***Roe v. Wade* (1973)** - Justice Blackmun - 7/2.

Everybody knows the name - few have read this case or know precisely what it stands for. Sarah Weddington, a University of Texas Law School graduate, was the attorney for Jane Roe. As an aside, I was a first year law student at UT when this case was decided in 1973.

Issue: An **unmarried** pregnant woman sought a declaratory judgment that the Texas criminal abortion statutes, which prohibited abortions **except** with respect to those procured or attempted by medical advice for the purpose of **saving the life of the mother**, were unconstitutional.

The *Roe v. Wade* Court
[The Court has not changed since *Eisenstadt*.]

Majority (7): Blackmun, Burger, Douglas, Brennan, Stewart, Marshall and Powell.
Minority (2): White and Rehnquist.

Held: The state's anti-abortion statutes violated plaintiff's personal liberty rights. Abortion is a fundamental right guaranteed by the Due Process Clause, but maternal health and the potentiality of human life are compelling interests that the state can protect through legislation narrowly tailored to those ends. States have legitimate interests in seeing to it that abortions are performed under circumstances that insure maximum safety for the patient. The right to privacy encompasses a woman's decision whether or not to terminate her pregnancy, but that right is not absolute and may be limited by the state's legitimate interests

in safeguarding the woman's health, in maintaining proper medical standards and in protecting potential human life. The unborn are not included within the definition of "person" as used in the Fourteenth Amendment. Prior to the end of the first trimester of pregnancy, the state may not interfere with or regulate an attending physician's decision, reached in consultation with his patient, that the patient's pregnancy should be terminated. From and after the end of the first trimester, and until the point in time when the fetus becomes viable, the state may regulate the abortion procedure only to the extent that such regulation relates to the preservation and protection of maternal health. From and after the point in time when the fetus becomes viable, the state may prohibit abortions altogether, except those necessary to preserve the life or health of the mother. The state may proscribe the performance of all abortions except those performed by physicians currently licensed by the state.

Reasoning: Justice Blackmun...The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. Our task is to resolve the issue by constitutional measurement, free of emotion and of predilection. Because we seek earnestly to do this, we place some emphasis upon what **history reveals about man's attitudes toward the abortion procedure over the centuries**.

Unless we are looking to the Framers' attitudes, what do historical attitudes about abortion have to do with anything? Is the Court trying to justify "its" attitude? And, aren't the "attitudes" of these Texans or, at most, our nation, more important than the "attitudes of mankind **over the centuries**" when the purpose of the inquiry is **Constitutional** interpretation? Regardless of the issue at hand, because societal "attitudes" change, it seems that anyone with an agenda can always find an "attitude" somewhere on the planet somewhere in time to support his or her position. Seriously, is that how the Court should operate?

The Statutes: The Texas statutes make it a crime to procure an abortion or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of **saving the life of the mother**."

The Facts: Jane Roe alleged she was **unmarried** and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her **right of personal privacy**, protected by the **First, Fourth, Fifth, Ninth, and Fourteenth Amendments**.

Her lawyer was up on her *Griswold/Eisenstadt* analysis, citing everything under the sun so as to "penumbrize" the "right to privacy" into a "**right** to make the abortion choice." By the way, watch carefully to see whether the Court slips up and refers to a "**right to an abortion**." There is no such "right." What if no one will perform it? Couching it in terms of a "right" implies the government must make sure an abortion happens. No, there is a "**right to choose**" abortion under certain circumstances and not be charged with a crime if a physician performs it. Lawyers and judges should not speak so loosely of "rights" that do not exist.

Roe argues the Texas statutes improperly invade a right to choose to terminate her pregnancy found within 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 (see *Griswold*[1] and *Eisenstadt*[2]) or among those rights reserved to the people by the Ninth Amendment (see *Griswold*).

Abortion laws in effect in a majority of States today, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from late 19th century movements.

1. *Ancient attitudes*. Criminal abortions were severely punished; however, abortion was practiced in Greek times as well as in the Roman Era and it was resorted to without scruple. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.

2. *The Hippocratic Oath*. "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion."

3. *The common law*. At common law, abortion performed *before* "quickening" -- the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy -- was not an indictable offense.

4. *The English statutory law*. England's first criminal abortion statute came in 1803. It made abortion of a quick fetus a capital crime, but it provided lesser penalties for the felony of abortion before quickening, and thus preserved the "quickening" distinction. Parliament enacted the Abortion Act of 1967 which permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would

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[1]Case 9A-AP-1 on this website.

[2]Case 9A-AP-3 on this website.

suffer from such physical or mental abnormalities as to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good-faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law*. In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860. In 1828, New York enacted legislation that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former a misdemeanor and the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law, only eight American States had statutes dealing with abortion. It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

   Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health. Three States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts. In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption by about one-third of the States of less stringent laws, most of them patterned after the ALI Model Penal Code.

   It is thus apparent that at common law, <u>at the time of the adoption of our Constitution,</u> and throughout the major portion of the 19th century, <u>abortion was viewed with less disfavor than under most American statutes currently in effect</u>.

6. *The position of the American Medical Association*...[not provided.]

7. *The position of the American Public Health Association*...[not provided.]

8. *The position of the American Bar Association*...[not provided.]

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

1. Product of a **Victorian social concern to discourage illicit sexual conduct**. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. The appellants contend that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

2. A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, **the procedure was a hazardous one for the woman**. This was particularly true prior to the development of antisepsis. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy. Modern medical techniques have altered this situation. The medical data indicates that abortion prior to the end of the first trimester is now relatively safe...Of course, important state interests in the areas of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. The risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

3. The third reason is the **State's interest in protecting prenatal life**. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

The Constitution does not explicitly mention any right of privacy...[But], in varying contexts, the Court or individual Justices have found at least the roots of that right in the First Amendment, *Stanley v. Georgia;* in the Fourth and Fifth Amendments, *Terry v. Ohio, Katz v. United States*; in the penumbras of the Bill of Rights and/or the Ninth Amendment, *Griswold v. Connecticut;* or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska.* **These decisions make it clear that only personal rights that can be deemed**

"fundamental" or "implicit in the concept of ordered liberty" (*Palko v. Connecticut)* **are included in this guarantee of personal privacy**. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia;* procreation, *Skinner v. Oklahoma;* contraception, *Eisenstadt v. Baird;* family relationships, *Prince v. Massachusetts;* and child rearing and education, *Pierce v. Society of Sisters, Meyer v. Nebraska.*

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 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. <u>All these are factors</u> the woman <u>and her responsible physician necessarily will consider</u> in consultation.

I understand a "consultation" on "medical" issues between patient and OB-GYN. Although my point will be better made in later cases, for now I am having a hard time understanding a "consultation" between patient and OB-GYN on "psychological," "mental," "distress of the unwanted child," "family" and "stigma of unwed motherhood" issues. What business is it of a medical doctor who specializes in abortion to be involved in his patient's decision on **any** issue outside of his **specialty**? Especially when he stands to profit from his decision!!! Discuss!

Roe argues 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.** 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. In fact, it is not clear to us that the claim asserted by some that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts,* (vaccination); *Buck v. Bell* (sterilization of "imbeciles")**.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these

rights may be justified only by a "compelling state interest."

The State argues that a fetus is a "person" within the language and meaning of the Fourteenth Amendment and if that is so, Roe's case collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. **On the other hand, no case has held that a fetus is a person within the meaning of the Fourteenth Amendment**. The Constitution does not define "person" in so many words. Its use is such that it has application only post-natally.

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion is significantly less than the maximum penalty for murder. If the fetus is a person, may the penalties be different?

The Supremes are being asked to determine whether a fetus is a person **within the meaning of the Constitution**. They say, "Look, if a fetus is a person, the woman should be a principal or accomplice in a criminal statute and penalties for aborting a 'person' should be the same for murder." What they are doing is passing the buck. In other words, they look to legislative acts to conclude that because lawmakers have not thought in terms of a fetus being a person, then "a fetus must not be a person." But, if a fetus **is** a person, then what they ought to do is strike down the laws that do not treat it as such. In other words, when this particular majority of Justices does not like some concept in a State statute, they strike it down. However, when they like something they find in legislation, they cite it as support. In my estimation, it is their job to determine the "constitutionality" of challenged laws on far more solid reasoning than their "likes and dislikes."

All this, together with our observation that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word **"person," as used in the Fourteenth Amendment, does not include the unborn**.

Nevertheless, a pregnant woman cannot be isolated in her privacy. The situation therefore is inherently different from marital intimacy or bedroom possession of obscene material or marriage or procreation or education, with which *Eisenstadt, Griswold, Stanley, Loving, Skinner*, *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly. **We need not resolve the difficult question of when life begins and, at this point in the development of man's knowledge, we are not in a position to speculate as to the answer.** Physicians and their scientific colleagues have regarded quickening with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, **potentially able to live outside the mother's womb**, **albeit with artificial aid**. Viability is usually placed at about 28 weeks, but may occur earlier. In areas other than criminal abortion, the law has been reluctant to

endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

Query: Can a person who guns down a pregnant woman be charged with the murder of a fetus in your State?

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman. However, the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling." **With respect to the State's important and legitimate interest in the health of the mother**, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. **This is so because of the <u>now-established medical fact</u> that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth**.

So, if medical science gets to the point where mortality rates in abortion are less than in normal childbirth (let's say at 8.5 months), can Ms. Roe abort at that time in the absence of her life or health being at risk? This appears to be a "moving target test."

It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like. This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that,

in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion **free of interference by the State**.

In his (the physician's) medical judgment? I thought we were talking about the mother's "right" to decide. There is a huge difference between a judgment that a pregnancy "should be" terminated and one that a pregnancy "can be" terminated. Does the physician have to agree she would be "better off" without this child? That the child would be "better off" not being born? Just what "judgment" is the Court looking for from the **abortion** physician? Also, does the Court really mean to suggest **complete** freedom from interference (regulation) by the State in the 1st trimester?

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. State regulation protective of fetal life after viability thus has both logical and biological justifications. **If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother**.

This presents more questions than answers. What if medical science gets so good that "viability" can be achieved at 1 week? Can the State proscribe nontherapeutic abortions after 7 days? Also, does anyone find it of interest that, although the Texas statutes only spoke of preserving the "life" of the mother, the Court adds "health" of the mother with no Constitutional discussion whatsoever? I by no means suggest that adding "health" in some rational way is a bad idea. I just question whether it is a judicial function. Sounds like a legislative function to me. Does "mental health" qualify? If so, is it OK to abort at 9 months if the mother is depressed about the mere thought of raising her child? At what point does the "life" of the "non-person-fetus" become "as or more" important than the mentally stressed mother? Please do not read these comments as flippant. They raise serious questions which this Court does not address.

Measured against these standards, this statute, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here. This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness.

To summarize and to repeat:

1. A state criminal abortion statute that excepts from criminality only a *lifesaving* procedure on behalf of the mother without regard to pregnancy stage and without recognition of the other interests involved, violates the Due Process Clause of the Fourteenth Amendment.

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.

2. The State may define the term "physician" to mean only a physician currently licensed by the State and may proscribe any abortion by a person who is not a physician as so defined.

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.

It appears the Court is wrapping things up by saying, in effect, that this is a reasonable "compromise" between the various competing positions. The discussion smacks more of legislating than interpreting, doesn't it? When interpreting the Constitution, should the Court be concerned about "compromising" any issue?

CONCURRENCE: Justice Stewart...*Griswold* 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. As so understood, *Griswold* stands as 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.* 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. *Pierce v. Society of Sisters; Meyer v. Nebraska.*

As Justice Harlan once wrote: "The 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 that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*. In the words of 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.*

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; Griswold; Pierce; Meyer; Prince; Skinner.* In *Eisenstadt* we recognized "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person 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* or the right to teach a foreign language protected in *Meyer v. Nebraska."*

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.

DISSENT: Justice Rehnquist...**I have difficulty in concluding that the right of "privacy" is involved in this case**. Texas 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.

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of Justice Stewart in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. 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.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

This is what I mean by this case raising more questions than it answers.

The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The Court was asked to determine whether the Texas statutes were constitutional...not to substitute its own elaborate legislative scheme in their place.

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication that the asserted right to an abortion is **not** "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

For me, the rationale of the decision is at least as important, if not more so, than the decision. For the Court to base any "constitutional" question **on what they determine** to be "deep rooted traditions and conscience" is dangerous. That would also be my feeling if they had upheld these Texas statutes on that basis.

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. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today. Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and "has

remained substantially unchanged to the present time."

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. 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.