AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights

**Texas Medical Providers Performing Abortion Services v. Lakey, No. 11-50614** (5th Cir., 2012)

*In the landmark case of* Planned Parenthood v. Casey *(1992), the U.S. Supreme Court held that a state could not adopt regulations that impose an “undue burden” on women seeking abortions. In 2011, the Texas state legislature amended its Woman’s Right to Know Act in order to mandate that doctors display and explain a sonogram of the fetus and play the fetal heartbeat to any woman seeking an abortion. In addition, the statute imposed a 24-hour waiting period between the sonogram and the actual abortion. The woman may decline the explanations and displays if the pregnancy falls within a variety of exceptions. A group of doctors brought suit in federal district court to block implementation of the law, and the trial court issued a preliminary injunction against the statute. The commissioner of the Texas Department of State Health Services, who had been named in the suit, appealed to the federal circuit court, which unanimously vacated the injunction of the lower court.*

JONES, JUDGE.

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. . . . In fashioning their First Amendment compelled speech arguments, which the district court largely accepted, Appellees must confront the Supreme Court’s holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), that reaffirmed a woman’s substantive due process right to terminate a pregnancy but also upheld an informed-consent statute over precisely the same “compelled speech” challenges made here. . . .

The law at issue in *Casey* required an abortion provider to inform the mother of the relevant health risks to her and the “probable gestational age of the unborn child.” . . .

The *Casey* plurality’s opinion concluded that such provisions, entailing “the giving of truthful, nonmisleading information” which is “relevant . . . to the decision,” did not impose an undue burden on the woman’s right to an abortion and were thus permitted by the Fourteenth Amendment. The requirement that the physician relay the probable age of the fetus furthered the legitimate end of “ensur[ing] that a woman apprehend the full consequences of her decision.” In other words, “informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant.” . . .

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The import of these cases is clear. First, informed consent laws that do not impose an undue burden on the woman’s right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures. Second, such laws are part of the state’s reasonable regulation of medical practice and do not fall under the rubric of compelling “ideological” speech that triggers First Amendment strict scrutiny. Third, “relevant” informed consent may entail not only the physical and psychological risks to the expectant mother . . . but also the state’s legitimate interests in “protecting the potential life. . . .” Finally, the possibility that such information “might cause the woman to choose childbirth over abortion” does not render the provisions unconstitutional.

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[T]he most reasonable conclusion is to uphold the provisions declared as unconstitutional compelled speech by the district court. To belabor the obvious and conceded point, the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information. They are no different in kind, although more graphic and scientifically up-to-date, than the disclosures discussed in *Casey* – probable gestational age of the fetus and printed material showing a baby’s general prenatal development stages. . . .

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. . . . Appellees’ position seems to assume that the facts of *Casey* represent a constitutional ceiling for regulation of informed consent to abortion, not a set of principles to be applied to the states’ legislative decisions. On this broad level, however, the Court has admonished that federal courts are not the repository for regulation of the practice of medicine.

Turning to the Appellees’ specific objections, the provision of sonograms and the fetal heartbeat are routine measures in pregnancy medicine today. They are viewed as “medically necessary” for the mother and fetus. Only if one assumes the conclusion of Appellee’s argument, that pregnancy is a condition to be terminated, can one assume that such information about the fetus is medically irrelevant. The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances. Denying her up to date medical information is more of an abuse of her ability to decide than providing the information. . . .

. . . . Certainly, the statute’s method of delivering this information is direct and powerful, but the mode of delivery does not make a constitutionally significant difference from the “availability” provision in *Casey*. . . .

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Appellees failed to demonstrate constitutional flaws [in the statute]. . . . Accordingly, we vacate the district court’s preliminary injunction [and] remand for further proceedings. . . .

HIGGINBOTHAM, CIRCUIT JUDGE, CONCURRING.

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