A Timeline of Supreme Court Decisions Protecting Privacy Rights

The 1973 Supreme Court decision in Roe v. Wade *was far from radical - it was the logical extension of High Court decisions on the right to privacy dating back to the turn of the century and used the same reasoning that guarantees our right to refuse medical treatment and the freedom to resist government search and seizure. In finding that the constitutional right to privacy encompasses a woman's right to choose whether or not to continue a pregnancy, the High Court continued a long line of decisions that rejected government interference in life's most personal decisions. What follows is an outline of selected Supreme Court decisions showing how the Court's views on abortion and the right to privacy have evolved.*

May 25, 1891, *Union Pacific Railway Co. v. Botsford*: The High Court rejected the right of a defendant in a civil action to compel the plaintiff to submit to physical examination, writing that "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . ."

June 4, 1928, *Olmstead v. United States*: In a wiretapping case, Justice Brandeis, dissenting, wrote broadly of the right to be "let alone":

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

June 1, 1942, *Skinner v. Oklahoma*: In a unanimous opinion, the Court held (per Justice Douglas) that, by forcing a prisoner to undergo sterilization, the State of Oklahoma violated the equal protection clause of the Fourteenth Amendment. The Court wrote that such an action treads on "one of the basic civil rights of man," and that "Marriage and procreation are fundamental to the very existence and survival of the race.

June 7, 1965, *Griswold v. Connecticut:* The Supreme Court held that the constitutional right to privacy, derived from the "penumbras and emanations" of the Bill of Rights, encompasses the right of married persons to use contraceptives. Justice Goldberg, in concurrence, relied extensively on the Ninth Amendment, which states that the specific rights enumerated in the Bill of Rights are not exhaustive.

April 21, 1971,*United States v. Vuitch:* By a 5-4 vote, the Court held that a District of Columbia statute criminalizing abortion unless

"necessary for the preservation of the mother's life or health" was not unconstitutionally vague. However, the Court interpreted the term "health" to include "psychological as well as physical well-being."

December 13, 1971: ***Roe v. Wade and Doe v. Bolton*** were argued for the first time before the Supreme Court.

March 22, 1972,*Eisenstadt v. Baird*: The Court held that a statute that allowed the provision of contraceptives to married adults, while prohibiting it for unmarried adults, violated the equal protection clause of the Fourteenth Amendment. In the course of its decision, the Court recognized that the right to privacy protects access to contraceptives for the married and unmarried alike. The opinion states, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Chief Justice Burger dissented. Neither Justice Powell nor Justice Rehnquist participated in this decision, presumably because they had only been recently appointed and were not present for oral argument.

October 11, 1972: ***Roe v. Wade*** and ***Doe v. Bolton*** were re-argued before the Court.

January 22, 1973: ***Roe v. Wade*** and ***Doe v. Bolton*** were both decided by the Court with a 7-2 vote. *Roe* established that:

1. Abortion is encompassed within the right to privacy.

2. Restrictions on abortion must be narrowly tailored to serve compelling state interest.

3. Before viability, the state's interest in fetal life is not compelling.

4. Even after viability, when the state's interest in fetal life becomes compelling, the state must allow abortions necessary to protect a woman's life or health.

5. The state's interest in maternal health becomes compelling at the end of the first trimester of pregnancy.

6. A fetus is not a "person" under the Fourteenth Amendment, nor may the state justify restrictions on abortion based on one theory of when life begins.

In *Doe*, the Court defined "health" to include "all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient."

Justices White and Rehnquist dissented in both cases.

1975: Justice Douglas (author of the *Griswold* opinion) retired and was replaced by Justice Stevens.

September, 1976: In an attempt to undermine *Roe* through regulation, Congress enacted the first Hyde Amendment as a rider to the appropriations bill for the Department of Health, Education and Welfare, later renamed the Department of Health and Human Services (HHS). The Hyde Amendment limited federal funding for abortions through

Medicaid and all other HHS programs to those necessary to save a woman's life and, in some years, in cases of rape and incest, or where the pregnancy would cause "severe and long-lasting physical health damage" to the woman.

July 1, 1976, *Planned Parenthood v. Danforth:* By a 6-3 vote, the Court invalidated a requirement that a married woman obtain her husband's consent for an abortion, reasoning that such a requirement granted unconstitutional veto power to a third party. In the same decision, the Court struck down a ban on the performance of abortions by saline amniocentesis. By a 5-4 vote (with Justice Stevens dissenting) the court struck down a statute requiring minors seeking abortions to obtain the written consent of one parent, again reasoning that it provided unconstitutional veto power to a third party. Chief Justice Burger, in a retreat from his concurrence in *Roe*, joined Justice White's dissenting opinion.

July 1, 1976, *Singleton v. Wulff:* A plurality of the Court (Justices Blackmun, Brennan, White, and Marshall) recognized that physicians may assert the rights of their patients seeking abortions, reasoning in part that women may be "chilled" from bringing abortion cases for themselves "by a desire to protect the very privacy of her decision from the publicity of a court suit." Four Justices dissented from this portion of the opinion; Justice Stevens found it unnecessary to decide the question.

July 1, 1976: In ***Bellotti v. Baird*** (*Bellotti* I), the Court, in a unanimous opinion delivered by Justice Blackmun, declined to rule on the merits of a Massachusetts statute requiring minors seeking abortions to obtain parental consent or a court order waiving parental consent. Instead, the Court held that the federal district court should have sought an interpretation of the statute from the Massachusetts Supreme Judicial Court. The High Court held the statute unconstitutional three years later.

June 9, 1977, *Carey v. Population Services International:* The Court invalidated a New York statute making it a crime to sell or distribute contraceptives to minors under 16; for anyone other than a pharmacist to distribute contraceptives to anyone over 16; and for anyone to display or advertise contraceptives. The Court thus expanded the right to obtain and use contraceptives established in *Griswold* and *Eisenstadt* to minors.

June 20, 1977: In three cases decided on the same day, ***Maher v. Roe, Beal v. Doe***, and ***Poelker v. Doe***, the Court for the first time addressed restrictions on public funding for abortions, upholding all of them. In *Beal*, the Court held that the federal Medicaid statute does not require funding of abortions that are not "medically necessary." In *Maher*, the same majority held that the equal protection clause of the Fourteenth Amendment does not require state Medicaid programs to cover non-therapeutic abortions for indigent women just because it covers the expenses associated with childbirth. In other words, the Court found that states may constitutionally promote childbirth over abortion through Medicaid. Similarly, in *Poelker,* the Court held that a public hospital's failure to provide non-therapeutic abortions did not violate the equal protection clause. In each case, the same three Justices - Brennan, Marshall, and Blackmun - dissented. Prefiguring its devastating holding three years later to uphold the Hyde Amendment, the Court in *Maher*

wrote that the restriction on funding non-therapeutic abortions "does not impinge upon the fundamental right recognized in *Roe*" because it imposes "no restriction on access to abortions that was not already there."

January 9, 1979, *Colautti v. Franklin*: By a 6-3 vote, the Court struck down a Pennsylvania statute requiring a physician performing an abortion to "preserve the life and health of the fetus [as though it were] intended to be born and not aborted" when the fetus is viable or if there is "sufficient reason to believe [it] may be viable." The Court found the law to be unconstitutionally vague because it did not distinguish between "may be viable" and the definition of viability established in *Roe*. Moreover, the Court noted that the statute did not "clearly specify . . . that the woman's life and health must always prevail over the fetus'[s] life and health when they conflict."

July 2, 1979, *Bellotti v. Baird* (*Belotti* II): Before the Court for the second time, this case involved a Massachusetts parental consent statute as interpreted by the Massachusetts Supreme Judicial Court. The Massachusetts court interpreted the statute to: (1) require the consent of both parents for any non-emergency abortion for a woman under 18; (2) require that a parent, if available, be notified of a court procedure to authorize the abortion; and (3) allow the court to withhold consent for the abortion even if the minor is capable of making an informed and reasonable decision. Eight Justices found the statute unconstitutional æ four because it granted absolute veto power of the minor's decision to either the parents or the court, and four because the court procedure required parental consultation and allowed the court to override the decision of a mature minor. In addition, four Justices, in a plurality opinion written by Justice Powell, announced a framework for testing the constitutionality of parental involvement statutes in the future. Under this framework, a parental involvement requirement must contain an alternative bypass procedure in which the minor is entitled to a waiver of parental involvement if she is mature enough to make the abortion decision or if an abortion would be in her best interest. The procedure must allow her to proceed anonymously to protect her privacy, and must be sufficiently expeditious so that her abortion is not delayed.

June 30, 1980, *Harris v. McRae*: The Court upheld the validity of the Hyde Amendment under the right to privacy of the Fifth Amendment and under the Establishment Clause of the First Amendment. The Court ruled that the Hyde restrictions do not interfere with the due process liberty recognized in *Roe*, writing, "a woman's freedom of choice [does not carry] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." The Court further stated that the Hyde Amendment "leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have if Congress had chosen to subsidize no health care costs at all." Finally, the Court held that states participating in the Medicaid program are not required by Title XIX of the Social Security Act to fund "medically necessary" abortions for which federal funds are not available. Just Brennan wrote a dissenting opinion, joined by Justices Marshall and Blackmun, decrying the Court's "failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory

sanctions." Similarly, Justice Stevens dissented, arguing that "the government must use neutral criteria in distributing benefits." Justice Brennan's dissent became the model for several state court rulings over the succeeding years requiring neutrality in funding between abortion and childbirth under state constitutions.

March 23, 1981, *H.L. v. Matheson*: The Court upheld a Utah parental notice statute that provided no procedure by which a minor could bypass parental involvement. The only plaintiff in the case was an unmarried, immature minor who was living with and dependent upon her parents; thus, the Court found she could not challenge the application of the statute to mature or emancipated minors. Three Justices dissented.

1981: Justice Stewart retired and was replaced by Justice O'Connor.

1982: The Solicitor General of the United States, who appeared in court on behalf of the Administration, filed an amicus brief in the ***City of Akron v. Akron Center for Reproductive Health*** case proposing an "undue burden" standard that would require courts to give "heavy deference" to state legislative judgment on abortion. The Solicitor proposed that the undue burden standard be developed on a case-by-case basis.

June 15, 1983: The Court decides two abortion cases on the same day. In ***City of Akron v. Akron Center for Reproductive Health,*** the Court struck down a city ordinance requiring that all second-trimester abortions be performed in a hospital; a woman seeking an abortion delay at least twenty-four hours after giving written consent and receiving biased information from the attending physician; women under age fifteen must obtain the "informed" written consent of one parent twenty-fours hour prior to an abortion; and fetal remains must be disposed of in a "humane and sanitary" manner. The Court's 6-3 opinion found that the hospital requirement did not serve the state's interest in protecting maternal health; the biased informed consent provision followed by a mandatory 24-hour delay period did not serve the state's interest in insuring informed consent; the parental consent requirement was invalid because it did not provide a confidential alternative bypass procedure; and the fetal remains provision was unconstitutionally vague. In her dissent, Justice O'Connor (joined by Justices White and Rehnquist) rejected the trimester framework established in *Roe* in favor of applying the "undue burden" test, under which a statute is invalid if it involves "absolute obstacles or severe limitations on the abortion decision." This represented the first time in which three Justices voted to discard *Roe* in a case involving restrictions on adult women.

In ***Planned Parenthood v. Ashcroft***, the Court likewise invalidated a second-trimester hospitalization requirement, but upheld a number of other restrictions. For the first time, the Court approved a parental consent statute that contained a judicial bypass mechanism. The Court also upheld a provision requiring a pathology report for each abortion and the presence of a second physician during all post-viability abortions.

1986: The Solicitor General of the United States filed an amicus brief in the ***Thornburgh v. American College of Obstetricians and Gynecologists*** case urging the Court to abandon *Roe v. Wade* entirely. The brief also attacked the doctrine of incorporation,

under which various substantive rights were made applicable to the states via the Due Process Clause of the Fourteenth Amendment.

June 11, 1986, *Thornburgh v. American College of Obstetricians & Gynecologists*: The Court struck down, in its entirety, a Pennsylvania statute requiring a woman seeking an abortion to receive a state-scripted lecture from her attending physician and to be told of the availability of additional state-printed materials, including information about fetal development, before giving her "informed" consent to the procedure; abortion providers to file reports with the state that name the performing and referring physicians, provide details about women obtaining abortions, and the method of payment; a physician performing a post-viability abortion to exercise the degree of care that is most likely to result in fetal survival, unless doing so "would present a significantly greater medical risk to the life or health of the pregnant woman;" and the presence of a second physician during abortions where it is possible for the fetus to survive the procedure, regardless of whether an emergency exists. In invalidating the reporting requirements, the Court wrote that "the Court consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities." In invalidating the first restriction on post-viability abortion, the Court found that this provision required an unconstitutional "trade-off" between the woman's health and fetal survival. The court found the second post-viability provision to be invalid because it contained no exception for emergency abortions.

In his dissent, Chief Justice Burger, who had concurred in Roe*, stated his desire to "re-examine* Roe*," leaving a bare 5-4 majority in favor of maintaining* Roe. *Justice O'Connor, also dissenting, urged once again the application of the "undue burden" standard she had defined in the* City of Akron *case three years earlier.*

June 30, 1986, *Bowers v. Hardwick*: By a 5-4 vote, the Court upheld a Georgia sodomy statute challenged by a gay man who claimed it violated his rights under the Ninth and Fourteenth Amendments. The Court declined to extend the right to privacy enumerated in *Roe* and *Griswold* to protect consensual sex between same-sex partners. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens. Justice Powell, who had supported the continuing validity of *Roe* a few weeks earlier in *Thornburgh*, concurred, but noted that the punishment for "a single private, consensual act of sodomy" under Georgia law may violate the Eighth Amendment's prohibition on cruel and unusual punishment.

1986: Chief Justice Burger retired and was replaced as Chief Justice by Associate Justice Rehnquist; Rehnquist's Associate position was filled by Justice Scalia.

1987-88: Justice Powell retired and was replaced by Justice Kennedy.

With this shift in the composition of the Court, there is no clear majority supporting Roe.

1989: The Solicitor General of the United States submitted an amicus brief in ***Webster v. Reproductive Health Services***, asking the Court to overrule *Roe*. The brief relied

extensively on purported historical evidence of a strong state interest in protecting fetal life.

July 3, 1989*, Webster v. Reproductive Health Services:* In a 5-4 opinion, the Court upheld a Missouri ban on the use of public employees and facilities for the performance of abortions, except where necessary to save a woman's life. The court found that the restriction was valid under *McRae* and preceding cases that hold that the "State need not commit any resources to facilitating abortions." The Court also upheld a requirement that physicians test for viability at twenty weeks' gestational age or more. Three Justices (Rehnquist, White and Kennedy) urged reconsideration of *Roe*, Justice Scalia went so far as to suggest that the Court overrule *Roe*, and Justice O'Connor voted to uphold the statute but found no conflict with prior precedents. In his dissent, Justice Blackmun wrote "For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows." This case marked the first time that only four Justices voted to uphold *Roe* in its entirety.

On the same day the Court decided *Webster*, it granted *certiorari* in three abortion cases - two involving parental notice statutes and one involving a statute regulating clinics that provide abortions. In one case, *Hodgson v. Minnesota*, the Solicitor General of the United States filed an amicus brief arguing that the scope of constitutional privacy rights should be determined by whether the right was specifically recognized in 1868, when the Fourteenth Amendment was ratified. As a fallback position, the Solicitor argued that the state's interest in fetal life is compelling enough to overcome a woman's right to choose abortion in all cases.

June 25, 1990: In ***Hodgson v. Minnesota***, a closely divided Court held that Minnesota's blanket requirement that minors notify both parents before obtaining an abortion is "unreasonable" and hence unconstitutional, but that an alternative Minnesota statute, which includes a judicial bypass mechanism, is valid. Four Justices (Kennedy, Rehnquist, White, and Scalia) voted to uphold the statute without the bypass.

The same day, in ***Ohio v. Akron Center for Reproductive Health***, the Court upheld Ohio's one-parent notice requirement by a 6-3 vote despite numerous problems with the judicial bypass procedure provided in the statute. The Court left open the possibility that a one-parent notice statute does not require a bypass mechanism at all.

1990: Justice Brennan retired and was replaced by Justice Souter.

May 23, 1991, *Rust v. Sullivan*: In an extension of prior abortion funding cases, the Court, by a 5-4 vote, held that a regulation prohibiting recipients of family planning funds under Title X of the Public Health Service Act from providing counseling about or referrals for abortions ("the gag rule") does not violate either freedom of speech or the right to privacy. The Court also upheld provisions barring Title X projects from engaging in activities that "encourage, promote, or advocate abortion as a method of family planning," and requiring grantees that provided abortions with non-federal funds to keep these activities "physically and financially separate" from their Title X project.

Newly-appointed Justice Souter provided the crucial fifth vote to uphold the gag rule. Had Justice Brennan still been on the Court, the result would have undoubtedly been different.

1991: Justice Marshall retired and was replaced by Justice Thomas.

1992: The Solicitor General of the United States filed an amicus brief in ***Planned Parenthood v. Casey*** arguing that there is no fundamental right to abortion and, even if there is, the state's compelling interest in protecting fetal life throughout pregnancy subsumes it, and, therefore the Court should uphold all the restrictions at issue in the case.

June 29, 1992, *Planned Parenthood v. Casey*: In a joint opinion upholding all but one provision of Pennsylvania's Abortion Control Act, Justices O'Connor, Kennedy, and Souter replaced the strict scrutiny standard established in *Roe* with an "undue burden" test for analysis of pre-viability restrictions on abortion. The joint opinion specifically re-affirmed *Roe's* standard for evaluating restrictions on abortion after viability but eliminated *Roe's* trimester framework by explicitly extending the state's interest in protecting potential life and maternal health to apply throughout pregnancy. Therefore, regulations that affect a woman's abortion decision that further these interests are valid unless they have the "purpose or effect" of "imposing a substantial obstacle" in the woman's path. Justice Scalia decries the "undue burden" test as unworkable, while Justice Blackmun announces hope that all the restrictions upheld by the Court will ultimately, upon new evidence, be invalidated as undue burdens. In applying this new standard to the Pennsylvania statute, the Court upheld the requirement that a physician - and only a physician - must provide a woman with state-scripted information 24-hours in advance of a non-emergency abortion. The Court also upheld Pennsylvania's narrow definition of medical emergency.

The Court did not uphold the statute's husband notification requirement, finding that, for a woman who doesn't choose to notify her husband, the requirement could enable her husband to prevent her from obtaining an abortion or harm her physically or otherwise - thus imposing an undue burden on her right.

1993: Justice White, one of two dissenting Justices in *Roe*, retired and was replaced by Justice Ginsburg.

1994: Justice Blackmun, author of *Roe*, retired and was replaced by Justice Breyer.

March 31, 1997, *Lambert v. Wicklund*: The Court held that, absent state court interpretation to the contrary, a requirement that an immature minor show that parental notification is not in her best interest is equivalent to a requirement that she show that abortion is in her best interest.

June 16, 1997, *Mazurek v. Armstrong*: The Court eliminated the crucial "purpose" prong in the undue burden test established in *Casey*, ruling that it was doubtful as to whether a

statute could be ruled invalid based solely on its impermissible purpose without showing an impermissible effect. The Court also weakened the discretion of the lower federal courts to consider evidence of the process by which a statute was enacted, including information showing that a statute was drafted by anti-choice groups and unsupported by any evidence that it furthered maternal health. The ruling ignored past cases establishing that courts must take such facts into consideration when reviewing cases involving race discrimination.

June 28, 2000, *Stenberg v. Carhart*: In a 5-4 vote, the U.S. Supreme Court struck down a Nebraska ban on so-called "partial-birth abortion," finding it an unconstitutional violation of Roe v. Wade. Writing for the majority, Justice Breyer found that the Nebraska ban violates the Supreme Court precedents *Roe v. Wade* and *Planned Parenthood v. Casey* by failing to include an exception to preserve the health of the woman and by imposing an undue burden on a woman's ability to choose an abortion

In addition, the Court determined that the effect of the bans went well beyond prohibitions against so-called "late term" abortion, finding the ban to be so broad and vague that constitutionally protected abortion procedures performed before viability could be prohibited. The majority decision was joined by five Justices. Four separate dissenting opinions were filed by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, demonstrating that Roe and the right to choose is imperiled.

The Court's decision rendered similar bans in over 30 states and Congress unconstitutional or unenforceable.

June 26, 2003, *Lawrence v. Texas* Voting 6-3, in *Lawrence v. Texas* the U.S. Supreme Court struck down a Texas statute criminalizing oral and anal sex by consenting gay couples. In a decision written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsburg and Breyer, the Court overruled *Bowers v. Hardwick* and ruled that the defendants in the case, two men who had been arrested and jailed overnight by Texas police after they were found in Lawrence's home engaging in private, consensual sex, "are entitled to respect for their private lives. . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." Justice O'Connor concurred in the judgment but did not join the Court in overruling Bowers. Instead, she would have held that the same-sex sodomy law at issue was unconstitutional under the Equal Protection Clause.

In its decision, the Court wrote: "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions." The Court relied extensively on its jurisprudence recognizing a woman's right to control whether to have a child, citing with approval *Roe's* recognition of "the right of a woman to make certain fundamental decisions affecting her destiny," and Casey's affirmation that decisions "involving the most intimate and personal choices a person may make in a lifetime, choices central to

personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."