouldn't be able to interfere with that.

Where did the Court purport to find this right to marital privacy which includes a right to contraceptives? Well, since the Court couldn't find it in the text, the majority said that they found it in "penumbras formed by emanations" of various constitutional guarantees. Unsurprisingly, what followed was a case that said, well, why should only married people have a right to access contraception? Single people should have that right as well. And that was *Eisenstadt v. Baird*. *Griswold v. Connecticut*^{iv} opinion had said that married couples have a right of privacy that inheres in marriage.

Eisenstadt v. Baird 1972

It was about extending the right to use contraception beyond married couples to single people. The right to privacy, as invented by the Supreme Court in this case, is the absolute foundation for the modern jurisprudence on abortion. Substantive due process is the underlying doctrine that gives us the right to privacy. It's fair to say, freedom of thought has a privacy element. Then we move to this decisional privacy, which is the right to make decisions without the

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government directing the outcome of the decision-making process. And then we get to the right to act on the decision, regardless of the community's beliefs that that action is contrary to the public good or contrary to what we would call state interests.

Eisenstadt didn't use "penumbras and emanation" of various constitutional guarantees. But instead, they contented there was a constitutional right for people to make decisions that are very, very important to them. We call this a right of privacy. So, what you have is a situation where what seemed to be a limited right to privacy in *Griswold* that only applied to marital relationships now applies to all relationships.

And then the next step in *Roe* is to suggest that, rather than only applying to contraceptives, it applies more generally to the right of whether you want to have children or not. Right of privacy about matters as fundamental as the right to decide whether to bear or beget a child was already announced and now, abortion is about the decision whether or not to bear or beget a child.

The arguments in favour of *Roe v. Wade*, which finally persuaded the justices, were that abortion is a purely private matter. And when matters are purely private, general constitutional principles forbid the government from intruding into them.

There are two main issues, one is women being able to make decisions about when and if they become pregnant and carry a pregnancy to term. On the other side, the state having interest in potential life, and then how we balance those things. And the way they figure to balance those things is through this idea of the trimester framework. There is not a recognition of foetal personhood. Although the state does have an interest in unborn life, that interest doesn't sufficiently come into play to outweigh the woman's choice until the foetus would be viable outside the womb.

I think the *Roe* decision has proven to be a deep wound in the body politic. The Court took upon itself an issue that was being addressed throughout the country, with vigorous advocacy on both sides, and finding some success, for good or for ill, by the changing laws throughout the country with no textual basis. It overturned the laws of all 50 states, so it was pretty radical. There was not even real build-up, but I think people who are philosophically opposed to abortion feel the Supreme Court decided that they have nowhere to go in the democratic process, that their views are just not valuable. And that really angered people and galvanized the movement. The Court anchored *Roe* in precedents of the time, particularly in the precedent from 1965 that had established a right to use contraception. All of those cases come out of an

understanding of the Fourteenth Amendment protection for due process. And that's something that's been with us for quite a long time. The Court doesn't go around finding fundamental, or even strong, constitutional rights every day, or every year, even. If we, in fact, believe, and I do believe, that the right to terminate a pregnancy is one that should exist in constitutional order, then I think it should be federally protected. The fact that the Supreme Court decision created this basic right was really important. It ensured that this debate would continue for 40 plus, now getting on for 50, years. Whatever the policy should be, the Constitution didn't settle it. And the Court was wrong to impose a particular policy. When people think back on it, they'll think back to that phrase from Justice White's dissent: Roe was an act "of raw judicial power."

Reference

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

Griswold v. Connecticut, 381 U.S. 479 (1965).

Eisenstadt v. Baird, 405 U.S. 438 (1972).

ⁱ 410 U.S. 113 (1973).

ⁱⁱ 405 U.S. 438 (1972).

ⁱⁱⁱ 381 U.S. 479 (1965).

^{iv} 381 U.S. 479 (1965).

^v 410 U.S. 113 (1973).