

What the Supreme Court Has Said about Abortion

On January 22, 1973, seven of the nine U.S. Supreme Court justices turned this country's abortion jurisprudence on its head. In the two court cases decided that day, *Roe v. Wade* and *Doe v. Bolton*, Justices Harry Blackmun, William Brennan, Thurgood Marshall, Lewis Powell, William O. Douglas, Potter Stewart, and Chief Justice Warren Burger overturned the abortion laws of all 50 states and essentially legalized the "right" to abortion for any reason throughout pregnancy. Justices William Rehnquist and Byron White were the two dissenters. Justice White, in his dissent, famously denounced *Roe* as "an exercise in raw judicial power."

Justice Blackmun, who authored the majority opinion in *Roe*, wrote that the "right to privacy" the Supreme Court had earlier discovered in the Constitution was "broad enough to encompass" a right to abortion. The Court acknowledged that "[t]he Constitution Does not explicitly mention any right to privacy," but Blackmun asserted that "at least the roots of that right" could be found in various provisions, including "the penumbras of the Bill of Rights."

The Court held that an unborn child was not a "person," and so was not protected by the 14th Amendment's right to life.

Roe v. Wade has survived for 33 years, yet from the very beginning it was fiercely condemned by many constitutional scholars, including those who support abortion, who criticized the legal reasoning used to prop up *Roe*.

The strongest and most memorable criticism came first—in a 1973 *Yale Law Journal* article entitled "The Wages of Crying Wolf." Professor John Hart Ely, personally "pro-choice," denounced *Roe* as a decision that "is not constitutional law and gives almost no sense of an obligation to try to be."

Harvard Law Professor Archibald Cox was equally harsh in *The Role of the Supreme Court in American Government*, published in 1976. "The failure to confront the issue in principled terms," Professor Cox wrote, "leaves the opinion to read like a set of hospital rules and regulations. ... Neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution."

That the seven justices were, in fact, writing legislation and not interpreting the Constitution—and knew it—was confirmed in the 1979 book *The Brethren: Inside the Supreme Court* by Bob Woodward, now a Washington Post editor, and Scott Armstrong. They wrote that it was commonly understood among justices and clerks that "the Court was going to make a medical policy and force it on the states. As a practical matter, it was not a bad solution. As a constitutional matter it was absurd." The same conclusion can be drawn from any number of books, including *Closed Chambers*, written by a former law clerk of Justice Blackmun.

None of the nine justices who decided the 1973 *Roe* and *Doe* decisions remains on the Court.

Despite its lack of constitutional underpinnings, the core holding of *Roe*—that a woman has a right to abortion—currently remains intact. But as the original *Roe* justices have retired and presidents have appointed new ones, in the last decade the Court has not been as hostile to some state regulations of abortion as it was from 1973 until the mid-1980s.

In a 1986 decision (*Thornburgh v. American College of Obstetricians and Gynecologists*) Chief Justice Warren Burger, a member of the original *Roe* majority, reversed himself and called for the reconsideration of *Roe*.

By the 1992 *Planned Parenthood of Southeast Pennsylvania v. Casey* decision, four justices—Rehnquist, White, Scalia, and Thomas—said they would reverse *Roe*. But in addition to pro-*Roe* stalwarts Blackmun and Stevens, a plurality of three justices—Kennedy, O'Connor, and Souter—proclaimed that while they might rule differently were there no 19-year history of Court support for a right to abortion the Court could not be seen as bending to perceived political pressure.

So, although it has wobbled precariously at times, the basic holding of *Roe*—that a woman has a constitutional right to abortion—still stands.

However, in reaffirming the right to abortion in *Casey*, the Court did make two major modifications. First, no longer did the Court rely on the “right to privacy” to undergird its decision. Instead the justices relied exclusively on the right to “liberty” found in the Due Process Clause of the 14th Amendment.

Second, *Casey* changed the standard the Court uses to review state abortion laws. Under *Roe* the Court required that any state regulation of abortion demonstrate that it met a “compelling state interest,” an exacting test that most abortion regulatory laws flunked. In the 1992 *Casey* decision the Court adopted a new standard which requires that a statute not place an “undue burden” (meaning “absolute obstacles” or “severe limitations”) on a woman seeking an abortion. Using this “undue burden” standard, the Court upheld state laws almost identical to statutes it had previously struck down using the “compelling state interest” test.

Roe v. Wade and *Doe v. Bolton* did not address the question of the killing of children who are partially born.

The Court noted that a Texas statute prohibiting such a practice remained in effect. Alas, in the 2000 case of *Stenberg v. Carhart*, five justices of the Supreme Court said that *Roe v. Wade* allows abortion providers to perform partial-birth abortions whenever they see fit, even on healthy women with healthy babies, if the providers claim some “health” benefit.

Far from settling the abortion issue “once and for all,” as some abortion supporters claim was done in 1973, the Court’s *Roe* and *Doe* decisions unleashed a torrent of state laws, challenges to those laws, and subsequent court rulings in an attempt by the people and their elected representatives to reclaim their right to regulate or restrict abortion that was taken from them by a judicial power grab in 1973.

The following are brief descriptions of the specifics of *Roe* and *Doe* and of other cases concerning abortion issues that have come before the Supreme Court since 1973.

The Legalization of Abortion

The Supreme Court decided two abortion cases on January 22, 1973: *Roe v. Wade* (challenging a Texas abortion law) and *Doe v. Bolton* (challenging a Georgia abortion law). Together, the cases effectively struck down all state abortion laws in the United States and replaced them with a national policy that essentially legalized abortion on demand for all nine months of pregnancy.

Trimesters

Roe v. Wade: The Court divided pregnancy into three three-month periods or trimesters:

First trimester: The Court ruled that states could not restrict or regulate abortion in any way (although the Court clarified in a later decision that states could require that abortions be done by a licensed physician).

Second trimester: The Court ruled that states must allow abortion for any reason, except to regulate abortions in minor ways to protect the health of the mother.

Third trimester: After the unborn child becomes “viable” (able to survive outside the womb with or

without medical support), which the Court said occurred at approximately the beginning of the last three months of pregnancy, the Court said states could regulate or prohibit abortion, except when an abortion was done to protect the life or “health” of the mother.

Doe v. Bolton: In this companion case to *Roe*, the Court defined “health” to include “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.” Under this broad definition of “health,” any woman who is unhappy about being pregnant may have an abortion, even in the last months of pregnancy, to protect her “health.”

The following issue summaries were compiled by Richard E. Coleson, M.A.R., J.D.

Facility Regulation

In *Roe*, the Supreme Court said that states could require that abortions performed after the first trimester be done in a hospital, a promise it subsequently withdrew in *Akron v. Akron Center for Reproductive Health* (1983). Since abortions were safer (for women) than they had been in 1973, the Court in *Akron* argued, states had no compelling interest to impose such a requirement. However, in *Simopolous v. Virginia* (1983), the Court said a state may require that all abortions after the first trimester be performed in a hospital or a clinic.

Abortionist Qualifications

In *Roe*, *Doe*, *Akron*, and *Connecticut v. Menillo* (1975), the Supreme Court held that a state may insist that only licensed physicians perform abortions. Nonetheless, due to the shortage of physicians willing to be abortionists, abortion advocates have been pushing for a Court decision that non-physicians could perform abortions.

In 1997, such a case came to the Supreme Court from Montana, where a physician assistant had challenged the state’s physician-only abortion law. The federal district court had refused to issue a preliminary injunction against Montana’s regulation before the case was decided, holding that there existed insufficient likelihood the plaintiffs would succeed.

The Supreme Court agreed with the district court in a brief summary opinion issued without oral argument in *Mazurek v. Armstrong* (1997). In its opinion, the Court noted that in *Casey* it had upheld a requirement that only physicians provide certain counseling because states have broad latitude in regulating professionals. Therefore, the Court noted, it was likely that Montana’s physician-only requirement would be upheld and a preliminary injunction should not be issued.

Given this opinion, it seems likely that states wishing to restrict the performance of abortions to physicians may continue to do so.

Second-Physician Requirement

In the 1973 *Doe* decision, the Court said that a state could not require an abortionist to obtain a concurring second opinion from another doctor. However, in *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft* (1983), the Supreme Court concluded that a state may require the presence of a second physician at an abortion after viability to care for the aborted child (in case he or she survives), provided there was an appropriate exception for “medical emergencies.”

Abortion Method and Standard of Care

In *Planned Parenthood v. Danforth* (1976), the Court struck down a law that banned the use of saline amniocentesis as an abortion method. Likewise, in *Thornburgh v. American College of Obstetricians and Gynecologists* (1986) and *Colautti v. Franklin* (1979), the Court struck down state laws mandating that an abortionist use the method most likely to allow the child to be born alive in post-viability abortions. The Court reasoned that there could be no “trade-off” between the woman’s health and fetal survival.

In *Thornburgh*, the Court similarly struck down a requirement that an abortionist exercise the degree of care “which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted.” It again found that a forbidden “trade-off” with maternal health would be required.

However, yet to be tested is a statute that specifies a standard of care for a viable unborn child and includes a provision allowing no “trade-off” with maternal health. In the *Ashcroft* case, such a statute was discussed, but not directly ruled on by the Supreme Court because it had not been challenged.

However, under *Danforth*, prior to viability no imposed standard of care for the unborn child is constitutionally permitted.

Reporting

In *Casey*, *Ashcroft*, and *Danforth*, the Supreme Court upheld state statutes that required confidential record keeping and reporting. In *Ashcroft*, the Court also approved of a requirement that there be a pathologist’s examination and report on all tissue removed in an abortion.

Residency

In *Doe*, the Supreme Court ruled that a state could not require that a woman be a resident of the state in order to obtain an abortion in the state.

Spousal Involvement

In *Danforth*, the Court struck down a Missouri law that obliged a married woman seeking an abortion to obtain her husband’s consent. This was widely interpreted to mean that biological fathers had no say in abortion decisions involving their unborn children. Indeed, in *Casey*, the Supreme Court decided that a husband was not even entitled to notice before his wife could choose abortion.

Parental Involvement

In *Danforth*, the Supreme Court held that states could require a minor to obtain consent of one parent before obtaining an abortion. However, any parental consent law must contain a “judicial bypass” option for minors who do not wish to obtain parental consent. (In such a confidential, expedited bypass hearing, the court determines whether the minor is mature enough to make the abortion decision herself or, if she is not, whether an abortion is in the minor’s “best interests.”)

Parental notice laws serve the important function of getting parents involved. A one-parent notification requirement with a judicial bypass procedure was found constitutional in *Ohio v. Akron Center for Reproductive Health* (1990). The question of whether a one-parent notice statute would be constitutional without a judicial bypass was expressly left open in the *Ohio* case.

While on its face a parental consent law would always seem more protective than a parental notice law, in fact it may not be. The judicial bypass procedure required with consent laws has become a mere rubber-stamp procedure before a pro-abortion judge in many jurisdictions. As a result, parents may never learn that their daughter is planning to have (or has had) an abortion. The opportunity for parental involvement is lost.

By contrast, a one-parent notice provision—provided there was no requirement for a judicial bypass—would assure parental knowledge that an abortion is being planned and allow them to interact with their child.

The 1990 *Ohio* case also decided that a minor could be required to prove her maturity to choose abortion or that an abortion is in her “best interests” by “clear and convincing evidence” (not by just “a preponderance of the evidence”). In addition, the abortionist can personally be required to bear the responsibility of notifying the parents when no judicial bypass is used.

On November 30, 2005, the justices heard challenges to New Hampshire's one-parent notification law. *Ayotte v. Planned Parenthood of Northern New England* addresses whether parental involvement laws must include a specific "health exception" and how easy (or difficult) it will be for pro-abortionists to stop a law from ever going into effect when it is challenged as applied generally to all situations.

Informed Consent

In *Casey*, the Supreme Court overruled its *Thornburgh* and *Akron* decisions which had struck down women's right to know laws. While abortionists are required in all jurisdictions to obtain informed consent from patients, numerous women have testified before state legislative bodies that they received little or no information about fetal development and other matters essential to making an informed decision about abortion. Legislatures have responded with women's right to know laws.

These laws mandate that certain information be provided in prescribed ways to women seeking abortion. The *Casey* Court upheld the requirement that the abortionist be personally responsible to provide some of the mandated information. A typical law requires that the woman be given information about fetal development, the probable age of her unborn child, alternatives to abortion, resources available for alternatives, the nature and risks of the abortion procedure, and the name of the abortionist.

Waiting Periods

In *Casey*, the Supreme Court reversed the *Thornburgh* and *Akron* decisions that had held that it was unconstitutional to require a waiting period after information is provided to the woman seeking abortion before she can consent to an abortion. The law at issue in *Casey* gave the woman seeking abortion 24 hours to consider the new information provided her in compliance with the woman's right to know law before she could give valid consent to an abortion.

In *Casey*, the Court also upheld the waiting period in the face of arguments from abortion-rights partisans that some women might have to make two trips to the abortion clinic, thereby experiencing greater expense, inconvenience, time commitment, and possible risk in abusive situations.

Public Funding

In *Harris v. McRae* (1980), *Williams v. Zbaraz* (1980), and *Maher v. Roe* (1977), the Supreme Court held that federal and state governments are under no obligation to fund abortion in public assistance programs, even if childbirth expenses are paid for indigent women and even if the abortion is deemed to be "medically necessary."

In *Webster v. Reproductive Health Services* (1989) and *Poelker v. Doe* (1977), the High Court decided that the federal Constitution Does not require the government to make public facilities such as hospitals available for use in performing abortions. Also, in *Rust v. Sullivan* (1991), the Court held that the government may ban public employees from counseling or referring for abortion in public facilities on public time.

Partial-Birth Abortion

In *Stenberg v. Carhart*, the Court struck down Nebraska's ban on partial-birth abortion. On a 5–4 vote, the justices found the statute invalid because it lacked a "health" exception. The five-justice majority in *Carhart* thought that Nebraska's definition of "partial-birth abortion" was vague and could be construed to cover not only abortions in which the baby is mostly delivered alive before being killed, but also the more common second-trimester "dilation and evacuation" (D&E) method.

Major Supreme Court Abortion Cases

Roe v. Wade/Doe v. Bolton, January 22, 1973
Planned Parenthood v. Danforth, July 1, 1976

Colautti v. Franklin, January 9, 1979

Harris v. McRae/Williams v. Zbaraz, June 30, 1980

H.L. v. Matheson, March 23, 1981

Planned Parenthood v. Ashcroft, June 15, 1983

Akron v. Akron Center for Reproductive Health, June 15, 1983

Thornburgh v. American College of Obstetricians and Gynecologists, June 11, 1986

Webster v. Reproductive Health Services, July 3, 1989

Hodgson v. Minnesota, June 25, 1990

Ohio v. Akron Center for Reproductive Health, June 25, 1990

Rust v. Sullivan, May 23, 1991

Planned Parenthood of Southeast Pennsylvania v. Casey, June 29, 1992

Stenberg v. Carhart, June 28, 2000

Ayotte v. Planned Parenthood of Northern New England, arguments heard November 30, 2005>END