

# **PRIVACY AND ABORTION**

Section B  
(Feb 29, 2008)

# THE ROE FRAMEWORK

- The personal right of privacy is part of the “ordered” liberty protected by the Due Process Clause of the Fourteenth Amendment (Griswold, 1965).
- The personal right of privacy includes the right of a woman to terminate her pregnancy before fetal viability.
- The state has a legitimate interest to regulate abortion after fetal viability.
- The balance be maintained by the trimester regime
  - The 1<sup>st</sup> trimester (pre-viability): state intervention unwarranted
  - The 2<sup>nd</sup> trimester (potential life): state intervention on procedures
  - The 3<sup>rd</sup> trimester (post-viability): prohibition except where the health of the mother is in danger

# PLANNED PARENTHOOD OF SOUTHEASTERN PA V. CASEY

## 505 U.S. 833 (1992)

### ● Gathering of a Storm

- Briefs of amici curiae were filed for the State of New York et al. by Robert Abrams, Attorney General of New York, Jerry Boone, Solicitor General, Mary Ellen Burns, Chief Assistant Attorney General, and Sanford M. Cohen, Donna I. Dennis, Marjorie Fujiki, and Shelley B. Mayer, Assistant Attorneys General, and John McKernan, Governor of Maine, and Michael E. Carpenter, Attorney General, Richard Blumenthal, Attorney General of Connecticut, Charles M. Oberly III, Attorney General of Delaware, Warren Price III, Attorney General of Hawaii, Roland W. Burris, Attorney General of Illinois, Bonnie J. Campbell, Attorney General of Iowa, J. Joseph Curran, Jr., Attorney General of Maryland, Scott Harshbarger, Attorney General of Massachusetts, Frankie Sue Del Papa, Attorney General of Nevada, Robert J. Del Tufo, Attorney General of New Jersey, Tom Udall, Attorney General of New Mexico, Lacy H. Thornburg, Attorney General of North Carolina, James E. O'Neil, Attorney General of Rhode Island, Dan Morales, Attorney General of Texas, Jeffrey L. Amestoy, Attorney General of Vermont, and John Payton, Corporation Counsel of District of Columbia; for the State of Utah by R. Paul Van Dam, Attorney General, and Mary Anne Q. Wood, Special Assistant Attorney General; for the city of New York et al. by O. Peter Sherwood, Conrad Harper, Janice Goodman, Leonard J. Koerner, Lorna Bade Goodman, Gail Rubin, and Julie Mertus; for 178 Organizations by Pamela S. [505 U.S. 833, 843] Karlan and Sarah Weddington; for Agudath Israel of America by David Zwiebel; for the Alan Guttmacher Institute et al. by Colleen K. Connell and Dorothy B. Zimbrakos; for the American Academy of Medical Ethics by Joseph W. Dellapenna; for the American Association of Pro-life Obstetricians and Gynecologists et al. by William Bentley Ball, Philip J. Murren, and Maura K. Quinlan; for the American College of Obstetricians and Gynecologists et al. by Carter G. Phillips, Ann E. Allen, Laurie R. Rockett, Joel I. Klein, Nadine Taub, and Sarah C. Carey; for the American Psychological Association by David W. Ogden; for Texas Black Americans for Life by Lawrence J. Joyce and Craig H. Greenwood; for Catholics United for Life et al. by Thomas Patrick Monaghan, Jay Alan Sekulow, Walter M. Weber, Thomas A. Glessner, Charles E. Rice, and Michael J. Laird; for the Elliot Institute for Social Sciences Research by Stephen R. Kaufmann; for Feminists for Life of America et al. by Keith A. Fournier, John G. Stepanovich, Christine Smith Torre, Theodore H. Amshoff, Jr., and Mary Dice Grenen; for Focus on the Family et al. by Stephen H. Galebach, Gregory J. Granitto, Stephen W. Reed, David L. Llewellyn, Jr., Benjamin W. Bull, and Leonard J. Pranschke; for the Knights of Columbus by Carl A. Anderson; for Life Issues Institute by James Bopp, Jr., and Richard E. Coleson; for the NAACP Legal Defense and Educational Fund, Inc., et al. by Julius L. Chambers, Ronald L. Ellis, and Alice L. Brown; for the National Legal Foundation by Robert K. Skolrood; for National Right to Life, Inc., by Messrs. Bopp and Coleson, Robert A. Destro, and A. Eric Johnston; for the Pennsylvania Coalition Against Domestic Violence et al. by Phyllis Gelman; for the Rutherford Institute et al. by Thomas W. Strahan, John W. Whitehead, Mr. Johnston, Stephen E. Hurst, Joseph Secola, Thomas S. Neuberger, J. Brian Heller, Amy Dougherty, Stanley R. Jones, David Melton, Robert R. Melnick, William Bonner, W. Charles Bundren, and James Knically; for the Southern Center for Law & Ethics by Tony G. Miller; for the United States Catholic Conference et al. by Mark E. Chopko, Phillip H. Harris, Michael K. Whitehead, and Forest D. Montgomery; for University Faculty for Life by Clarke D. Forsythe and Victor G. Rosenblum; for Certain American State Legislators by Paul Benjamin Linton; for 19 Arizona Legislators by Ronald D. Maines; for Representative Henry J. Hyde et al. by Albert P. Blaustein and Kevin J. Todd; for Representative Don Edwards et al. by Walter Dellinger and Lloyd N. Cutler; and for 250 American Historians by Sylvia A. Law. [505 U.S. 833, 843]



- **Pro Life Groups**

- Life begins at conception.
- Abortion is a murder.
- Overrule Roe.

- **Pro Choice Group**

- At issue is fetal viability.
- Abortion before fetal viability is a matter of personal choice within the meaning of “liberty.”
- Reaffirm Roe.

# SUPREME COURT JUSTICES



Lee (Feb 29, 2008)

# FACTS

- The PA abortion law requires during the first trimester (before viability):
  - Make certain information (risks, alternatives) available to the pregnant woman 24 hours before abortion and seek informed consent
  - Spousal notification
  - Parental notification (or judicial bypass) in case of a minor
- Petitioners ask the Court to reaffirm Roe and invalidate the PA abortion statute.
- Respondents ask the Court to overturn Roe v. Wade, and uphold the PA abortion statute.

# QUESTION BEFORE THE COURT

- Whether the PA anti-abortion statute violates the Due Process Clause within the meaning of *Roe v. Wade*:
  - Informed consent prior to the procedure
  - Notify the husband
  - At least one parental consent in case of a minor
- The larger task is “to review . . . the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.” p. 417

# OPINION OF THE COURT

- Justices O'Connor, Kennedy, and Souter announced the judgment of the Court, joined by Blackmun and Stevens.
- The essential holding of Roe v. Wade be retained and affirmed.
- The Roe's trimester regime is rejected and replaced by the undue burden standard.
- Under the undue burden standard,
  - The informed consent requirement before fetal viability should not create undue burden (The PA statute is not invalid).
  - Spousal notification causes undue burden (The PA statute is invalid).
  - One parental notification (or judicial bypass in case) should not create undue burden (The PA statute is not invalid).

# UNDERLYING RATIONALE

- The Roe framework is essentially sound (Griswold).
- Abortion before fetal viability is the woman's personal right of privacy (Roe);
- It is the substantive component of the Due Process Clause;
  - “At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.” p. 419

- Pre-viable abortion is not an absolute right;
- The state may intervene without causing undue burden;
- The state regulation should be subject to strict scrutiny test (i.e., substantive due process as opposed to procedural due process);
- Roe has been the law of the land ever since 1973 (cases)
- The Court should be mindful of the historical workings of the “Stare Decisis” principle (e.g., heavy price).

# DISSENT

- Chief Justice Rehnquist, joined by Justices Scalia, Thomas, and White argue that Roe be overturned;
- Insist that the anti-abortion law should not be subject to strict scrutiny but to rational-basis test, whether the state action is rational to achieve the legitimate government function.