**Synopsis of the Case**

In June 1969, 21-year-old Norma McCorvey discovered she was pregnant with her third child. She returned to Dallas, Texas, where friends advised her to assert falsely that she had been raped in order to obtain a legal abortion (with the understanding that Texas law allowed abortion in cases of rape and incest). However, this scheme failed because there was no police report documenting the alleged rape. In any case, the Texas statute allowed abortion only "for the purpose of saving the life of the mother". She attempted to obtain an illegal abortion, but found that the unauthorized facility had been closed down by the police. Eventually, she was referred to attorneys Linda Coffee and Sarah Weddington. (McCorvey would end up giving birth before the case was decided, and the child was put up for adoption.)

In 1970, Coffee and Weddington filed suit in the United States District Court for the Northern District of Texas on behalf of McCorvey (under the alias ‘Jane Roe’). The defendant in the case was Dallas County District Attorney Henry Wade, who represented the State of Texas. McCorvey was no longer claiming her pregnancy was a result of rape, and later acknowledged that she had lied about having been raped. "Rape" is not mentioned in the judicial opinions in the case.

On June 17, 1970, a three-judge panel of the District Court unanimously declared the Texas law unconstitutional, finding that it violated the right to privacy found in the 9th Amendment. In addition, the court relied on Justice Arthur Goldberg's 1965 concurrence in Griswold v. Connecticut. The court, however, declined to grant an injunction against enforcement of the law.

*Roe v Wade* reached the Supreme Court on appeal in 1970. After the first round of arguments seven justices (two had recently resigned) tentatively agreed the Texas law should be struck down, but on varying grounds; Justice Blackmun (assigned to write the opinion) felt he could not adequately reflect his colleagues’ views, and suggested the case be reargued, with the two new justices in attendance. It will be in 1972, with a decision announced in January 1973.

**Judgement:**

In a 7 - 2 ruling, the Court ruled that a right to privacy under the Due Process Clause of the 14th Amendment extended to a woman’s decision to have an abortion, but that this right must be balanced against the state’s interests in regulating abortions: protecting women’s health and protecting the potentiality of human life. Arguing that these state interests become stronger over the course of a pregnancy, the Court resolves this balancing test by tying state regulation of abortion to the third trimester of pregnancy.

**Court Judicial Interpretation**

- On the lower court decision – The Court declined to adopt the district court’s 9th Amendment rationale, and instead asserted that the “right of privacy, whether it be founded in the 14th Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the district court determined, in the 9th Amendment’s reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.” Justice Douglas, in his concurring opinion in the companion case, Doe v Bolton (overturned a Georgia state abortion law), stated more emphatically, "The 9th Amendment obviously does not create federally enforceable rights."

- Justice Blackmun's majority opinion explicitly rejected a fetal "right to life" argument. The Court instead recognized the right to an abortion as a fundamental right included within the guarantee of personal privacy. As a result, regulations limiting abortion had to be justified by a "compelling state interest," and legislative enactments regulating abortion had to be narrowly tailored to meet the compelling interests; in other words, Justice Blackmun applied a strict scrutiny analysis to abortion regulations

- This nationalized (NOT selectively incorporated) the Supreme Court decision on the entire nation, effectively nullifying the multiple existing laws of different states. In effect, power of the federal government was strengthened while the power of the states was weakened.

- Due process clause – the 14th Amendment clause guaranteeing that no state shall "deprive any person of life, liberty or property, without due process of law", the Supreme Court interpreted the due process clause to provide for “selective incorporation” of amendments into the states, meaning that either the states nor the federal government may abridge individual rights protected by the Constitution.

- “Penumbra” of privacy – (Derived from the Latin for “partial shadow”) the Supreme Court has ruled that several amendments in the Bill of Rights cast a “penumbra” of the right to privacy, although the right to privacy itself is never explicitly named.

- Justiciability – An aspect of the decision that attracted comparatively little attention was the Court's disposition of the issues of standing and mootness. Under the traditional interpretation of these rules, Jane Roe's appeal was "moot" because she had already given birth to her child and thus would not be affected by the ruling; she also
lacked "standing" to assert the rights of other pregnant women. As she did not present an "actual case or controversy" (a grievance and a demand for relief), any opinion issued by the Supreme Court would constitute an advisory opinion, a practice forbidden by Article III of the United States Constitution. The Court concluded that the case came within an established exception to the rule: one that allowed consideration of an issue that was "capable of repetition, yet evading review." Blackmun's opinion noted that pregnancy would normally conclude more quickly than an appellate process: "If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied."

**Key Quotes for the Dissenting Opinions**

- "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 women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disenfranchised to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the woman, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but, in my view, its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."  
  Justice White

  NOTE: He suggests that the majority are exercising Judicial Activism in this case’s majority opinion.

- "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. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today."  
  Justice Rehnquist

  NOTE: He hints toward his own originalist (‘what the founders intended’) reading of the Constitution here.

**Related Cases**

- **Griswold v Connecticut (1965).** The Court invalidated a Connecticut 'Comstock Law' (the law prohibited birth control use) on the grounds that it violated the right of marital privacy, which established the basis for the right to privacy with respect to intimate practices. It viewed the right to privacy as a right to protection from government intrusion.

- **Planned Parenthood v Casey (1992).** The Court rejected Roe’s trimester framework while affirming its central holding that a woman has a right to abortion until fetal viability. The plurality of three Justices (O'Connor, Souter, Kennedy) made a subtle move away from the physical-rights approach of Roe and instead toward a patient’s-rights approach. The plurality in Casey, explicitly confirming that women had a constitutional right to abortion and further upholding the “essential holding” of Roe, stated that women had a right to choose abortion before viability and that this right could not be unduly interfered with by the state. They asserted that this right was rooted in the Due Process Clause of the Fourteenth Amendment.
Questions to Consider
To what does “penumbra” of privacy refer?
Since the 1960s the Supreme Court has held that several amendments create a “penumbra” of privacy for individuals' private beliefs and conduct. Identify four examples of amendments which could be cited as support for a right to privacy. How does the Supreme Court go about balancing liberty and order?