

ROE V. WADE

FACT SHEET

Even More Than Abortion: The Constitutional Importance of *Roe v. Wade* and the Right to Privacy.

Roe did far more than establish the right to abortion; it solidified and expanded the constitutional "right to privacy," which has also been described as the right to autonomy or to be let alone. This right to privacy is part of the right to liberty protected by the Fifth and Fourteenth Amendments, which state that no person shall be deprived of "life, liberty or property, without due process of law."¹

The Constitution's protection of liberty and privacy underlies the Supreme Court's recognition of fundamental rights related to contraception and procreation, marriage, family relations, child rearing, and intimacy.² Although the Supreme Court's recognition of the right to privacy predates *Roe*, *Roe* is an important affirmation of and foundation for a broad array of privacy rights.³ While not exclusively dependent on *Roe*, *Roe* influenced privacy principles in each of these areas—principles that could be undermined if the Supreme Court overturned *Roe*.

- **The Right to Obtain Contraception and the Right to Procreate:** *Roe* reaffirmed prior decisions protecting individuals' rights to obtain contraception and to decide whether to bear a child.⁴ Subsequent cases upholding the right to obtain and use contraception, in turn, rely on *Roe*. For example, a 1977 Supreme Court case ruled it unconstitutional to prohibit distribution of nonprescription contraceptives to adults by anyone other than a pharmacist and to impose a blanket prohibition on sales or distribution of contraceptives to individuals under 16. The case explicitly relied on *Roe* for its central holding that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."⁵
- **The Right to Marry:** *Loving v. Virginia* acknowledged the constitutional right to marry, and *Roe* affirmed that it is among the fundamental liberties protected by the right to privacy.⁶ Subsequent cases protecting the right to marry have relied on *Roe*. For example, a 1978 Supreme Court decision upheld the right of single parents obligated to pay child support to marry without first obtaining the permission of a judge,⁷ and based this conclusion in part on *Roe*.⁸
- **The Right to Maintain Family Relationships:** The umbrella of privacy also protects family relationships.⁹ For example, the Supreme Court relied on *Roe* to hold that the state cannot interfere in the realm of family life by preventing close relatives from living together.¹⁰ As the Supreme Court put it, the challenged zoning regulation, which banned a grandmother from living with her grandson, "slic[ed] deeply into the family itself . . . by select[ing] certain categories of relatives who may live together and declar[ing] that others may not."¹¹ The Supreme Court went on to say that courts used *Roe* to "consistently acknowledge[] a 'private realm of family life which the state cannot enter.'"¹²
- **The Right to Make Decisions About How to Rear One's Children:** Yet another privacy right is the parents' right to raise their children according to their preferences, subject to certain limits (such as compulsory school attendance, mandatory vaccinations, or laws criminalizing parental neglect). The Supreme Court has relied on *Roe* as important support for the

proposition that “[a] person’s decision whether to bear a child and a parent’s decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities” and thus protected by the Constitution.¹³ While these rights related to parental decision-making were recognized before *Roe*,¹⁴ *Roe* relied on and strengthened the underlying principle—that parenting is best when free from unwarranted government intrusion.¹⁵

- **The Right to Intimacy:** Another privacy right profoundly influenced by *Roe* is the right to form intimate relationships and the concomitant right for adults to engage in consensual sexual relations in private. This right was first recognized in a 2003 decision striking down laws that criminalized same-sex intimate activity.¹⁶ The case proclaimed that “*Roe* recognized the right of a woman to make certain

fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person,” such as autonomy in decision-making about intimate relationships.¹⁷

Were *Roe* ever to be overturned, it could have ripple effects beyond the right to an abortion. As privacy cases have recognized, “our laws and tradition afford constitutional protection to personal decisions relating,” among other things, “to marriage, procreation, contraception, family relationships, child rearing” and intimacy.¹⁸ The right to privacy, strengthened by *Roe*, supports each of these areas. Overturning *Roe* could thus potentially erode the ability of individuals to make highly personal decisions free from intrusive government regulations and harm the overall right to privacy.

1 U.S. CONST., amend. V; *Id.* at amend. XIV, § 1.

2 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003); George Blum et al., *Right to Privacy*, 16B Am. Jur. 2d Constitutional Law § 652 (2012).

3 While not originally understood as arising primarily from the Due Process Clause, the right to privacy has been recognized since at least 1891, when the Supreme Court proclaimed “[n]o right is held more sacred . . . than the right of individual to the possession and control of his own person, free from all restraint or interference of others.” *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891); see *Roe v. Wade*, 410 U.S. 113, 153 (1973) (citing *Botsford* as recognizing right to privacy rooted in the Constitution).

4 *Roe*, 410 U.S. at 153. The right to obtain contraception was first established by *Griswold v. Connecticut*, a 1965 case striking down a law banning the distribution of contraceptives to married persons. 381 U.S. 479 (1965). In *Eisenstadt v. Baird*, decided a year before *Roe*, the Supreme Court extended this right to unmarried persons, stating “[i]f the right of privacy means anything, it is 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.” 405 U.S. 438, 453 (1972). *Eisenstadt* thus recognized the right to contraception extended beyond the use of birth control; it also encompassed freedom to make fundamental decisions involving procreation.

5 *Carey v. Population Services, Int’l*, 431 U.S. 678, 687 (1977).

6 *Roe*, 410 U.S. at 152. The foundational case on the right to marry is *Loving v. Virginia*, a 1967 decision that struck down anti-miscegenation laws and permitted interracial unions, which did so on both right to privacy and equal protection grounds. 388 U.S. 1 (1967).

7 *Zablocki v. Redhail*, 434 U.S. 374, 375, 386-87 (1978). The challenged law not only required single parents obligated to pay child support to obtain a court order before marrying, it also provided that such permission would not be granted unless the parent proved both that he or she was current on the child support payments and that the children were not likely to become public charges.

8 *Id.* at 386 (citing *Roe* for the proposition that “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”) Given this history, *Roe* is also relevant to the current term’s Supreme Court cases on marriage equality. For example, in the case challenging California’s ban on same-sex marriage, the plaintiffs argue that the right to marry is one of the most fundamental entitlements accorded any individual and utilize *Roe* to support this position. Brief of Respondents in Opposition to a Writ of Certiorari at 31, *Hollingsworth v. Perry*, No. 12-144, 2012 WL 3134429 (Dec. 7, 2012).

9 This right is said to derive from decisions dealing with procreation and parental rights. Some cases, such as, *Moore v. City of E. Cleveland, Ohio.*, directly cite *Roe* to establish family rights. See 431 U.S. 494, 498-99 (1977).

10 *Id.*

11 *Id.*

12 *Id.* at 499. The Supreme Court went on to say that the family was not immune from state regulation, but that *Roe* required these regulations to be “carefully examined.”

13 *Id.*

14 For example, *Meyer v. Nebraska*, a 1923 decision, held that a prohibition of foreign language classes prior to the Eighth Grade was an unconstitutional interference of parental rights. 262 U.S. 390 (1923).

15 See *Roe*, 410 U.S. at 153.

16 *Lawrence*, 539 U.S. at 558.

17 *Id.* at 565.

18 *Id.* at 574.