
Beyond "Choice": Roe v. Wade as U. S. Constitutional History

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I teach a general education course in U. S. constitutional history to undergraduates, the majority of whom are not history majors and, in fact, do not have much knowledge of—nor do they have a particular interest in—either women's or gender history. The occasional student is actively hostile to both. But *Roe v. Wade* (410 U. S. 113, 1973) is a case that virtually all students recognize, even if they do not know exactly what it is that the Supreme Court actually said. Not infrequently, they view *Roe* either as a case about a narrowly (and often imprecisely) defined "feminist" issue that does not concern them directly or, alternatively, as a ruling that concerns them only in the abstract sense that they might one remote day be faced with a personal decision about whether or not to carry a pregnancy to term. Students do not often begin my courses regarding reproductive rights as having the same fundamental significance in U. S. constitutional history as, say, freedom of speech or the free exercise of religion, and in this sense they are no different than large segments of the American public. What is more, today's traditional students are coming of political age at a time when sound-bite-as-discourse has impoverished our political vocabulary, with the unfortunate consequence of reducing the complexity of the key constitutional issues underlying *Roe* to the trope of "making a choice," something akin to consumers' freedom to choose among brands of toothpaste at Walgreen's drug store. My response has been to reposition *Roe* in my teaching as a case that dealt with principles that are integrally imbedded within American history rather than marginal to it. The case represents a specific and important landmark in a larger story about the rights of individuals—men and women—to make determinations regarding their own bodies, free from interference by the state. It is thus inextricably linked to the more familiar discourses of personal liberty that are woven throughout the grand narrative of U. S. history.

The true significance of the claims *Roe* brought before the nation's high court becomes more apparent, I think, only after students have examined the historical picture prior to 1973 and gotten a glimpse of what the United States looked like when individuals—both male and female—*lacked* recognized rights to make choices regarding their own bodies. The institution of chattel slavery and the common-law notion of married women's coverture serve as the two most obvious instances in which individuals lacked rights to bodily self-determination. But, even as these strictures were breaking down in the late nineteenth and early twentieth centuries, the power of

states to enact measures that infringed upon bodily autonomy was actually increasing.¹ Several important cases in the first half of the twentieth century challenged this expanding authority on the grounds that such laws violated the Fourteenth Amendment's protections of individual's life and liberty from infringement by the states. Prior to mid-century, however, such claims rarely received the backing of the courts. Instead, the states' power to protect the health and safety of the general public at the expense of individual rights was repeatedly validated.²

Using case law has the pedagogical advantage of providing a logical framework for demonstrating how concepts of bodily autonomy rights are historically constructed and thus change over time. Recovering the stories underlying the cases that come before the U. S. Supreme Court can be a fascinating endeavor for students, allowing them to really sink their teeth into the crucial constitutional issues that arise from ordinary people's lives. What is more, these cases leave behind proverbial mountains of documentary evidence that an instructor can draw upon for use in the classroom, including legal briefs, tapes and transcripts of oral arguments, and the texts of the opinions themselves. This material is readily and inexpensively available in government documents and law libraries, reproduced, usually as excerpts, in numerous commercially published casebooks and edited documents readers, and easily accessible in both excerpted and full-text formats on a range of internet sites. In fact, the material is so voluminous that identifying specific documents for use in the classroom can be daunting. A caveat concerning electronic resources in legal history is that most legal research web sites are designed for the convenience of law students and legal professionals, making them somewhat less useful for teaching and student research in undergraduate history courses. (The Oyez Project, created and directed by Jerry Goldman, is found at www.oyez.org and is an excellent resource.) The following cases represent the most important landmarks in the evolution of bodily autonomy rights in the United States over the course of the twentieth century.

In *Jacobson v. Massachusetts* (197 U. S. 11, 1905), the U. S. Supreme Court upheld that state's compulsory vaccination statute against the Reverend Henning Jacobson's claims that the Fourteenth Amendment protected his right to choose not to undergo the procedure, which had been mandated by local public authorities in Cambridge during a smallpox epidemic. Years later, the Court expanded upon this ruling in *Zucht v. King* (260 U.S. 174, 1922) allowing Texas to compel vaccination for public school children, even when there was no smallpox epidemic present in the community. The states' authority to restrict the bodily autonomy of individuals in the name of a wider public good can also be seen in *Muller v. Oregon* (208 U. S. 412,

1908), in which the justices upheld Oregon's law restricting the number of hours that women could work in commercial laundries. In the ruling, the Court accepted Oregon's argument that it maintained a compelling interest in protecting women's reproductive capacities from being harmed by excessive or debilitating physical labor; women were, in the Court's words, "mothers of the race" and thus their reproductive capacities were the legitimate business of the state.

The most notorious of all the high court's rulings supporting the powers of states over the bodies of individuals came in *Buck v. Bell* (274 U. S. 200, 1927), in which the justices supported a Virginia law allowing an institution's officials to sterilize people they deemed to be "feeble-minded" without their consent, or even their knowledge. The deeply disturbing story of Carrie Buck, the teenaged, poor, barely educated rape victim whose test case was manufactured by the law's supporters (including Carrie Buck's own counsel), stands today as a cautionary tale about the implications of allowing the state an extensive reach into the private realm of reproductive choice. Interestingly, the Court's ruling in *Buck v. Bell* has never been overturned.

States' powers to perform sexual sterilization procedures on unwilling individuals did get checked, however, in *Skinner v. Oklahoma* (316 U. S. 535, 1942). For the first time, the Court defined human reproduction as a fundamental right belonging to U. S. citizens, and as a result, state laws infringing upon it would henceforth receive "strict scrutiny" by the courts, a designation requiring states to demonstrate a compelling interest when taking actions that restrict individuals' decisions regarding their own fertility. (Disturbingly, the Court accepted that Virginia's interest in sterilizing Carrie Buck had been satisfactorily demonstrated.) The *Skinner* opinion sowed the seeds of the most significant (and controversial) ruling the Court has made on the subject of a personal right to privacy, *Griswold v. Connecticut* (381 U. S. 479, 1965), which struck down state laws prohibiting married couples from using birth control. While not expressly written into the Constitution, the Court held that a right to personal privacy was implicit in other restrictions on governmental power such as the Fourth Amendment's prohibition against unwarranted searches of our homes. Seven years later, in *Eisenstadt v. Baird* (405 U. S. 438, 1972), the justices threw out a Massachusetts statute that had made it a crime to sell or give away contraception to unmarried people.

The 1973 opinion *Roe v. Wade*, then, built upon these precedents. The Court ruled that a woman's right to bodily self-determination included the right to undergo an abortion during the first trimester of pregnancy, when a fetus could not exist independently of her body. Justice Harry

Blackmun's complex opinion did, however, acknowledge that a state's compelling interest in protecting human life may allow for restrictions on and regulations of that right as the fetus moved toward viability over the course of the pregnancy. I find it particularly effective to have the class listen to portions of recordings of the oral argument in which the justices grapple with each side's counsel regarding the fundamental question of whether constitutional protections apply to fetuses.³ The dialog highlights in a particularly dramatic and memorable way the intricacies of the issues raised in the case. (*Roe's* opponents have worked to establish the legal precedents for fetal personhood by, for example, criminalizing certain behaviors by pregnant women such as recreational drug use that may put the health of the fetus at risk.) Students are often surprised to learn that, under the Court's ruling in *Roe*, states already enjoy considerable leeway to regulate or even prohibit abortion.

The Court revisited the question of reproductive rights in several subsequent cases, including *Webster v. Reproductive Health Services* (492 U. S. 490, 1989) and *Planned Parenthood v. Casey* (505 U. S. 833, 1992) that sought to clarify the boundaries between individual reproductive rights and the power of the state to protect fetal life. The various opinions reflect deepening divisions among the justices as the conservative Rehnquist Court rolled back expanded definitions of individual liberties under the Warren and Burger Courts, setting the stage for twenty-first century political debates over *Roe*. One important reaffirmation of a constitutional right to personal privacy, however, came in *Lawrence v. Texas* (539 U. S. 558, 2003), in which the Court threw out that state's anti-sodomy law on the grounds that it violated the protections of liberty afforded by the Fourteenth Amendment. The *Lawrence* ruling overturned one of the Court's previous decisions, *Bowers v. Hardwick* (478 U. S. 186, 1986) that had supported states' power to criminalize particular sex acts, even if performed by consenting adults in their own bedrooms.

Presented within the framework of constitutional rights enjoyed by all who live in the United States, male and female, the landmark challenge made in *Roe v. Wade* becomes a central event in the master narrative of U.S. constitutional history that my students and I build throughout my course. Using case materials can be enlightening for students, allowing them to see the real consequences for real people that ensue when the state denies individuals the right to control their own bodies. I like to think that at least some of my students complete the course with a clearer picture of why *Roe* really matters.

NOTES

¹There is a rich body of historical scholarship exploring various dimensions of the power of the state over individual bodily autonomy in the late nineteenth through mid-twentieth centuries. Some examples include: Judith Walzer Leavitt, *Typhoid Mary: Captive to the Public's Health* (Boston: Beacon Press, 1996); Alan M. Kraut, *Silent Travelers: Germs, Genes, and the Immigrant Menace* (Baltimore, MD: Johns Hopkins University Press, 1994); Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States* (Berkeley: University of California Press, 1997); Allen M. Hornblum, *Acres of Skin: Human Experiments at Holmsburg Prison* (New York: Routledge, 1998); Paul Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (Baltimore, MD: Johns Hopkins University Press, 2008); Victoria F. Nourse, *In Reckless Hands: Skinner v. Oklahoma and the Near-Triumph of American Eugenics* (New York: W. W. Norton, 2008); and Nancy Woloch, *Muller v. Oregon: A Brief History with Documents* (Boston and New York: Bedford Books of St. Martin's Press, 1996).

²Lynne Curry, *The Human Body on Trial: A Handbook with Cases, Laws, and Documents* (Santa Barbara, CA: ABC-CLIO, 2002).

³Sources for recordings of oral arguments in *Roe v. Wade* include www.oyez.org and Peter Irons and Stephanie Guitton, eds., *May It Please the Court* (New York: The New Press, 1996).

script and working on a collaborative volume, entitled *Law and Order in Nineteenth-Century Korea: Translation and Analysis of Inquest Records*.

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