

3.9 Amendments: Due Process and the Right to Privacy



ESSENTIALS

1. While a right to privacy is not explicitly named in the Constitution, the Court has interpreted the due process clause to protect the right of privacy from state infringement.
2. The landmark U.S. Supreme Court case that incorporated privacy was *Roe v. Wade* (1973). In this case the Court applied a women’s right to an abortion to all fifty states, using the due process clause of the 14th Amendment.

1. What is the underlying idea of this cartoon?

2. Might there be another way to better describe our “right to privacy”? Is it really privacy we want?

Roe v. Wade (1973) has underscored the deep culture war that has been waged in America for decades. Explain.

What is a culture war?

Who are the two sides?

Who is winning? Explain.

While a right to privacy is not explicitly named in the Constitution, the Court has interpreted the due process clause to protect the right of privacy from state infringement. This interpretation of the due process clause has been the subject of controversy:

The Roe precedent has evolved since 1973. Track how the Supreme Court has changed its meaning over time in these cases:

Harris v. McRae (1980)

Webster v. Reproductive Health Services (1989)

Planned Parenthood v. Casey (1992)

Stenberg v. Carhart (2000)

Whole Woman's Health v. Hellerstedt (2016)

SCOTUS Comparison.

Although hearkening back to a Supreme Court decision in 1973, a “pro-choice” public policy is anything but “settled law.” The Court has tinkered with the proper interpretation and implementation of relevant constitutional principles. One such example would be the Court’s highly controversial opinion *Planned Parenthood v. Casey* (1992). In this case, a majority argued:

“...Section 3205's informed consent provision is not an undue burden on a woman's constitutional right to decide to terminate a pregnancy. To the extent *Akron I*, 462 U. S., at 444, and *Thornburgh*, 476 U. S., at 762, find a constitutional violation when the government requires, as it does here, the giving of truthful, non-misleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases are inconsistent with *[this Court's]* acknowledgment of an important interest in potential life, and are overruled. Requiring that the woman be informed of the availability of information relating to the consequences to the fetus does not interfere with a constitutional right of privacy between a pregnant woman and her physician, since the doctor-patient relation is derivative of the woman's position, and does not underlie or override the abortion right. Moreover, the physician's First Amendment rights not to speak are implicated only as part of the practice of medicine, which is licensed and regulated by the State. There is no evidence here that requiring a doctor to give the required information would amount to a substantial obstacle to a woman seeking an abortion. The premise behind *Akron I*'s invalidation of a waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion, 462 U. S., at 450, is also wrong. Although § 3205's 24-hour waiting period may make some abortions more expensive and less convenient, it cannot be said that it is invalid on the present record and in the context of this facial challenge...”

From Justice O'Connor, Justice Kennedy and Justice Sutter
Majority opinion in ***Planned Parenthood of SE Pa. v. Casey*** (1992)

Based on the information above, respond to the following questions.

- A. Identify a common constitutional principle used to make a ruling in both *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992).
- B. Explain how the rulings of *Roe v. Wade* and the rulings of *Planned Parenthood v. Casey* appear to be in conflict with each other.
- C. Describe how the Congress, other than passing legislation, could respond to similar cases to *Planned Parenthood v. Casey* if it disagrees with the decision.