

ROE V. WADE: A FAULTY LEGAL DECISION

Many lawyers and commentators, whether personally pro-life or pro-choice, believe that from a legal standpoint, Roe v. Wade was poorly decided. Quotes from some of their critiques follow:

Justice William Rehnquist:

"I have difficulty in concluding, as the Court does, that the right of 'privacy' is involved in this case. ... 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 seems to me as strong an indication there is 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.' ... 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."¹

Justice Byron White.

"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 mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes."²

Archibald Cox, Esq.:

The Justices "sweep away established law supported by the moral themes dominant in American life for more than a century..." They "read into the generalities of the Due Process Clause of the Fourteenth Amendment a new 'fundamental right' [the right to privacy] not remotely suggested by the words."³

Robert M. Byrn, Esq.:

"Upon analysis, it becomes evident that the structure of the Court's opinion in Roe v. Wade is defective."⁴

Robert A. Destro, Esq.:

"The reasoning of the Court has been examined and found to be wanting legally, historically, scientifically, and philosophically."⁵

John D. Gorby, J.D.:

"... the fetus ... never enjoyed his 'day in court.' The Supreme Court had every opportunity to hear arguments [that] the fetus was a 'constitutional person' [whose life was therefore protected]. However, the Court chose not to take advantage of this occasion."⁶

Justice Sandra Day O'Connor.:

"... there is no justification in law or logic for the trimester framework adopted in Roe v. Wade ..."⁷

Justice Ruth Bader Ginsburg:

"Women were lobbying around [the abortion] issue. The Supreme Court stopped all that by deeming every law – even the most liberal – as unconstitutional. That seemed to me not the way courts generally work."⁸ "Roe v. Wade ... ventured too far in the change it ordered and presented an incomplete justification for its action."⁹

The following critiques were all cited in one article.¹⁰

Joseph W. Dellapenna, Villanova law professor:

“The opinion [in Roe] is replete with irrelevancies, non-sequiturs, and unsubstantiated assertions. The Court decides matters it disavows any intention of deciding—thereby avoiding any need to defend its conclusions. In the process, the opinion simply fails to convince.”

Laurence H. Tribe, Harvard law professor:

“One of the most curious things about Roe is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”

Edward Lazarus, former clerk to Justice Harry Blackmun:

“It is time to admit in public that, as an example of the practice of constitutional opinion writing, Roe is a serious disappointment. You will be hard pressed to find a constitutional law professor, even among those who support the idea of constitutional protection for the right to choose, who will embrace the opinion itself rather than the result. This is not surprising. As a constitutional argument, Roe is barely coherent. The Court pulled its fundamental right to choose more or less from the constitutional ether.”

William Saletan, writing in Legal Affairs:

“Blackmun’s [Supreme Court] papers vindicate every indictment of Roe: invention, overreach, arbitrariness, textual indifference.”

Michael Kinsley, columnist writing in the Washington Post:

“Although I am pro-choice, I was taught in law school, and still believe, that Roe v. Wade is a muddle of bad reasoning and an authentic example of judicial overreaching.”

References

1. Justice William Rehnquist, *Roe v. Wade*, *United States Supreme Court Reports*, 35 L Ed 2d (January 22, 1973): 197-198.
2. Justice Byron White, *Roe v. Wade*, *United States Supreme Court Reports*, 35 L Ed 2d (January 22, 1973): 195-196.
3. Archibald Cox, “The Supreme Court and Abortion,” *The Human Life Review*, 2:4 (Fall, 1976): 17.
4. Robert M. Byrn, “An American Tragedy: The Supreme Court on Abortion,” *Fordham Law Review*, 41 (May, 1973): 813.
5. Robert A. Destro, “Abortion and the Constitution: The Need for a Life-Protective Amendment,” *California Law Review*, 63 (1975): 1340.
6. John D. Gorby, “The ‘Right’ to an Abortion, Scope of the Fourteenth Amendment ‘Personhood’ and the Supreme Court’s Birth Requirement,” *Studies in Law and Medicine*, No. 5, p. 9. (Originally published in the *Southern Illinois University Law Journal*, No. 1, 1979).

7. Justice Sandra Day O'Connor, *Akron v. Akron Center for Reproductive Health, United States Supreme Court Reports*, 76 L Ed 2d (June 14, 1983): 721.
8. Justice Ruth Bader Ginsburg, as quoted in an Associated Press report of her address to University of Kansas law students, and in LifeNews.com, "Supreme Court Justice Ginsburg Criticizes Roe v. Wade Abortion Case," March 14, 2005.
9. Justice Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade," *North Carolina Law Review*, 63 (1985): 375-376.
10. Paul Stark, "Even Abortion Backers Admit Roe v. Wade Was a Terrible Decision," LifeNews.com, December 20, 2012.

For additional critiques of the Supreme Court's Roe v. Wade decision, see the following:

- John Hart Ely, "The Wages of Crying Wolf," *The Yale Law Journal*, 82 (April, 1973): 920-947.
- Stephen M. Krason and William B. Hollberg, "The Law and History of Abortion: The Supreme Court Refuted," in J. Douglas Butler and David F. Walbert (eds.) *Abortion, Medicine and the Law*, N.Y.: Facts on File Publications, 1986 (3rd Ed): 196-225.
- John T. Noonan, Jr. *A Private Choice*, Toronto, Ontario: Life Cycle Books, 1979.
- Gregory J. Roden, "Roe Revisited: A Grim Fairy Tale," *The Human Life Review*, 30:2 (Spring, 2004): 48-57.
- Victor G. Rosenblum, "Abortion, Personhood and the Fourteenth Amendment," *Studies in Law and Medicine*, No. 11, Chicago, IL: Americans United for Life, Inc., 1981.
- Basile J. Uddo, "A Wink from the Bench: The Federal Courts and Abortion," *Tulane Law Review* 53:2 (February, 1979): 398-464.