STEWART, J., Concurring Opinion

SUPREME COURT OF THE UNITED STATES

410 U.S. 113

Roe v. Wade

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 70-18 Argued: December 13, 1971 --- Decided: January 22, 1973

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in Ferguson v. Skrupa, 372 U.S. 726, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in Skrupa put it:

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Id. at 730.[n1]

Barely two years later, in Griswold v. Connecticut, 381 U.S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in Skrupa, the Court's opinion in Griswold understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution.[n2] So it was clear [p168] to me then, and it is equally clear to me now, that the Griswold decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment.[n3] As so understood, Griswold stands as one in a long line of pre-Skrupa cases decided under the doctrine of substantive due process, and I now accept it as such.

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Board of Regents v. Roth, 408 U.S. 564, 572.

The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239; Pierce v. Society of Sisters, 268 U.S. 510, 534-535; Meyer v. Nebraska, 262 U.S. 390, 399-400. Cf. Shapiro v. Thompson, 394 U.S. 618, 629-630; United States v. Guest, 383 U.S. 745, 757-758; Carrington v. Rash, 380 U.S. 89, 96; Aptheker v. Secretary of State, 378 U.S. 500, 505; Kent v. Dulles, 357 U.S. 116, 127; Bolling v. Sharpe, 347 U.S. 497, 499-500; Truax v. Raich, 239 U.S. 33, 41. [p169]

As Mr. Justice Harlan once wrote:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter,

> Great concepts like . . . "liberty" . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.

National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. Loving v. Virginia, 388 U.S. 1, 12; Griswold v. Connecticut, supra; Pierce v. Society of Sisters, supra; Meyer v. Nebraska, supra. See also Prince v. Massachusetts, 321 U.S. 158, 166; Skinner v. Oklahoma, 316 U.S. 535, 541. As recently as last Term, in Eisenstadt v. Baird, 405 U.S. 438, 453, we recognized

> the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person [p170] as the decision whether to bear or beget a child.

That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.

> Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in Pierce v. Society of Sisters, 268 U.S. 510 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U.S. 390 (1923).

Abele v. Markle, 351 F.Supp. 224, 227 (Conn.1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently, or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of personal [p171] liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

[1] Only Mr. Justice Harlan failed to join the Court's opinion, 372 U.S. at 733.

[2] There is no constitutional right of privacy, as such.

> [The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's General right to privacy -- his right to be let alone by other people -- is, like the protection of his property and of his very life, left largely to the law of the individual States.

Katz v. United States, 389 U.S. 347, 350-351 (footnotes omitted).

[3.] This was also clear to Mr. Justice Black, 381 U.S. at 507 (dissenting opinion); to Mr. Justice Harlan, 381 U.S. at 499 (opinion concurring in the judgment); and to MR. JUSTICE WHITE, 381 U.S. at 502 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in Poe v. Ullman, 367 U.S. 497, 522