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Roe v. Wade
The Case That Changed Democracy

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INTRODUCTION

Any society that relies on nine unelected judges to resolve the most serious issues of the day is not a functioning democracy. I just don't think that a democracy is responsible if it doesn't have a political, rational, respectful, decent discourse so it can solve these problems before they come to the Court.¹

No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²

Citizens obviously are sharply divided concerning whether women should have the right to terminate a pregnancy. Some citizens believe that abortion should be legal only in certain circumstances, such as in the first trimester of pregnancy.³ Others believe that abortion should be legal only in cases of rape or incest, while others would permit abortions at nearly any stage to protect the health of the mother. However, few, if any, debates focus on the *process* by which abortion became a fundamental constitutional right, and on whether and how that process has had effects well beyond the issue of abortion itself. Stated another way, little consideration has been given to either how abortion came to be a fundamental right or why the process that ultimately identified it as such should be of significant concern and is worthy of inquiry – and perhaps a healthy amount of skepticism.

The inquiry should begin at the beginning – with the language of the Constitution. Whether one is a lawyer or lawyer or layperson, the question must be asked whether a reasonable interpretation of this language supports creating a right to terminate a pregnancy at any stage. Before answering that question, consider what the Supreme Court said in *Roe v. Wade*.

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¹ Brian Resnick, *Anthony Kennedy: The U.S. 'Is Not a Functioning Democracy,'* NATIONAL JOURNAL (Oct. 4, 2013), available at: <http://www.nationaljournal.com/domesticpolicy/anthony-kennedy-the-u-s-is-not-a-functioning-democracy-20131004>.

² U.S. Const., Amend. XIV, Cl. 1.

³ See Gallup Organization, *Abortion: Gallup Historical Trends*, available at: <http://www.gallup.com/poll/1576/abortion.aspx>

**THE DECISION
IN *GRISWOLD'S SHADOWS***

*One of the most curious things about Roe is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.*⁴

In *Roe*, the plaintiff challenged a Texas law that prohibited abortions except to save the life of the mother. Texas's asserted interest was to protect the life of the unborn fetus. In a 7-2 decision, the Court held that the Fourteenth Amendment to the United States Constitution protects a woman's right to terminate a pregnancy prior to viability, which equates to approximately the first twenty-two weeks of a pregnancy.

But how did the Court arrive at this conclusion? The process by which the Court created this right represented what is arguably an unprecedented example of judicial overreaching. The Court began, as it did in *Griswold*, by conceding that "the Constitution does not explicitly mention any right of privacy."⁵ Nonetheless, the majority inexplicably concluded that "*the Court* has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution" in "the penumbras of the Bill of Rights," and in "the concept of liberty guaranteed by the first section of the Fourteenth Amendment."⁶ Without explaining the textual or historical basis for arriving at these conclusions, the Court proceeded to infer a right to abortion from the implied right to privacy:

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.*⁷

That, in a nutshell, is *Roe v. Wade*. Additionally, the Court relied on opinions from medical experts to establish a "trimester" abortion framework. Under this approach, women had a nearly unfettered right to abortion in the first trimester. In the second and particularly third trimesters, the State would be empowered to enact reasonable restrictions on abortion. Many people viewed *Roe* as a landmark decision protecting women's privacy and autonomy. However, *Roe* proved to be anything but that.

How did the Court manage to infer an abortion right out of a constitutional provision that prohibits the states from depriving persons of "life, liberty, or property *without due process of law*?" It did something quite extraordinary. It acknowledged that it was not relying on the Constitution itself. Instead, the Court looked to *Griswold's* invisible penumbras to create from thin air what it could not interpret from constitutional text.

⁴ See Laurence Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973)

⁵ 410 U.S. 113, 152 (1973).

⁶ *Id.*

⁷ *Id.* (emphasis added).

As discussed in Chapter 7, the Court in *Griswold* invalidated a Connecticut law that banned married couples in most circumstances from using contraception. Many reasonable people would agree that the Connecticut legislature's decision to ban contraception was "an uncommonly silly law."⁸ The question before the Court, however, was whether the law was unconstitutional. When interpreting the plain language of the Fourteenth Amendment, as the Court did in *Griswold*, the answer was no. After all, Connecticut was not depriving citizens of life, liberty, or property *without due process of law*. Connecticut's law was passed by a majority vote of legislators who were elected by the people through the democratic process. Thus, how did the Court nonetheless manage to conclude that it violated the Fourteenth Amendment? The Court held that the Fourteenth Amendment's language encompasses a *substantive* right to privacy, despite conceding that the Constitution "does not speak in so many words of the right of privacy in marriage," and that "no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family."⁹

Thus, despite candidly acknowledging that a fundamental right of privacy did *not* exist in the Constitution, the Court nonetheless managed to conclude that the Constitution *protected* a right to privacy. To reach this seemingly odd, if not contradictory result, the Court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees," that give them "life and substance."¹⁰ At bottom, the Court concluded that, although the Fourteenth Amendment does not encompass a right to privacy, it *should* encompass this right and therefore it *does*. In so doing, the Court unilaterally imagined and then created unwritten and invisible "rights" that rise from the Amendment like steam from a freshly baked potato.

Importantly, by empowering itself to invent implied rights that no interpretation of the Constitution's text could support, the Court placed itself at the forefront of deciding questions that the Constitution expressly entrusts to citizens through the democratic process. In this regard, the Court signaled a level of confidence that it could – and should – usurp powers traditionally left to the electorate on those occasions when the Court, in its view, was in a superior position to "get it right." As discussed below, the implications of *Griswold* are still being felt today. For example, the Court has embraced *Griswold's* ethereal penumbras to create a collection of "rights," including the right "to define one's own concept of existence...and the mystery of human life," and a right "within a lawful realm, to define and express [one's] identity."¹¹ What's more, by defining these "rights," in such broad terms, the Court has given itself the power to recognize additional rights in future – and unforeseeable – contexts. That is a prescription for judicial review of the most undemocratic kind.

Roe v. Wade is arguably the most notorious example of where *Griswold's* penumbras, rather than a reasonable interpretation of the text, self-authorized the Court to invent a fundamental constitutional right. In many ways *Roe* is the father of the Court's contemporary outcome-based jurisprudence.

⁸ 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

⁹ *Id.* at 495-96 (Goldberg, J., concurring).

¹⁰ *Id.* at 484.

¹¹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

THE IMPACT ON DEMOCRACY

*Justice Douglas, you must remember one thing. At the constitutional level where we work, 90 percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilection.*¹²

Only two Justices dissented in *Roe*. Their reasoning was simple: the Fourteenth Amendment simply does not protect a substantive right to privacy. As then Associate Justice William Rehnquist noted, to find a right to abortion in the Constitution, 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.”¹³ In all likelihood, the Court believed that it was reaching a fair and just outcome. That, however, is precisely the problem. By focusing on the utility of the outcome, the Court disregarded the constitutional processes that are designed to check the Court’s power and promote a participatory democracy. More specifically, in doing so, the Court: (1) embraced the concept of “living constitutionalism;” (2) politicized the judicial branch; (3) laid the groundwork for an unenumerated and outcome-based rights jurisprudence; and (4) upset the careful balance between the state and federal government.

THE LIVING CONSTITUTION

Roe is most troubling because, like *Griswold*, the Court manipulated, even disregarded, the Constitution’s text to achieve what nine unelected Justices believed was the proper outcome. The effect is that *Roe* became one of the most prominent 20th Century cases to embrace a fairly recent form of constitutional interpretation known as “living constitutionalism.” Simply put, living constitutionalism states that the meaning of constitutional text provision changes over time to account for events and issues that the Founders could not foresee.

However, the validity of living constitutionalism turns on whether:

- The text in question is ambiguous;
- The text is reasonably susceptible to a particular interpretation; and
- The purpose of the words supports a particular interpretation.

When the Text is Ambiguous

To illustrate the point regarding ambiguity, consider the text of the Eighth Amendment:

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

The text of the Eighth Amendment is ambiguous because whether bail is “excessive or whether punishment is “cruel and unusual,” will depend on the facts of a particular case, and on the attitudes of society as it develops and matures. For example, the Founders may have considered beheading and burning at the stake to constitute cruel and unusual punishment, but the Founders could never have considered the question of whether the gas chamber was cruel

¹² Ray Forrester, *The New Constitutional Right to Buy Elections*, 69 A.B.A. J. 1078, 1082 (1983).

¹³ *Roe*, 410 U.S. at 175 (Rehnquist, J., dissenting).

and unusual because it did not exist at the time. Thus, courts must inevitably interpret the Constitution in light of issues and events that the Founders could not foresee, but their interpretation must nonetheless be consistent with the purpose of the provision. The purpose of the Eighth Amendment context is to guard against the infliction of unnecessary pain. Thus, when considering if punishments that did not exist in the Founders era are cruel and unusual, the Court should be guided, and in a sense limited, by the question of whether the punishment inflicts unnecessary pain.

Whether the Text is Reasonably Susceptible to a Particular Interpretation

Regarding whether a provision is susceptible to a particular interpretation, consider the Fourteenth Amendment.

No state shall deprive any person of life, liberty, or property, without due process of law

The plain language of the Fourteenth Amendment leaves little room for doubt regarding its meaning: the state may not deprive citizens of life, liberty, or property *unless* the state provides appropriate procedures to guard against the arbitrary deprivation of these rights. Put differently, “due process of law” qualifies the preceding language and therefore protects *procedural*, not substantive, rights. Accordingly, citizens may challenge state action under the Amendment by arguing that the state’s procedures were inadequate, and courts may disagree on whether the procedures adopted in a given case provide “due process of law.”

However, no reasonable interpretation of this language supports the conclusion that the Fourteenth Amendment is a source of *substantive* constitutional rights. Of course, it would be a different matter if the Fourteenth Amendment only stated that “No state shall deprive any person of life, liberty or property.” In this situation, courts might disagree about whether life, liberty, or property encompasses various rights, such as abortion. But that is not what the Fourteenth Amendment says.

Furthermore inferring substantive rights from the Fourteenth Amendment leads to an entirely illogical result. If, as the Court held in *Roe*, the Fourteenth Amendment protects an unfettered right to terminate a pregnancy prior to viability, then the Court is essentially saying that *no processes whatsoever* could be sufficient to deprive a woman of this right. Under that interpretation, the Court has, as a practical matter, severed the words “due process of law” from the Fourteenth Amendment and transformed its meaning in a manner that is wholly inconsistent with what the Founders intended.

Thus, when the Court in *Roe* and *Griswold* interpreted the Fourteenth Amendment to protect substantive rights to privacy and abortion not only did it fail to ascribe a meaning that the words would support, it expressly altered the very meaning of the provision. In so doing, the Court also disregarded the constraints on its Article III reviewing authority, because by embracing an interpretation that the text could not support, the Court gave itself the power to disregard the text in other cases and expand, limit, or create rights as it sees fit. In a society where laws are made from the bottom up and democracy is the avenue by which citizens have a voice in self-governance, the judiciary should strive to enhance democratic *processes*, not undermine democracy through an outcome-based jurisprudence.

Whether the purpose of a law supports a particular interpretation

Courts must consider whether the purpose underlying a particular constitutional provision supports the court's interpretation. Consider another example:

Citizens are prohibited from smoking cigarettes in a public place.

Note: For purposes of this example, assume that the purpose of this provision was to protect citizens from the dangers of second-hand smoke.

Courts interpreting this provision will encounter ambiguity only in determining whether a citizen was smoking a cigarette in a public place. For example, if a person smokes a cigarette inside of their car while parked in a deserted lot, are they in a public place? Courts may disagree about this while also maintaining consistency with the purpose of the statute.

However, what if someone is smoking a pipe in a crowded movie theater? There would be no question that the person was in a public place, and certainly second-hand smoke from a pipe may cause harm to third persons. In this situation, if a citizen is convicted of a violation of the above law, should a court uphold the conviction?

No. A pipe is not a cigarette. If the legislature wanted to include pipes, it could have. Since it did not, the judiciary has no authority to ascribe a meaning to the word "cigarette" that it will not bear.

Put differently, when determining a statute's purpose, courts must consider the words as evidence of that purpose, not merely the broader objective of protecting citizens from second-hand smoke. This approach ensures that a law will be interpreted as the legislature intended, and not as courts wish to interpret it. In the same way, the Constitution's text must be interpreted based on a reasonable understanding of the Constitution's words, in light of the purposes that the words further, and not as a mere guide that the Court is free to disregard at its pleasure. Indeed, although the Court is responsible for deciding *legal* questions and protecting citizens against tyrannical majorities, it does not have the authority to decide *any* legal question based on the Justices' personal policy predilections.

This is precisely what the Court did in *Roe*, however, and the result was to give courts the power "to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary." One might ask, "Why does process matter?" After all, if one agrees that the Court reached a favorable outcome in *Roe*, why should the Court's reasoning be a source of concern? The answer can be summarized in one word: power.

THE POLITICIZATION OF THE JUDICIARY

The Court's decision in *Roe* did tremendous damage to the Court's institutional legitimacy. The *Roe* Court almost unapologetically reached its decision based solely on the outcome it deemed most desirable, and in the absence of a faithful interpretation of either the text or history, and certainly with little concern for the purpose of the Fourteenth Amendment or respect for democratic processes. As a result, the Court not only invented a right in *Roe*; it created the very real perception that decisions by nine unelected judges were motivated by outcomes and ideology, not process and reason.

Thus, it should come as no surprise that the federal judiciary has become increasingly politicized. For example, the process of nominating judges to the federal bench, particularly the Supreme Court, has become contentious, if not toxic. In 1986, Robert Bork's nomination was derailed – and his reputation severely damaged – after senators in the democratic party all but accused Bork of being a member of the Ku Klux Klan. At Bork's nomination hearing, former Senator Edward Kennedy stated as follows:

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizen.¹⁴

Bork was defeated by a vote of 58-42. Four years later, President George H.W. Bush nominated Clarence Thomas to the Supreme Court, and the confirmation fight that ensued was nothing short of despicable. The Senate attacked Thomas with unproven allegations of sexual harassment, and shared the lurid details of this alleged harassment before a nationally-televised audience. In fact, the nomination process was filled with such vitriol that Thomas angrily declared the process to be little more than the “high tech lynching for uppity blacks.”¹⁵

There is a reason that the nomination process has become so contentious, and that reason can be traced to *Roe*: once the Court got into the business of deciding cases based upon the desirability of an outcome, elected representatives perceived, rightfully or not, that ideology would dictate a Justice's approach to constitutional interpretation. To an extent, this perception reflects reality. After all, one can likely predict how the Court will rule based on the ideology of the Presidents who appointed the Justices. That should make citizens of all political persuasions uneasy.

In fact, perception met reality in *Bush v. Gore*, when former Justice John Paul Stevens issues a stinging dissent criticizing the Court decisions to end the 2000 election between George W. Bush and Al Gore:

The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. *It is the Nation's confidence in the judge as an impartial guardian of the rule of law.*¹⁶

¹⁴ James Reston, *Washington; Kennedy and Bork*, available at: <http://www.nytimes.com/1987/07/05/opinion/washington-kennedy-and-bork.html>

¹⁵ American Rhetoric, *Clarence Thomas: Statement Before the Senate Judiciary Committee*, available at: <http://www.americanrhetoric.com/speeches/clarencethomashightechlynching.htm>

¹⁶ 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

Justice Stevens’s words clearly frame the issue: the process by which we reach a result is necessarily as important as the result itself. With respecting that process, the Court can, as it did in *Griswold* and *Roe*, decide questions that properly belong to the people and their elected representatives. This result harms all citizens. In *Bush v. Gore*, conservatives cheered the Court’s decision, and in *Roe v. Wade*, progressives celebrated. That, in a nutshell is the point – and the problem.

THE “IMPLIED RIGHTS” PROBLEM

Beginning with *Griswold*, and continuing with *Roe*, the Court created an “implied rights” problem. Specifically, when courts create fundamental constitutional rights by *inferring* those rights from the text rather than from a reasonable interpretation of its actual words, they lay a new, shifting foundation upon which additional, phantom rights can be inferred from yet other “implied rights.” This ad hoc approach to judicial decision-making divorces the courts from the constraints on their reviewing authority and gives them the power to independently invent rights that have no relation to the Constitution’s text. Justice Potter Stewart emphasized this point in *Griswold*:

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy ‘created by several fundamental constitutional guarantees.’ With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.¹⁷

Consider below the text of the Fourteenth Amendment, and the rights that were inferred from that language.

No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CASE	THE RIGHT ESTABLISHED
Griswold v. Connecticut	Privacy
Roe v. Wade	Abortion (implied from privacy)
Planned Parenthood of Southeastern Pennsylvania v Casey	Abortion and the right “to define one’s own concept of existence...and the mystery of human life”) (implied from privacy)
Lawrence v. Texas	Right to engage in private sexual activity
United States v. Windsor	Right to equal dignity
Obergefell v. Hodges	Right to define and express one’s identity

To be clear, it does not matter whether one thinks that citizens *should* have these rights. The question is whether the *Court* should be deciding whether these rights exist. If an asserted right can be supported by the reasonable interpretation of the text and is consistent with its underlying purposes, the answer is yes. If the asserted right cannot be so supported and is not

¹⁷ *Griswold*, 381 U.S. at 530 (Potter, J., dissenting).

consistent with the underlying purposes, the answer should be *no*. In *Roe*, the Court roundly ignored these principles, and since that time – and in direct response --many states have sought to eviscerate a women’s right to abortion.

THE FEDERALISM FIGHT

Roe disrupted the delicate balance between the state and federal government because the Court appeared to be impermissibly overreaching by deciding matters that were within the state’s powers to regulate. As a result, there was a backlash against *Roe* that endangered the very right that *Roe* created. Over the years, states have launched indirect attacks on *Roe* by enacting legislation that, among other things, required women to obtain the consent of their husband before having an abortion and, most recently, required abortion providers to obtain hospital admitting privileges. These attacks continue to this day, and are motivated by the belief that the Court overstepped its constitutional authority. To the surprise of some, Justice Ruth Bader Ginsburg, a staunch supporter of abortion rights, criticized *Roe*’s broad language, stating that “[h]eavy-handed judicial intervention (in the context of *Roe*) was difficult to justify and appears to have provoked, not resolved, conflict.”¹⁸ Justice Ginsburg argued in favor of an incremental approach that would allow the Court to “put its stamp of approval on the side of change and let that change develop in the political process.”¹⁹

CONCLUSION

*If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.*²⁰

When Chief Justice John Roberts wrote those words in *Obergefell*, he expressed a sentiment that should alarm citizens across the political and ideological spectrum to dissent: the Court cheated the people by disregarding the Constitution and disrespecting the voices of millions of citizens. Although Justice Roberts acknowledged the “undeniable appeal”²¹ of arguments in favor of same-sex marriage, he adhered to a principle that has universal appeal: the right of the people to decide questions to which the Constitution does not speak, and to which judicial review is unsuited. As Justice Scalia stated in *United States v. Windsor*:

We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide. But that the majority will not do. Some will rejoice in today’s decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both

¹⁸ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385-86 (1985).

¹⁹ Interview by Geoffrey Stone with Ruth Bader Ginsburg, Assoc. J., U.S. Sup. Ct., in Chi., Ill. (May 11, 2013), <http://www.law.uchicago.edu/video/ginsburg051113>.

²⁰ *Obergefell, et al. v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, J., dissenting).

²¹ *Id.* at 2611.

sides, robbing *the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better.* I dissent.²²

Justices Roberts and Scalia were right, and *Roe* is the culprit that ushered in a new era of judicial review that should cause citizens across the political and ideological spectrum to dissent. The cases that followed in *Roe*'s wake, regardless of whether one celebrates the outcomes, were based on the "mystical aphorisms of the fortune cookie," not any reasonable interpretation of the Constitution.²³

²² *United States v. Windsor*, 133 S. Ct. 2675, 2711 (2013) (Scalia, J., dissenting) (emphasis added).

²³ *Obergefell*, 135 S. Ct. at 2630, n. 22 (Scalia, J., dissenting) (emphasis added).