Roe v. Wade / Excerpts from Dissenting Opinion

The following are excerpts from Justice Rehnquist's dissent:

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. [However, no party in the case was currently in her first trimester of pregnancy.] … Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.

The Due Process Clause of the 14th Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective . . . But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

To reach its result, the Court necessarily has had to find within the scope of the 14th Amendment a right that was apparently completely unknown to the drafters of the Amendment . . . . The only conclusion possible from this history is that the drafters did not intend to have the 14th Amendment withdraw from the States the power to legislate with respect to this matter.

Questions to Consider

1. What are Justice Rehnquist's reasons for disagreeing with the right to privacy that is recognized in the majority opinion?

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2. What kind of abortion law would Justice Rehnquist agree is unconstitutional?

3. Justice Rehnquist argues that the drafters of the 14th Amendment did not intend for the rights to be extended to include abortion. Do you think he is correct? Should a right only be recognized if it was intended by the original drafters of the Constitution or the amendments? Explain your answer.

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