"We … acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires."

- Justice Blackmun (1973), majority opinion in *Roe v. Wade*
Roe v. Wade

About landmarkcases.org

This site was developed to provide teachers with a full range of resources and activities to support the teaching of landmark Supreme Court cases, helping students explore the key issues of each case. The "Resources" section features basic building blocks such as background summaries and excerpts of opinions that can be used in multiple ways. The "Activities" section contains a range of short activities and in-depth lessons that can be completed with students. While these activities are online, many of them can be adapted for use in a one-computer classroom or a classroom with no computer.

Depending upon the amount of time you have to teach the case, you may want to use one or more of the "Resources" or "Activities" in conjunction with one or more of the general teaching strategies. These general teaching strategies include moot court activities, political cartoon analysis, continuum exercises, and Web site evaluation.

If you have time constraints, look at the Teaching Recommendations on page 3.

Feel free to experiment with these materials!
Teaching Recommendations Based on Your Time

If you have one day:

- Begin with the “Cartoon Analysis.” As an alternate introductory activity, do “Is Privacy Protected in the Constitution?”
- Read the appropriate Background Summary and Questions and discuss.
- Have students start the “Classifying Arguments” activity and finish it for homework, if necessary.

If you have two days:

- Do all of the activities recommended for the first day.
- Discuss answers to the “Classifying Arguments” activity. Ask students which arguments they think will prevail and why.
- Read the Key Excerpts from the Majority and Dissenting Opinions.
- It might also be a good idea to revisit the political cartoons now that students have a better understanding of the case.

If you have three days:

- Do all of the activities recommended for the first and second day.
- Do either “The Casey Case: Roe Revisited” or “The Legacy of Roe: The Debate Continues.”
Background Summary and Questions

In the latter part of the nineteenth century and the first half of the twentieth century, most states adopted laws strictly regulating the availability of abortions. Many states outlawed abortion except in cases where the mother’s life was in jeopardy. Illegal abortions were widespread and often dangerous for women who undertook them because they were performed in unsanitary conditions.

The sexual revolution that began in the second half of the twentieth century resulted in public pressure to ease abortion laws. As some states began to relax abortion restrictions, some women found it relatively easy to travel to a state where the laws were less restrictive or where a doctor was willing to certify medical necessity.

However, poor women often could not travel outside their state to receive treatment, raising questions of equality. Statutes were often vague, so that doctors did not really know whether they were committing a felony by providing an abortion. In addition, government interference in sexual matters was beginning to be called into question by a changing conception of privacy.

There is no right to privacy explicitly guaranteed in the Constitution. However, the Supreme Court has long acknowledged some right to privacy. In earlier rulings about privacy, the Supreme Court seemed to connect the right to privacy to location, with a particular emphasis on a person’s home. This association stemmed from notions of property rights and centered on people’s personal property.

However, in the second half of the last century, the Court’s position on privacy came to be seen as a right connected to a person, not to a location. The change in conceptions of privacy can be seen clearly in the landmark decision of *Griswold v. Connecticut* (1965). The Supreme Court ruled that a Connecticut statute outlawing access to contraception violated the U.S. Constitution because it invaded the privacy of married couples to make decisions about their families. In that ruling, the Court identified privacy as a transcendent value, fundamental to the American way of life, and to the other basic rights outlined in the Bill of Rights. Though the decision focused on the fundamental nature of privacy associated with marriage, the case set the stage for the Court to proceed further in its protection. Seven years later, the Court decided a case that extended access to contraception to unmarried persons, as well.

While the word privacy does not appear in the Constitution, the argument for protecting privacy is based on the Due Process Clause of the 14th Amendment. That clause has been found to protect certain fundamental rights against government action.

Jane Roe, a pseudonym used to protect her identity, was an unmarried and pregnant Texas resident in 1970. She wanted to have an abortion, but Texas abortion law made it a felony to abort a fetus unless “on medical advice for the purpose of saving the life of the mother.” Roe filed suit against Wade, the district attorney of Dallas County, Texas to challenge the statute outlawing abortion.

Roe contested the statute on the grounds that it violated the Fourteenth Amendment mandating equal protection of the laws and the guarantee of personal liberty, and a mother’s right to privacy implicitly guaranteed in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The state argued that “the right to life of the unborn child is superior to the right to privacy of the mother.” The state also argued that in previous decisions where the Court protected individual or marital privacy, that right was not absolute. The state argued that this is a policy matter best left to the legislature to decide. A three-judge federal district court ruled the Texas abortion law unconstitutional, and the case was then appealed directly to the U.S. Supreme Court.
Roe v. Wade

Background Summary and Questions • • •

Questions to Consider:

1. What was the Texas law at issue here?

2. How did the right to privacy change over the course of the last half-century?

3. Do you believe that privacy is a fundamental right, necessary to secure the other rights in the Bill of Rights? Why or why not?

4. Do the Supreme Court's decisions in the contraception cases prohibit states from outlawing abortion? Explain.
Background Summary and Questions

As the sexual revolution took hold in the second half of the twentieth century, women faced great difficulty getting abortions. At the time, many states had outlawed abortion except in cases where the mother’s life was in danger. Illegal abortions were often dangerous because they were performed in unsanitary conditions. As people’s ideas about sexual freedom changed, women gained greater access to birth control measures, but public pressure to change abortion laws also increased. A number of states relaxed their abortion laws so that women living in states that outlawed abortion could travel to another state for an abortion.

However, poor women often could not afford to travel outside their state to receive treatment, raising questions of equality. Laws were often vague, so that doctors did not know whether they were breaking the law by providing an abortion. In addition, some people began to question whether the government should be able to interfere with people’s decisions in sexual matters. They believed that laws banning birth control and abortion were an invasion of privacy.

There is no right to privacy specifically guaranteed in the Constitution. However, the Supreme Court has long acknowledged some right to privacy, but usually associated that right with a particular location, like a person’s home. However, during the 1960s, the Court’s position on privacy changed so that it was connected with a person, not a location.

In the case of Griswold v. Connecticut (1965), the Supreme Court ruled that a Connecticut law outlawing access to contraception violated the U.S. Constitution because it invaded the privacy of married couples to make decisions about their families. In that ruling, the Court identified privacy as a fundamental value for the American way of life, and for the other basic rights outlined in the Bill of Rights.

Jane Roe, (not her real name), was an unmarried and pregnant Texas resident in 1970. She wanted to have an abortion, but Texas abortion law made it a felony to abort a fetus unless “on medical advice for the purpose of saving the life of the mother.” Roe filed suit against Wade, the district attorney of Dallas County, Texas to challenge the law outlawing abortion.

Roe said that the law violated the Fourteenth Amendment, which provides equal protection of the laws and a guarantee of personal liberty, and a woman’s right to privacy implicitly guaranteed in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The state argued that “the right to life of the unborn child is superior to the right to privacy of the mother.” The state also argued that in previous decisions where the Court protected individual or marital privacy, that right was not absolute. The state argued that this is a policy matter best left to the legislature to decide. A three-judge federal district court ruled the Texas abortion law unconstitutional, and the case was then appealed directly to the U.S. Supreme Court.
Questions to Consider:

1. What was the Texas law at issue in this case?

2. Do you think a right to privacy includes 1) a right to be private in a place 2) a right to establish a certain relationship with a married partner, 3) and/or a right to privacy in most, if not all, of your personal decisions? Explain your answer.

3. What did the Court state about the right to privacy in Griswold?

4. Do you believe that privacy is a fundamental value, necessary to secure the other rights in the Bill of Rights? Why or why not?
Roe v. Wade

Background Summary and Questions

Vocabulary

liberal
Define:

Use in a sentence:

abortion(s)
Define:

Use in a sentence:

vague
Define:

Use in a sentence:

privacy
Define:

Use in a sentence:

appealed
Define:

Use in a sentence:
In the second half of the twentieth century, people's ideas about sexual relationships began to change and become more liberal. Women could get birth control more easily and some states made it easier to get abortions.

However, these changes also created problems. Some poor women who lived in a state that outlawed abortion could not travel to get treatment. Some people said that this was not fair. Abortion laws were sometimes vague, so that doctors did not know when they were breaking the law. Also, some people said that the government should not tell people what to do in sexual relations. They said this was an invasion of privacy.

The U.S. Constitution does not say clearly that there is a right to privacy. However, the Supreme Court had said in other cases that a person has a right to privacy in particular places, like the home. In the case of Griswold v. Connecticut (1965), the Supreme Court said that Connecticut could not stop married couples from getting birth control. The Court said that families have a right to privacy in their decisions about having children and sexual relationships. The Court said that privacy was a basic value that is important for all the rights in the Bill of Rights.

Jane Roe (not her real name) was unmarried and pregnant and lived in Texas. She wanted to have an abortion, but according to Texas law she could not have an abortion unless her life was in danger. Roe challenged the law by suing Wade, the district attorney where she lived.

Roe argued that she had a right to privacy and should be able to decide whether to have an abortion or not. She argued that the right to privacy comes from combining several other rights listed in the Bill of Rights. The state argued that "the right to life of the unborn child is superior to the right to privacy of the mother." The state also argued that this is a topic that should be left to the legislatures to decide how to handle. A three-judge federal district court ruled the Texas abortion law unconstitutional. The case was then appealed to the U.S. Supreme Court.
Roe v. Wade

Background Summary and Questions

Questions to Consider:

1. What Texas law was Roe challenging?

2. What were two problems with abortion laws?

3. Where does the constitution state that you have a right to privacy?

4. What arguments did each side make?
Diagram of How the Case Moved Through the Court System

The Supreme Court of the United States (1973)

The case was originally argued on December 13, 1971 and was reargued on October 11, 1972. The decision was delivered on January 22, 1973. In a 7-2 opinion, the Court decided that (a) during the first trimester of pregnancy a woman could have an abortion on demand without interference from the state; (b) during the second trimester the state could regulate abortions for safety but could not prohibit them entirely; and (c) during the third trimester, the state could regulate or forbid all abortions except to save the life of the mother.

United States District Court for the Northern District of Texas (1970)

A three-judge panel found that the law violated Roe’s rights but refused to issue an injunction that would have prevented the law from being enforced against all pregnant women.
Key Excerpts from the Majority Opinion

MR. JUSTICE BLACKMUN delivered the opinion of the Court. Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall and Powell joined the opinion.

...We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

...The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras.

...The Constitution does not explicitly mention any right of privacy. ...[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. ... 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.

On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute....We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation.

... (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.

(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.
(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 it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.
Key Excerpts from the Majority Opinion

Questions to Consider:

1. Where in the Constitution does the Court find support for the right to privacy? Do you agree that this provision of the Constitution protects a right to privacy?

2. What are the state’s interests in regulating abortion that are recognized by the Court?

3. How is the right to privacy in the abortion context different from other areas in which a right to privacy has been recognized?

4. Describe the right to an abortion that a woman has at each stage of pregnancy.

5. How well do you believe the opinion balances the interests of pregnant women and the interests of the state? Give reasons for your answer.

6. Justice Blackmun’s opinion is also concerned with preserving the relationship between the mother and the physician. How important is it to limit government regulation on the relationship between the doctor and the patient? Give reasons for your answer.
Mr. Justice Rehnquist, dissenting.

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 Fourteenth 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 Fourteenth 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 Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.
Key Excerpts from the Dissenting Opinion

Questions to Consider:

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

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

3. Justice Rehnquist argues that the drafters of the Fourteenth 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.
Classifying Arguments

The following is a list of arguments in the *Roe v. Wade* court case. Read through each argument and decide whether it supports Roe’s side (R), against the Texas law restricting abortion; Wade’s side (W), in favor of the Texas law restricting abortion; both sides (BOTH); or neither side (N).

1. The Fourteenth Amendment says

   *No State shall…deny to any person within its jurisdiction the equal protection of the laws.*

   Having different abortion laws in various states keeps poor women in states with restrictive laws from having access to abortions, while wealthier women can travel elsewhere to have a legal and safe abortion.

2. The Fourteenth Amendment says

   *No State shall…deny to any person within its jurisdiction the equal protection of the laws.*

   If a fetus is a person from conception, then the Fourteenth Amendment guarantees equal protection of the laws. The life of the fetus must be considered as having equal weight with the life of the mother. Thus the state has a compelling interest in protecting the life of the fetus.

3. The Fourteenth Amendment says

   *No State shall…deprive any person of life, liberty, or property, without due process of law….*

   This clause has been interpreted in some cases to guarantee substantive due process. This means that the government cannot infringe on liberty without proving a compelling interest and any law that infringes on liberty has to be very narrowly crafted. Any law that infringes on a protected liberty interest, in this interpretation of the Fourteenth Amendment, is presumed to be unconstitutional and the State has to jump a high hurdle to prove otherwise.

4. The Texas abortion law declaring that a woman cannot have an abortion unless her life is in danger is too vague. Doctors may not know precisely when they are breaking the law when performing an abortion.

5. The First Amendment says:

   *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*
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The Fourth Amendment says:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

The Fifth Amendment says:

No person shall...be compelled in any criminal case to be a witness against himself.

The First, Fourth, and Fifth Amendments also apply to the States. Though these Amendments do not mention the right of privacy, privacy is fundamental to the exercise of the rights that are explicitly mentioned. As such, privacy is protected by the penumbras of the First, Fourth, and Fifth Amendments.

6. The Ninth Amendment says:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

The Framers did not want the Bill of Rights to be an all-inclusive list of the rights that people in the United States have. The Ninth Amendment says that people retain other rights that are not explicitly listed in the Constitution. Among these rights may be the right to privacy, which would include freedom of choice in the basic decisions of one’s life.

7. It has long been an acknowledged role of the state to safeguard health and regulate medical practices.

9. The U.S. Constitution does not explicitly mention any right of privacy.

10. For the U.S. Supreme Court to determine when, where, and how an abortion should occur would be to overstep its authority as a court. It is the job of state legislatures to determine how abortions should be regulated, not federal courts.

11. The use of the word “person” in the U.S. Constitution as it was drafted does not include a fetus. Thus, the Fourteenth Amendment cannot be construed to protect the unborn.

12. As a pregnancy progresses, the interest of the state in protecting the health of the mother and the life of the fetus becomes more “compelling.”
Is Privacy Protected in the Constitution?

DIRECTIONS:
The following is the text of the Bill of Rights, the first ten amendments to the U.S. Constitution. Read each amendment and record specific examples of rights that could be seen as privacy-related rights.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be
confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
Cartoon Analysis

Analyze the cartoons below in terms of its meaning related to abortion laws and *Roe v. Wade.*

1. What do you see in the cartoon? Make a list. Include objects, people, and any characteristics that seem to be exaggerated.
2. Which of the items on the list from Question 1 are symbols? What does each symbol stand for?
3. What is happening in the cartoon?
4. What is the cartoonist's message?
5. Do you agree or disagree with the message? Explain your answer.
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WHY MUST WE GO TO WAR? I THINK IT'S A SENSELESS ACT OF AGGRESSION TO KILL INNOCENT PEOPLE IN IRAQ, ESPECIALLY WHEN...

WE HAVE PLenty TO KILL HERE IN THE U.S.

THE ENEMY

PRO CHOICE

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Roe Revisited: Casey and Stare Decisis

In 1992, the Supreme Court decided the case of Planned Parenthood of Southern Pennsylvania vs. Casey. At issue were five provisions of the Pennsylvania Abortion Control Act of 1982, which required that a woman seeking an abortion give her informed consent prior to the procedure; specified that she be provided with certain information at least 24 hours before the abortion is performed; mandated the informed consent of one parent for a minor to obtain an abortion; required that a married woman seeking an abortion notify her husband; and imposed certain reporting requirements on facilities providing abortion services. Because the make-up of the Court had changed and become more conservative since Roe was first decided, many people believed that the Court might use this case to overturn Roe altogether.

In a 5-4 decision the Court reaffirmed its commitment to Roe and to the basic right of a woman to have an abortion under certain circumstances. Justice O’Connor, who authored the majority opinion, argued that stare decisis required the Court to not overturn Roe. Stare decisis is the general principal that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. (However, the doctrine of stare decisis is not always relied upon. From time to time, the Court overrules earlier precedent that the Justices believe had been wrongly decided.) O’Connor argued that a generation of women had come to depend on the right to an abortion. Nonetheless, certain restrictions were upheld.

As a result of the case, a woman continues to have a right to an abortion before the fetus is viable (before the fetus could live independently outside of the mother’s womb). The Court held that states cannot prohibit abortion prior to viability. However, the states can regulate abortions before viability as long as the regulation does not place an “undue burden” on the access to abortion. After fetal viability, however, states have increased power to restrict the availability of abortions. The state maintains the power to restrict some abortions because of its legitimate interest in protecting the health of the woman and the potential life of the fetus. The Court stated that a regulation places an “undue burden” on access to abortion when “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” However, the Court did not define what constitutes a “substantial obstacle.” Specifically in Casey, the Court upheld the 24 hour waiting period, but found the spousal notification requirement to be unconstitutional.

States can pass some laws that regulate abortion, but these laws cannot place a “substantial obstacle in the path of a woman seeking an abortion.” However, the Court did not define precisely what constitutes a substantial obstacle. The Casey decision held that regulations were constitutional if they did not place an “undue burden” on obtaining an abortion. For example, the decision allowed a regulation that requires a woman to give “informed consent” at least 24 hours before the abortion takes place.

Link to the full opinion:
Roe v. Wade

Roe Revisited: Casey and Stare Decisis

Questions to Consider:

1. What is stare decisis and how was it used to uphold a woman’s right to an abortion that was first recognized in Roe v. Wade?

2. The original decision in Roe v. Wade used a trimester test (i.e. abortions were legal in the first six months of pregnancy) but the Casey court adopted a viability test. What are the differences between these two tests? What are the potential advantages and problems with each test?

3. Although Casey did not overturn the basic holding of Roe, it did modify it. Did Casey generally expand the right to an abortion recognized in Roe or allow for greater restrictions on that right? Explain your answer.

4. Under the undue burden test adopted by Casey, which of the following would place an undue burden on the right to an abortion. Give reasons for each answer.

   a. A state law requires the father of the baby to provide written consent before his wife is able to obtain an abortion.

   b. A poor woman is unable to obtain an abortion because her state does not provide public funds to cover such a medical procedure.

   c. A state law requires 24-hour waiting period between the time of a woman’s formal decision to have an abortion and the actual procedure.

   d. A state law requires a pregnant minor to obtain written consent from both parents in order to obtain an abortion.

   e. A state law requires a pregnant minor to obtain written consent from one parent or a judge in order to obtain an abortion.
The Legacy of Roe: The Pro-Life vs. Pro-Choice Debate

The 1973 Roe decision did not end the debate over abortion. In many ways, the decision actually intensified the debate, making it a national issue rather than a state issue. Abortion is an extremely controversial issue that involves people’s strongly held beliefs about religion, morality, life, the role of the government, and the right to bodily integrity and privacy. Each year, on the anniversary of the decision (January 22, 1973), pro-life and pro-choice supporters stage protest rallies in front of the Supreme Court.

Abortion has become an important issue in elections and in judicial nominations. Depending on who is president and which party controls Congress, abortion counseling at federally funded clinics has sometimes been permitted and sometimes been prohibited. In congressional districts and U.S. Senate elections where the public is closely divided on this issue, candidates are often reluctant to take a strong stand either for or against abortion rights for fear of alienating an important segment of voters. And as long as the public believes that the U.S. Supreme Court is closely divided over abortion issues, advocacy groups on both sides will closely monitor presidential nominations to the Supreme Court and even to lower federal courts.

In addition to political arenas, confrontations over abortions take place on a regular basis in many communities outside of clinics that offer abortion services. Those who are against abortion often stage protests outside of clinics and those who support abortion rights volunteer to escort patients who might otherwise be discouraged from entering the clinics as a result of protests. Some extreme opponents of abortion feel so strongly that abortion is wrong that they advocate the killing of doctors who perform abortions. On the other side, some advocates of abortion rights argue that abortion opponents who threaten women or their doctors should be treated like terrorists because they advocate violence and attempt to intimidate people from exercising their constitutional rights.
Questions to Consider:

1. In your own words, why do you believe that abortion is such a controversial issue?

2. More than 30 years after Roe, some argue that this case should not have been decided by the Court and that the decision belongs in state legislatures. What are the strengths and weaknesses of this state-by-state legislative approach?

3. No case in recent constitutional history has stirred deeper emotions than Roe v. Wade. Organizations have been founded with the primary purpose of either protecting the judicially created right to an abortion or seeking to have this right overturned. Using the Internet, find one organization on each side of this debate and explain its mission. A list of internet sites is available in Public Agenda’s Issue Guide, at www.publicagenda.org/issues/frontdoor.cfm?issue_type=abortion.

4. When people feel strongly on both sides of such an important issue, can a compromise be reached? Are there are ways to lessen the hostilities between the two sides?