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*Questions & Answers*

# What did the Court say?

Q. What is meant by the Court's "abortion jurisprudence"?

A. The term "abortion jurisprudence" as used here refers to the Court's holdings on legal matters related to abortion. In its 1973 *Roe v. Wade* and *Doe v. Bolton* decisions, the Court reached the shocking conclusion that abortion, which is mentioned nowhere in the text of the Constitution and had been criminalized for centuries in Anglo-American law, is a "fundamental" constitutional "right." The Court's "abortion jurisprudence" includes what the Court said in 1973 as well as in all its subsequent abortion decisions. Over the years the Court has adjusted aspects of its holdings, and in 1992 retreated from its position that abortion is "fundamental." To this day, however, the Court continues to treat abortion as a constitutionally protected right under principles of *stare decisis* (or respect for precedent). Many scholars, including some who support a right to abortion as a matter of legislative policy, agree that *Roe* and *Doe* are among the most constitutionally indefensible decisions in the history of the Court. The Court created a "right" to abortion without basis in the Constitution or U.S. legal traditions, and displaced the democratically-expressed will of the people and their representatives.

Q. In *Roe v. Wade*, what did the Court say about the kind of abortion laws states may pass?

A. In *Roe v. Wade*, the Supreme Court struck down a Texas law that prohibited abortion except in cases where an abortion was performed with the purpose of saving the mother's life.[1] The Court decided that a "right" to abortion was encompassed by the due process clause of the Fourteenth Amendment. The Court said the Texas law, as well as any state law that prohibited abortion before viability (or, in the absence of a maternal health exception, after viability), was a denial of due process.

To determine whether a state's abortion law passes muster under the Fourteenth Amendment, the Court created a "trimester framework." Under this framework, a state *may not* prohibit or regulate abortion during the first trimester. After the first trimester, a state *may* regulate abortion if the regulation is "reasonably related" to protecting the mother's health. After viability, the state *may* regulate abortion for the purpose of "promoting its interest in the potentiality of human life." And after viability the state *may* ban abortion but any such ban must include an exception for the life and health of the mother. And, in *Doe v. Bolton*, the companion decision to *Roe*, the Court said that health should be construed to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[2] *Roe* and *Doe*, the Court stated, are to be "read together."[3]

And finally, the Court said, a state may require that abortions be performed by physicians.

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[1] Roe v. Wade, 410 U.S. 113 (1973).
[2] Doe v. Bolton, 410 U.S. 179, 192 (1973).
[3] Roe, 410 U.S. at 165.

In *Doe v. Bolton*, the Court considered a Georgia law that required abortions to be performed in an accredited hospital after approval of the abortion by two physicians and a hospital committee. The law also required that the woman be a resident of Georgia. The Court struck down each of these provisions.

Consequently, under *Roe* and *Doe* the only constitutionally valid abortion regulation that applies through nine months of pregnancy is one that limits the performance of the procedure to physicians. After the first trimester, only regulations aimed at protecting the woman's health can pass constitutional muster. And after viability, a state may demonstrate an interest in protecting the life of the unborn. But the state may not prohibit post-viability abortion – that is, an abortion of a child who can survive outside the womb – without the all-encompassing "health exception."[4]

Q. Does *Roe v. Wade* require states to enact any regulations or protections for the rights of unborn children?

A. No. Under *Roe* and its progeny, unborn children have no constitutionally protected rights. The Court has held that the federal government (and states) *may* protect a child from partial-birth abortion.[5] The government, however, is not constitutionally required to do so. Today the question of whether the government may enact a meaningful ban on abortion after viability is disputed.[6] Even protections for viable unborn children, however, are not constitutionally required under existing precedent.

Q. What regulations has the Court deemed constitutionally impermissible?

A. The Court has consistently held, since the time of *Roe*, that the state may require that only physicians perform abortions.[7]

But after *Roe*, in a series of challenges to state abortion regulations, the Court largely struck down even modest requirements. For example, in 1976 the Court struck down the following provisions of a Missouri law in *Planned Parenthood of Central Missouri v. Danforth*:[8]

- a requirement that a woman seeking an abortion in the first trimester obtain her spouse's consent;[9]
- a requirement that an unemancipated minor seeking an abortion in the first trimester obtain the consent of at least one parent;[10]
- a ban on the saline method of abortion after the first trimester, even when the ban was enacted to protect the mother's health;[11]

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[4] *Id*. at 164-165.
[5] Gonzales v. Carhart, 550 U.S. 124 (2007).
[6] Justice Thomas noted in his dissent from the denial of *certiorari* in Voinovich v. Women's Medical Professional Corp., 523 U.S. at 1039 (1998): "Our conclusion that the statutory phrase at issue in *Doe* [whether abortions were "necessary"] was not vague because it included emotional and psychological considerations in no way supports the proposition that, after viability, a mental health exception *is required as a matter of federal constitutional law*. *Doe* simply did not address that question." (emphasis in original)
[7] Roe, 410 U.S. at 165; Connecticut v. Menillo, 423 U.S. 9 (1975).
[8] 428 U.S. 52.
[9] *Id*. at 67-72.
[10] *Id*. at 72-75.
[11] *Id*. at 75-79.

- a standard of care to protect the child who survives the abortion.[12]

In a similar way, in 1983 the Court struck down the following provisions of a city ordinance in *Akron v. Akron Center for Reproductive Health*:[13]

- a requirement that abortions after the first trimester be performed in a hospital;[14]
- a requirement that a minor under the age of 15 obtain the consent of at least one parent for an abortion when there is no clear judicial bypass allowing her to prove she is mature enough to make the decision or that an abortion is in her best interests;[15]
- a requirement that the woman be told that the unborn child is a human life from the moment of conception;[16]
- a requirement that a doctor, before performing an abortion, personally inform the woman of the risks of the procedure and provide her with other information to ensure that her consent is informed;[17]
- a twenty-four hour waiting period;[18]
- a requirement that fetal remains be disposed of humanely.[19]

And in 1986 the Court struck down the following provisions of a Pennsylvania law in *Thornburgh v. American College of Obstetricians and Gynecologists*:[20]

- a requirement that the pregnant woman be offered printed materials describing the unborn child's development and listing agencies to help the woman choose alternatives to abortion;[21]
- a requirement that the woman be advised of the availability of medical assistance benefits, and of the father's responsibility for child support;[22]
- a requirement that the woman be informed of detrimental physical and psychological effects and medical risks of the procedure;[23]
- a provision requiring the abortion facility to report information about the method used for payment of the abortion and demographic information about the woman;[24]
- a requirement that a doctor performing a post-viability abortion use an abortion method giving the unborn child the best chance of surviving the abortion;[25]
- a requirement that a second physician be present during a post-viability abortion to care for the child who survives the abortion, when there is no medical emergency exception.[26]

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[12] *Id*. at 81-84.
[13] 462 U.S. 416.
[14] *Id*. at 431-439.
[15] *Id*. at 439-442.
[16] *Id*. at 444.
[17] *Id*. at 442-449.
[18] *Id*. at 449-451.
[19] *Id*. at 451-452.
[20] 476 U.S. 747.
[21] *Id*. at 762-763.
[22] *Id*. at 763.
[23] *Id*. at 764.
[24] *Id*. at 765-768.
[25] *Id*. at 768-769.
[26] *Id*. at 769-771.

Q. What regulations has the Court deemed constitutionally permissible?

A. The Court's detailed and complex legal rules brought it to a point at which the Court's own members recognized that its abortion jurisprudence had gone too far.

Dissenting in *Thornburgh*, Chief Justice Burger expressed astonishment that the Court would, for example, strike down regulations designed simply to ensure that a woman's consent to an abortion is informed. "If *Danforth* and today's holding really mean what they seem to say," he wrote, "I agree we should reexamine *Roe*."[27]

Echoing these sentiments, in 1989 in *Webster v. Reproductive Health Services*, Chief Justice Rehnquist, joined by Justices White and Kennedy, wrote that the Court's abortion jurisprudence had resulted in a "web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine."[28] With this decision, the Court began dismantling the "trimester framework" and its treatment of abortion as a fundamental "right" subject to strict scrutiny, the most exacting form of judicial review. The Court held that a state may make a policy statement that "the life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being."[29] But such a policy statement must be restrained by the limits of the Constitution as determined by the Supreme Court. The statement is a permissible "value judgment" of a state so long as it is not used to unconstitutionally restrict the "right" to abortion as defined by the Court.[30]

And then, with its 1992 decision in *Planned Parenthood v. Casey*, the Court adopted an entirely new standard for reviewing abortion regulations.[31] Under *Casey*'s "undue burden standard," the state may regulate abortion so long as the regulation does not place a "substantial obstacle in the path of a woman seeking an abortion" before viability.[32] The state may also further its interest in potential life, but any such regulation "must be calculated to inform the woman's free choice, not hinder it."[33] By virtue of the *Casey* decision, federal courts no longer apply strict scrutiny to abortion regulations.

Using the new standard, *Casey* upheld, with a statutory exception for medical emergencies, a law requiring informed consent throughout pregnancy. An informed consent requirement can include telling the woman about the procedure and its risks, the likely age of her child and about the availability of printed materials. The printed materials, describing the unborn child and providing information about alternatives to abortion, were judged constitutional.[34]

*Casey* also upheld a twenty-four waiting period despite some increased expense and delay. The Court said that such burdens did not amount to a "substantial obstacle."[35] Consistent with earlier precedent, *Casey* also upheld an informed parental consent law with a judicial bypass.[36]

And finally, *Casey* upheld requirements that abortion facilities keep records and reports with the names of the physician, facility, and referring physician or agency; the age of each woman; the

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[27] *Id*. at 785 (Burger, C.J., dissenting).
[28] 492 U.S. 490, 518.
[29] *Id*. at 504.
[30] *Id*. at 506.
[31] 505 U.S. 833 (1992).
[32] *Id.* at 877-879.
[33] *Id*. at 877.
[34] See *id*. at 881-885.
[35] *Id*. at 885-887.
[36] *Id*. at 899-900.

number of each woman's prior pregnancies and prior abortions; pre-existing conditions which would complicate pregnancy; medical complications experienced with any abortions; the basis for a physician's medical judgment that an abortion was necessary to prevent maternal death or a substantial and irreversible impairment; the weight of the unborn child; and the number of abortions performed by trimester.[37]

Though the "undue burden" standard allows states greater latitude in protecting pregnant women and their unborn children, *Casey* reaffirmed "the central holding of *Roe*" (which includes *Doe*). That holding forbids the federal government and the states to ban abortion before viability, or after viability when the abortion is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[38]

Q. Does *Roe* require states to pay for abortions or compel health care providers to perform them?

A. The question whether the government is required to fund abortions was not before the Court in *Roe* and *Doe*. But because of the far-reaching nature of the decisions, the assumption often was made that such a requirement existed. In subsequent rulings, however, the Court has consistently held that the abortion "right" created by *Roe* does not constitute an entitlement to have the procedure paid for or performed by the state. In fact, the statute under consideration in *Doe* contained a conscience clause for hospitals and the Court relied on the clause in part, in its decision striking down the requirement of the hospital abortion committee. The Court noted that the hospital was free not to perform abortions at all.[39]

Since *Roe* and *Doe*, the Court has upheld numerous limits on the use of public funds, facilities and personnel for abortions, including the following:

- a state Medicaid plan that limits funding for first-trimester abortions to those that are "medically necessary";[40]
- a policy of a city-owned hospital to perform abortions only in the case of a threat of grave physiological injury or maternal death;[41]
- federal government restrictions set forth in the Hyde Amendment on the use of Medicaid funds for abortions;[42]
- a state law providing medical assistance for abortions necessary to preserve the life of the mother but not for other "medically necessary" abortions;[43]
- a state law prohibiting state employees, in the course of their employment, to perform or assist in abortions not necessary to save the mother's life and banning such abortions in public hospitals;[44]
- a federal regulation prohibiting Title X projects from engaging in abortion counseling, referrals, and advocacy.[45]

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[37] *Id*. at 900-901.
[38] *Id*. at 879, citing Roe v. Wade 410 U.S. at 164-165.
[39] Doe v. Bolton, 410 U.S. at 197.
[40] Maher v. Roe, 432 U.S. 464 (1977).
[41] Poelker v. Doe, 432 U.S. 519 (1977).
[42] Harris v. McRae, 448 U.S. 297 (1980).
[43] Williams v. Zbaraz, 448 U.S. 358 (1980).
[44] Webster, 492 U.S. 490.
[45] Rust v. Sullivan, 500 U.S. 173 (1991).

Q. Is it possible for *Roe* to be reversed?

A. Yes, it is. And, as fundamentally bad constitutional law, it must be.

Historically, erroneous Supreme Court decisions have been corrected in two basic ways: Either by amendment to the U.S. Constitution or by the Court's own subsequent decisions.

Article V of the U.S. Constitution provides that amendments can be proposed either by Congress or by a convention, and any proposed amendments can be ratified either by the state legislatures or by special conventions in the states. "Super-majority" levels of approval are required in proposing (two-thirds) and in ratifying (three-fourths).

Over the years, 27 amendments have been added to the Constitution. All were proposed by Congress, with 26 amendments being ratified by the state legislatures and one, the Twenty-First Amendment, by state conventions.

The convention method of proposing amendments was not the route used in the successful amendments to date. Nevertheless, the method represents a way for the states to take needed amendment action when Congress refuses or fails to act, especially to curb excesses and abuses.

Needless to say, the formal amendment process is difficult, as it was intended to be. The more straightforward approach is for the Court to correct its own mistakes. As Chief Justice William Rehnquist noted in his separate opinion in *Casey*, "Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions."[46] The Court likewise should correct *Roe*, for principled as well as practical reasons. Justice Antonin Scalia has observed that, with neither constitutional text nor accepted legal traditions on which to rely, the Court, as a legal institution, has no way to resolve the abortion issue.[47] "If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed."[48]

In time, protection for the right to life of the unborn must be secured by amending the U.S. Constitution.

[46] 505 U.S. at 959 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
[47] Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting).
[48] *Id*. at 956 (Scalia, J., dissenting).