

Planned Parenthood v. Casey (1992): Three Judicial Views on Abortion Restrictions

In 1992, the Supreme Court addressed the question of whether *Roe v. Wade*, the landmark 1973 decision which established constitutional protection for a woman's right to access abortion, should be overturned. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, involved abortion restrictions that the Supreme Court had found unconstitutional under the strict scrutiny standard adopted in *Roe*: a requirement that a woman delay her abortion for at least 24 hours after receiving state-mandated information intended to persuade her to choose childbirth over abortion. The strict scrutiny standard is the most protective level of analysis applied by courts to determine a law's constitutionality. Under "strict scrutiny," a government must establish that the law is narrowly tailored to serve a compelling interest and there must not be any less restrictive means by which the government can accomplish its objectives.

In a splintered opinion, in which five Justices wrote separate opinions, no single opinion garnered majority support, but a majority voted against overturning *Roe*. On the equally important question of what level of constitutional protection should be afforded to abortion rights, again no single opinion received support from a majority of Justices. As a result, the Court adopted the plurality's "undue burden" standard for determining the constitutionality of government restrictions on abortion, replacing the strict scrutiny standard adopted in *Roe*. The undue burden standard is a lesser standard of protection for laws restricting abortion than the strict scrutiny standard.

The Justices' varied opinions in this case reflect the three most common judicial views on the level of constitutional protection that should be accorded to a woman's right to obtain an abortion:

1) Strict Scrutiny: A woman's right to obtain an abortion is fundamental and entitled to the highest level of constitutional protection.

In *Roe v. Wade*, the Court held that a woman's right to terminate her pregnancy is encompassed within constitutional protections for individual autonomy and privacy. The Court determined that strict scrutiny—which requires that all restrictions on abortion be narrowly tailored to serve a compelling state interest—was the appropriate level of constitutional protection for laws limiting abortion.

In *Casey*, Justice Blackmun's opinion reaffirmed *Roe* and argued that a woman's right to obtain an abortion should continue to receive the highest level of constitutional protection. Accordingly, Justice Blackmun would have applied *Roe*'s strict scrutiny standard to invalidate all of the challenged restrictions.

If *Roe*'s strict scrutiny standard had not been replaced by *Casey*'s undue burden standard, the outcome of the Supreme Court's most recent abortion rights case, *Gonzales v. Carhart*, would have undoubtedly been very different. In *Gonzales*, the Court upheld the federal ban on so-called "partial-birth abortions," in spite of the fact that the law makes no exceptions for circumstances in which the woman's physician believes that the banned procedure is necessary to preserve her health. A strict scrutiny analysis of the ban challenged in *Gonzales* likely would have found that that the law was not narrowly tailored to serve a compelling state interest because of the lack of a health exception.

2) Undue Burden: A woman's right to obtain an abortion is significant, but countervailing government interests permit substantial government restrictions that do not impose an undue burden.

In *Casey*, Justices O'Connor, Souter, and Kennedy issued a joint opinion adopting the "undue burden" standard, which is currently controlling law governing review of abortion restrictions. Declining to overturn *Roe* in its entirety, the Justices reaffirmed what they characterized as its central holding: "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." The Justices did not apply the strict scrutiny test, however. Instead, they adopted the "undue burden" standard of review: "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." Employing the undue burden standard, Justices O'Connor, Souter, and Kennedy upheld a mandatory 24-hour delay and biased counseling requirement, but struck down the requirement that the husband of a married woman be notified before she obtained an abortion.

therefore largely depend on their state of residence or ability to travel to a state where abortion remained available.

The effect of the Court's adoption of the undue burden standard has been growing incremental restrictions that make abortion unavailable to some women.

3) No Heightened Protection: A woman's right to obtain an abortion is not entitled to heightened constitutional protection; *Roe v. Wade* was wrongly decided and government regulation of abortion need only be rationally related to a legitimate interest.

In his opinion in *Casey*, as well as his dissent in *Roe* some 20 years earlier, Justice Rehnquist argued that a woman's right to obtain an abortion is not protected by the right to privacy and deserves no heightened constitutional protection. Speaking for himself and three other Justices (White, Scalia, and Thomas) in *Casey*, Justice Rehnquist reiterated that *Roe* was wrongly decided. Furthermore, he asserted that "States may regulate abortion procedures in ways rationally related to a legitimate state interest."

If Justice Rehnquist's view of abortion rights were adopted by a majority of the Court, states would be free to determine the legality of abortion with little or no impediment by the federal courts. Some states would likely ban virtually all abortions (providing exceptions only when necessary to save the life of the pregnant woman) while others would protect access to abortion as a fundamental right. Women's access to abortion would