ROE V. WADE: BACKGROUND, HOLDING, CRITICISMS, AND RAMIFICATIONS

1. *Roe v. Wade*, 410 U.S. 113 (1973) was decided shortly after some major developments in biological science: a) highly effective (but not perfect) form of female-use contraception, i.e. birth control pills (introduced 1960), and b) modern life support technology that could keep the body alive even after irreversible brain death (e.g., positive-pressure ventilators, introduced in the 1950s).

2. These developments raised the issue of "legal personhood"—i.e., the possibility that a living human being prior to or after certain points (e.g., before birth, after brain death) would not be entitled to due process or other constitutional rights (see the Fourteenth Amendment's Equal Protection Clause: "No State shall … deny to any person within its jurisdiction the equal protection of the laws.")

3. The Pill's introduction came at about the same time as the sexual revolution of the 1960s, when sex outside of marriage became much more widespread and acceptable. This coincidence likely led to an increase in unplanned pregnancies among younger/unmarried women despite the Pill (due to limited availability to unmarried women, improper use, etc.).

4. The 1960s also saw the rise of the feminist movement, which argued (among other things) that unintended pregnancies placed women at a disadvantage in the workplace when compared to men.

5. Prior to *Roe v. Wade*, every state had an abortion statute, most of them dating from the 1800s. (Many of these dated back before the adoption of the Fourteenth Amendment, suggesting that the drafters of the amendment saw no conflict between it and the abortion statutes.) These statutes varied from state to state; some banned all abortions, while others allowed exceptions for rape, incest, fetal abnormality, or some combination thereof.

6. In 1965, the case of *Griswold v. Connecticut*, 381 U.S. 479, created the "right to privacy" in matters relating to reproductive choice, paving the way for several related decisions in the following decade.

7. *Roe* based its holding on the substantive due process liberty interest of the woman not to have children as well as her privacy rights.

8: Per Justice Blackmun: "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."

8. *Roe* did not recognize an absolute right to an abortion. Per Justice Blackman: "[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."

9. *Roe* did, however, find abortion to be a "fundamental right" and thus any law restricting abortion was to be subjected to "strict scrutiny," greatly reducing the power of a state to restrict abortion.

10. *Roe* balanced the woman's and state's interests with the "trimester" formula, (i.e., in the first trimester, the woman's interest prevailed), since overruled by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

11. *Roe* also established the highly controversial "viability" test (in effect making "personhood" dependent on technology, which is constantly advancing). Per Justice Blackmun: "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb." Unlike the trimester formula, the "viability" test is still in effect.

12. Other than Justice Blackman's cryptic reference to "potential life" (inaccurate, since the fetus is certainly alive as a matter of biological fact), the Court recognized only a) the rights of the woman and b) the interests of the state. The Court gave the fetus no actual or legal right to due process. In short, the Court refused to recognize a human being prior to birth as a Fourteenth Amendment "person" who is entitled to "the equal protection of the laws." This is perhaps the most hotly-debated aspect of *Roe*.

13. Legal scholars (including some who agree with its outcome) have criticized *Roe* as extreme judicial activism. Per Justice Byron White, dissenting in *Roe*: "I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. …As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but, in my view, its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court." Per Professor John Hart Ely of Harvard Law School: "What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."

14. On the other hand, Peter Singer, bioethicist and professor at Princeton University, argues for extension of the *Roe* rationale to allow the legal killing of children for some weeks or months after birth: "[T]he fact that a being is human, and alive, does not in itself tell us whether it is wrong to take that being's life. … [In some cases] the effect that the death of the child will have on its parents can be a reason for, rather than against killing it. [T]he most plausible arguments for attributing a right to life to a being apply only if there is some awareness of oneself as a being existing over time, or as a continuing mental self. Nor can respect for autonomy apply where there is no capacity for autonomy."

15. *Planned Parenthood v. Casey* replaced *Roe*'s trimester formula with the rule that an abortion regulation must not be an "undue burden" on the right to an abortion. This language requires heavy and ongoing judicial supervision of abortion regulations in accord with "strict scrutiny."

16. If *Roe* were overturned, it would not mean that all abortions would become illegal, but instead that each state could pass its own abortion laws free from strict judicial scrutiny. Many states, presumably, would continue to allow unfettered abortion rights, while others would restrict abortion rights.