The Unjustified Decision of *Roe v. Wade* and the Equal Protection Clause

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Introduction

The purpose of this article is to examine the ways in which the Equal Protection Clause of the Constitution's Fourteenth Amendment could have secured the right to choose to terminate a pregnancy better than the right to privacy did. The initial part of this article will set out to give an account of the most notable parts of the 1973 *Roe v. Wade* case by focusing in particular on the Texas abortion prohibition statues and the arguments that led to their enactment, as well as how the appellant uses the claim to personal privacy to achieve the goal of legalizing abortion. A discussion will then be made of the unreliability of the right to privacy and the medical approach proposed in the case. Finally, the Equal Protection Clause will be discussed, not on the basis of abortion as an autonomous reproductive right, but as a right which can be guaranteed as a way to improve gender equality between U.S. citizens. In order to complete a discussion of the Equal Protection Clause, the views of two major critics of *Roe v. Wade* will be put up against each other. The first of them will be judge and future Associate Justice of the U.S. Supreme Court, Ruth Bader Ginsburg, who will be used in favor of the application of the Equal Protection Clause. The other critic is the anti-abortionist and specialist in equal protection jurisprudence, Erika Bachiochi, who, unlike Ginsburg, finds the Equal Protection Clause unsuitable in abortion and gender equality cases. To underline some of the points made in the article, references will also be made to former or subsequent cases dealing with similar issues and arguments concerning reproduction and equality.

Roe v. Wade and the right to privacy

The case of *Roe v. Wade*

In March 1970, a pregnant single woman instituted a federal action against the Dallas County District Attorney. The appellant, Norma McCorvey, most famously known under the name Jane Roe, filed the suit in an effort to obtain "[…] a declaratory judgement that the Texas criminal

abortion statutes were unconstitutional" (*Roe v. Wade* 120). The Texas law brought into question was one which stated that unless the life and/or health of the pregnant woman was endangered by continuing the pregnancy, she would be denied the ability to terminate the pregnancy at will (113). McCorvey brought suit because she believed that the restrictions were unconstitutionally vague and that any abortion restrictions imposed on her or other similarly situated women to prevent them from obtaining an abortion would be a violation of their right to privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments (120). The first enactment of a criminal abortion statute in Texas law appeared around the mid-1850s, and in the following century the laws remained largely unchanged in spite of medical advancements and a social change in the stigmatization of sexuality in the public eye (119–20).

The case presented different views on abortion over time and points to several factors which could have supported the continuation of laws banning abortion. First, the Court pointed to the medical reality of abortion procedures in the 19th century, which the Supreme Court speculated to most likely have played a significant role in the implementation of abortion laws. Abortion procedures were widely known to have a high mortality rate and the Court considered that the laws could have been introduced to prevent the premature deaths of pregnant women who wished to terminate their pregnancy. They also highlighted the social norms at the time and drew attention to the hostile attitude towards open discussions about sex and sexuality as well as pregnancy out of wedlock, which could have resulted in the establishment of abortion prohibition laws in order to discourage illicit sexual behavior (148–9). The Court stated that in the 19th century these two factors were reasonable enough to justify the introduction of criminal abortion statues to prevent abortion procedures from taking place. However, the Supreme Court invalidated the medical grounds for the continued provisions, stating that the medical advancements achieved in the 1970s could ensure that the mortality rate for abortions performed in the first trimester to possible be even lower than for childbirth (163). The appellee also sought to justify the provisions by arguing for personhood for prenatal life, an argument which was not recognized by the Court. The justification for the rejection of prenatal life as persons was based on the lack of recognition of fetal personhood in previous cases, which the Court considered to be applicable to this case as well (157).

The trimester framework

The Supreme Court subsequently held that the appellant's claim to the right of privacy was broad enough to give pregnant women the right to choose whether or not to carry a pregnancy to term (152). However, the right was not adopted as an absolute right, as the appellant had originally

sought after; the Court instead recognized the right to privacy as a negative right, that is, the right to make a decision without interference from the state or the government. The Court introduced a framework known as the trimester framework, which could accommodate both the recognized right to privacy, i.e., the right to choose, as well as a state's interests in protecting maternal health, medical standards, and prenatal life in the late stages of pregnancy (155). That is to say that the considerations in the framework included the knowledge that abortion procedures posed an increasing risk to the woman's health and life the later a termination of the pregnancy would take place, while also taking into account the viability of the fetus (155).

The trimester framework is based around the three main divisions of the pregnancy period. In the first trimester, a pregnant woman seeking an abortion is required to be medically assessed by her attending physician, who would subsequently be responsible for the abortion decision and for carrying out the procedure. A medical assessment must not only consider the woman's health and the risk a pregnancy may pose to her body, but it must also include an assessment of how a child would affect the woman in the period following the childbirth. Such evaluations include the consideration of the economic and psychological capability of the woman and/or family to take care of a child, as well as the mental strain that an unwanted child may place on a person (Beck 505; *Roe v. Wade* 152). In the second trimester, a state is allowed to impose abortion restrictions which are "reasonably related to maternal health" (Beck 505). This means that the state may, for example, require the person performing the abortion procedure to have certain qualifications. The state may also impose requirements on that person's medical license or requirements on the facility in which the abortion takes place (*Roe v. Wade* 163). In the third trimester, the state is fully authorized to implement any abortion restrictions in favor of the protection of potential human life, unless such restrictions pose an imminent risk to the life and/or health of the pregnant woman (Beck 505). The third trimester is also known as the stage of fetal viability, which is presumably the point at which the fetus is considered capable "[…] of meaningful life outside the mother's womb" (*Roe v. Wade* 163). In other words, the Supreme Court held that the point of viability served as both the logical and biological foundation for the state to interfere with the right to choose to terminate a pregnancy (163).

A discussion of the right to privacy and the Equal Protection Clause

The unjustified decision of *Roe v. Wade*

One flaw in the outcome of the case, which has been condemned by critics, is the fact that the Roe Court was extremely vague in locating where in the Constitution the right to privacy could be

found. The case claimed that the right is inherently located in the First, Fourth, Fifth, and Ninth Amendments in the Bill of Rights. However, the Court never clarified exactly what it was in these amendments that secured the right. The Court, furthermore, specified that the right could also be found in the more substantial Due Process Clause of the Fourteenth Amendment, as a concept guaranteed by ordered "liberty" (Ziegler 28). Thus, it is never revealed with great precision how the Court in reality used the constitutional text to justify its decision.

Having said that, they instead relied heavily on a previous case as justification for the decision. In the case of *Griswold v. Connecticut*, the right to privacy was also brought up as an argument by the appellant. The case, which took place in 1965, concerned a Connecticut law which banned the use of all contraceptive drugs, medical devices, and similar instruments (*Griswold v. Connecticut* 480). The appellant, Griswold, instigated the action based on the claim that the law was unconstitutional. In the case, the appellant argued that the Constitution protected the right to marital privacy and that the state should not be allowed to interfere with a couple's ability to get counseling on contraceptives. The Supreme Court ruled in favor of Griswold and held that although there were no direct references to the right to privacy in the constitutional text, it could be found as an implicit right in the First, Third, Fourth and Ninth Amendments. In addition, Justice Goldberg, Chief Justice Warren, and Justice Brennan concurred that the right to marital privacy could also be located in the Due Process Clause of the Fourteenth Amendment as incorporated in the concept of "liberty" (486–7).

The vagueness of the decision made by the *Roe v. Wade* Court seemed to have inspired anti-abortion advocates to make use of the same technique of interpreting the Constitution in favor of their views. They continued to emphasize the belief that prenatal life was entitled the title of personhood. Their arguments for this claim have been strengthened over the years, along with the medical advances regarding fetal viability, and the arguments remain an essential part of the anti-abortion movements of the 21st century (Lambert, Hackworth, and Billings)

Another critic of the *Roe v. Wade* case is judge Ruth Bader Ginsburg, who in 1985 published an essay which primarily focused on criticizing the way in which the appellant conducted a medically oriented approach in the pursuit of abortion rights, i.e., the trimester framework. Ginsburg expresses her belief that this approach is to blame for the massive backlash from the public following the decision, as well as the extreme controversy that arose and quickly divided public opinion on abortion regulations (Ginsburg 382). The medical approach, which was centered around the viability of the fetus, "[…] permitted states to enact different categories of abortion regulations at different stages of pregnancy" (Beck 505).

In her critique, Ginsburg highlights one of the major flaws of the trimester framework by pointing to the fact that the development of medical technology would inevitably render the framework unreliable. She indicates this by stating that future medical advances will bring the justifications for the protection of women's health into conflict with the point at which the fetus can be considered viable (Ginsburg 381). She declares that the Supreme Court's need to "[…] specify by some kind of legislative code the one alternative pattern that will satisfy the Constitution" (383) led to an incomplete justification for the legalization of abortion, which in effect weakened the pro-abortion movement that was already underway in the early 1970s (383, 385).

Ginsburg is, however, not the only person to have criticized the trimester framework proposed by the Roe Court. In the 1992 case *Planned Parenthood v. Casey*, the workings of the trimester framework were again brought into the light and its inherently flawed and unreliable nature, as pointed out by Ginsburg, was called into question (Ziegler 60). Casey instead proposed a new concept which was to replace the trimester framework with a new test known as the undue burden test. The undue burden test aims to preserve and protect the right to abortion as recognized by *Roe v. Wade*, while also seeking to establish a more reliable system. An undue burden exists when, for example, a statutory provision is used to create unreasonable obstacles in order to prevent a pregnant woman from obtaining an abortion (*Planned Parenthood v. Casey* 837). An example of such a burden is the issue addressed in Casey, where a Pennsylvania law required the woman to inform the father or, in the case of a minor, a parent of the abortion before being able to obtain one (833).

Gender equality and the Equal Protection Clause

Ginsburg's essay does not, in the same way as Casey, propose a different way of dealing with abortion regulations, seeing as her issue is with the approach set out in *Roe v. Wade*. Instead, she suggests a different argument, which she believes is more likely to ensure the continued legalization of abortion. Ginsburg argues that the Roe Court should have focused more on abortion prohibitions as a direct consequence of discrimination against women. She claims that by shifting to a gender-based approach the decision would have had significantly fewer rebuttals and would have created a less pronounced division amongst the public. The gender-based approach would have allowed arguments centered around abortion rights as a way to create more equality, meaning that the opportunity to terminate a pregnancy would be able to improve "[…] a woman's […] ability to stand in relation to men, society, and the state as an independent, self-sustaining, equal-citizen" (Ginsburg 383). A gender-based approach, instead of relying on the concept of ordered "liberty" in the Fourteenth Amendment or the implicit right to privacy, would be able to rely on the explicit Equal Protection Clause, also mentioned in the Fourteenth Amendment. Ginsburg

considers that by using this clause the Supreme Court would have been forced to consider the issue of abortion impartially (383). However, it must be taken into account that even this clause has its advantages and disadvantages. Ginsburg relies on the clause to provide an alternative way of arguing for abortion which is grounded in the constitutional text without being implicitly implied, and to argue for the right to abortion as a positive right which will ensure a person's well-being through equal opportunity.

Ginsburg's call for the use of the Equal Protection Clause has, in similar ways to *Roe v. Wade*, been critiqued for its inability fully to apply to the argument for abortion rights by anti-abortion advocates. By looking at the abortion discourse in the late 1970s and well into the 1980s an illustration of this inability is showcased. It was during this period that a strong resurgence of the support for originalism among anti-abortionists arose. According to Mary Ziegler, originalism was a form of interpretation of the constitutional text which relied heavily on the original intentions of the authors (48). This method of interpretation would have rendered the Equal Protection Clause practically inapplicable to the promotion of abortion rights as an element in achieving gender equality. Moreover, the originalists generally disregarded anything other than issues of race and the rights of free people of color when dealing with the Fourteenth Amendment, arguing that most constitutional provisions which were enacted after the Civil War dealt strictly with similar issues of racial equality (58). Justice Rehnquist, dissident in *Roe v. Wade*, similarly points out that most states in the 19th century considered abortion a crime, that is, that the attitude towards abortion in most cases was considerably negative and therefore the Fourteenth Amendment most likely did not concern abortion rights or gender equality issues. Anti-abortionist and equal protection jurisprudence specialist Erika Bachiochi expresses similar views on the interpretation of abortion as the originalists. Bachiochi argues that the Equal Protection Clause refers exclusively to questions of racial equality (898–9). More importantly, Bachiochi criticizes Ginsburg's call to apply the Equal Protection Clause for (1) being applied to cases not concerning race, i.e., that of gender equality cases, and (2) the wrongful application of the clause to a case in which the two parties are not equally situated.

Firstly, she addresses the question of applying the clause outside of issues related to race by referencing former Justice Frankfurter, who stated that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same" (899). By using this quotation, she acknowledges the similarities between racial and gender equality by pointing to the immutable characteristics, which in the case of sex and race are defined by a person's birth. Yet she adamantly denies that these classifications can be regulated under the same law, namely the Equal Protection Clause.

In spite of this assertion of the inapplicability of the clause in the case of gender equality, the Equal Protection Clause has formerly been applied in cases which did not concern questions of racial equality, but rather questions of sexual autonomy and reproduction rights. A famous example of such a case was the 1972 case *Eisenstadt v. Baird*. This case dealt with a Massachusetts law regarding access to contraceptives. The case presented the issue of which individuals were allowed access to certain types of contraceptives based on their marital status. To put it in other words, married couples were allowed to use contraceptives in order to prevent unwanted pregnancies; most notably among these contraceptives was the birth control pill (Ziegler 38–9). Unmarried persons were, by contrast, only allowed access to contraceptives which could prevent the spread of sexually transmitted diseases (38–9). The appellant, Eisenstadt, argued that the law was illogical and that its proclamation to "[…] prevent the distribution of [contraceptives] which may have undesirable, if not dangerous, […] consequences" (*Eisenstadt v. Baird* 442) was discriminatory due to its non-compliance with the Equal Protection Clause. In short, Eisenstadt called attention to the fact that it made no sense to have a law which allowed the endangerment of married couples, who were allowed to use the so-called dangerous drugs, while at the same time claiming to protect unmarried persons from these same drugs (Ziegler 38–9). The Court ruled that the law should be struck down on the basis of not being consistent with the Equal Protection Clause of the Fourteenth Amendment (*Eisenstadt v. Baird* 454–55). This case serves to refute Bachiochi's contention that the Equal Protection Clause cannot be applied in other circumstances than issues of race.

To this point Bachiochi's second critique of the use of the clause in abortion and gender equality related cases comes into play. She argues that even if the Equal Protection Clause could be applied to questions of gender equality issues, it would not be applicable specifically to abortion rights or pregnancy-related issues in general. She supports this claim by, on the one hand, considering the biological differences between men and women. She points out that a pregnancy is the result of collective efforts of both a man and a woman, and that the biological reality is that the woman's body is simply the only possible vessel for the creation of a human child (Bachiochi 896, 907). She finds that allowing abortion would place the responsibility for the unwanted child on the woman's shoulders alone. Bachiochi suggests instead that rather than legalizing abortion, a greater responsibility should be placed on the father of the fetus (896–7). On the other hand, she also criticizes Ginsburg and other pro-abortion advocates for wanting to apply the Equal Protection Clause as a way to give the woman an equal standing during the pregnancy term. She argues that by calling for Equal Protection, the pro-abortion movement is expressing a desire to legalize abortion as a way for the woman to be able to emulate paternal abandonment by

terminating the pregnancy without experiencing any repercussions. Her main criticism of abortion as a way to create reproductive equality is that she believes it to set up the male as paradigmatic, i.e., setting up the male body as the norm, and claiming that the woman will only be able to achieve equality by imitating the abilities of a wombless man (896–7).

To counteract this, Ginsburg points out the very important fact that women are traditionally expected to assume the role of the caretaker in a parental relationship, as well as the fact that the father of a fetus can very easily deny paternity and thus ignore the responsibilities of care and financial support that are usually regarded to be a part of a paternal relationship (Ginsburg 382). It therefore seems that both of Bachiochi's claims, although shared by many anti-abortionist advocates, are not necessarily able to refute Ginsburg's assertion that Equal Protection is applicable in the case of gender equality and reproductive rights.

Conclusion

The federal action instituted by Norma McCorvey against the Dallas District Attorney in 1973 resulted in the national legalization of abortion in the United States. The appellant argued that the right to privacy was protected by the First, Fourth, Fifth, and Ninth Amendments, as well as by the concept of ordered "liberty" in the Due Process Clause of the Fourteenth Amendment. The Roe Court established the trimester framework which was intended to protect both the health of the pregnant woman and the viability of a fetus. Although the appellant was successful in the case, the decision has been subjected to scrutiny in the time following the end of the case. One of the primary criticisms was the Supreme Court's inability to clarify exactly where in the Constitution it was locating the right to privacy, as well as the fact that the Court mainly justified its decision based on the previous case of *Griswold v. Connecticut*, in which the right to marital privacy was held to be a right. Secondly, the appellant's medical approach has been questioned for being unable to withstand medical developments in the field of reproduction. A major critic of the case is Judge Ginsburg, who blames the unnecessary action for instigating the continued divisions in public opinion. She suggests an alternative way to have ensured abortion rights, arguing that such a right is a vital part of achieving gender equality. She points to the Equal Protection Clause of the Fourteenth Amendment as explicit evidence for her claim. Ginsburg's emphasis of the Equal Protection clause was later challenged by Bachiochi, who did not agree with the clause being applied in cases dealing with gender equality. She, however, shares the originalist interpretation that the Fourteenth Amendment deals exclusively with racial equality. She also points out that the clause would not be able to be applied in cases concerning pregnancy because the man and the woman would not be similarly situated, considering that it is only a woman who can become pregnant. By

referencing the case of *Eisenstadt v. Baird*, Ginsburg proves that the Equal Protection Clause can be applicable in cases not dealing with racial equality.

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