

Roe v. Wade: Questions & Answers

Editor's note. Although the 1992 case of *Planned Parenthood v. Casey* revised the legal grounding for the "right" to abortion, it remains important to know what Justice Harry Blackmun said in his historic *Roe v. Wade* decision and its fraternal sister, *Doe v. Bolton*. The following is a brief outline along with a brief rebuttal.

Q: What did *Roe* and *Doe* say?

A: It's very important to remember that prior to 1973, the abortion issue was primarily dealt with by state legislatures. At issue in *Roe* and *Doe* were two state abortion laws. *Roe v. Wade* invalidated a century-old Texas law which prohibited abortion except where necessary to preserve the life of the mother. *Roe's* companion case, *Doe v. Bolton*, invalidated Georgia's "reform" abortion statute. This law allowed abortion where continuation of the pregnancy would endanger the woman's life or health, including mental health, where the fetus would likely be born with a serious defect, or where pregnancy resulted from rape.

But the judicial reach of *Roe* and *Doe* was so extensive that they overturned the abortion statutes of all 50 states, whether these laws went back to the 1860s or were enacted in the decades just prior to *Roe* and *Doe*. Most observers, including many who applauded the results of the decisions, found Blackmun's reasoning unpersuasive, his history untrustworthy, and his conclusion unsupported by the analysis he offered.

Q: Yes, but what did Blackmun's *Roe/Doe* decisions actually hold?

A: As one observer put it, the Court sewed together disparate pieces of the Constitution to fashion a Frankenstein's monster-like creation—a "right of personal liberty" that included a "right of privacy" that was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

Q: This "right to privacy"—where did Blackmun find its component parts?

A: Although a "right to privacy" is not found explicitly in the Constitution, that didn't stop Blackmun (or Justices William Brennan and William Douglas, in previous cases). As one scholar put it, the Court held that "various judges ... had found 'at least the roots of that right' in the First Amendment, in the 'penumbras of the Bill of Rights,' in the Ninth Amendment or in the 'concept of liberty guaranteed by the first section of the Fourteenth Amendment.'" The obvious problem is that even if this right to privacy is granted, it Doesn't follow that it protects/includes the right to abortion. Subsequently, for instance, the High Court in 1997 specifically rejected the idea that the "right to privacy" includes the right to assisted suicide.

Q: Isn't it an exaggeration to say that *Roe* and *Doe* essentially established abortion on demand?

A. *Roe* and *Doe* support the doctrine that abortion must be allowed for any reason until "viability" (about five and one-half months), and for "health" reasons (broadly defined) even during the final three months of pregnancy. Rhetorically, there were speed bumps in the decisions, but in practice Blackmun's decision had the effect of running right over them. For example, Blackmun talked a lot about the unborn as "potential life." In *Roe* he said that while the state has a "compelling interest" in the mother's health from the beginning of pregnancy, a similar interest in "potential life" *Doe v. Bolton* not exist until the third trimester. At this point, Blackmun wrote, "the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion"

However, the rest of the sentence reads, "except where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother." But what is "health"? In the *Doe v. Bolton* case,

Blackmun defined “health” to include “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.” In other words, all a woman needs to do is find an abortionist willing to abort her child.

Q: Didn’t Blackmun maintain that there has never been a historical consensus regarding “when life begins” that reached all the way back to antiquity, and that it was not until the mid-19th century that abortion was forbidden by law in the United States?

A: This gets very complicated. As to the first assertion, let’s turn to Burke Balch, J.D. (director of NRLC’s Robert Powell Center for Medical Ethics) and Dennis Horan, J.D. They wrote,

[S]cholarly research reveals that recognition of the unborn as a “person in the whole sense” was largely determined by the biological and medical knowledge of each historical era. The ovum and the actual nature of fertilization were discovered in the nineteenth century. Prior to this, scientists and contemporaneous jurists supposed that human life commenced at “formation,” “animation,” or “quickening.” ... [A]n approach coinciding with historical continuity [following Blackmun’s reasoning] would be to protect the unborn from the time of fertilization because that is when modern science teaches us that the life of an individual human organism comes into being.

As for abortion law, Blackmun drastically misread history. While the penalties varied, as did the methodology employed to prevent abortions, abortion was condemned in ancient times and opposition to abortion is the consensus of Western Civilization. Nowhere is Blackmun’s misrepresentation more important than in his faulty interpretation of what has come to be known as the mid-19th century “Physicians’ Crusade,” characterized by the passage of laws that protected the unborn beginning at conception.

Relying heavily on two law review articles written by Prof. Cyril Means, Blackmun argued that these laws were enacted not to protect the unborn but exclusively to protect maternal health.

This is not true. In fact these laws, vigorously sponsored by the American Medical Association, reflected the greater medical knowledge about the unborn, specifically the biological discoveries proving that life began at fertilization.

In addition, according to Prof. Victor Rosenblum, “It was the new research finding which persuaded doctors that the old ‘quickening’ distinction embodied in the common and some statutory law was unscientific and indefensible.”

Please turn to the review of *Dispelling the Myths of Abortion History* on page 10 for a fuller examination.

Q: Was/Is criticism of *Roe/Doe* limited to pro-lifers?

A: Hardly. In fact the criticism most often cited then, as now, featured scholars known to be sympathetic to the results. John Hart Ely’s scathing Yale Law Review article is only the most famous. Ely wrote,

What is frightening about *Roe* is that this super-protected right is not inferrable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis à vis the interests that legislatively prevailed over it. And that, I believe ... is a charge that can responsibly be leveled at no other decision of the past twenty years. At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.

Then there’s Harvard Law School Professor Archibald Cox who wrote, “The failure to confront the issue in principled terms 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.”

Finally, there is Prof. Joseph Dellapenna, who observed, “...The opinion is replete with irrelevancies, non-sequiturs, and unsubstantiated assertions. The court decides matters it disavows any intention of deciding—thereby avoiding any need to defend its conclusion. In the process the opinion simply fails to convince.”

Please turn to page 21 for a larger sample of pro-abortion criticisms of *Roe*.