

# Family Life † Respect Life ARCHDIOCESE of NEW YORK

## ABORTION AND THE LAW — A JOURNEY TO A LAND OF MYTH

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**L**et's begin with a bold statement: virtually everything you have heard or read in the media about the law of abortion, and about the Supreme Court's decision in *Roe v. Wade*, is false. Misleading. Inaccurate. Incomplete. Distorted. Mythical.

How can this be true? *Roe v. Wade*, decided by the Supreme Court on January 22, 1973, is one of the most famous and important Supreme Court decisions. It has become one of the dominant factors in American law and politics. Its importance is felt in Presidential elections and judicial confirmation disputes, as well as local political races.

Yet, just about everything that is said about *Roe* is wrong. To see this, let's examine some of the most common myths that are floating around.

**MYTH: Under *Roe*, abortion is legal only in the first trimester.**

**FACT: You still hear this from the media, but it has always been utterly false.**

Since *Roe v. Wade*, abortion has been legal in all nine months of pregnancy, for any reason. The government cannot prohibit abortion prior to fetal viability, and has extremely limited ability to control it after viability. ("Viability" means that the baby could survive outside her mother's womb; this usually happens by the twenty-fourth week of pregnancy.)

To really appreciate abortion law in the United States, you have to understand both *Roe v. Wade* and *Doe v. Bolton*, which the Court decided on the same day and intended to be read as one. It's also helpful to know the case of *Casey v. Planned Parenthood*.

In *Roe v. Wade*, the Court held that during the first trimester, virtually no regulation of abortion is permissible. During the second trimester, the state could only regulate it to protect maternal health — it could not defend the unborn child. During the third trimester, which the Court deemed to be the time of fetal viability, the state must permit abortion if it is necessary to preserve the mother's life or health. There is nothing in *Roe* to support the notion that abortion was to be legal only in the first trimester.

In *Doe v. Bolton*, the Court defined the crucial term "health" to include "all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being

of the patient". This is so broad that the states cannot impose any real restrictions on abortion, even in the third trimester.

In 1992, *Roe* was affirmed in the case of *Casey v. Planned Parenthood*. The Court scrapped the three-trimester rule and replaced it with one that relied solely on viability. But the result is the same as in *Roe* — abortion cannot be prohibited before viability, and it must be permitted afterwards if necessary to preserve the mother's life or health (as that term was broadly defined by *Doe*).

The bottom line is that under *Roe* and *Doe* and *Casey*, abortion is legal throughout all nine months of pregnancy.

**MYTH: *Roe v. Wade* legalized abortion.**

**FACT: *Roe* didn't just legalize abortion — it constitutionalized it.**

In 1973, most of the states permitted abortion, but only to save the mother's life. Others, like New York, permitted it in more liberal circumstances. Not one single state allowed abortion on demand through all nine months of pregnancy, as *Roe* does.

What *Roe* actually did was much more radical than just legalizing abortion. It struck down the laws of all fifty states and the District of Columbia — laws that had been duly enacted by the people's elected representatives and upheld by many lower courts.

In effect, *Roe* said that legalized abortion is constitutionally required, that it is central to our nation's understanding of individual liberty — even though the Constitution says nothing about abortion, and it had been either outlawed or sharply restricted throughout our nation's history.

In effect, *Roe* amended the Constitution to impose a law on abortion that no state had ever adopted. *Roe* is so radical that it has been used to strike down laws — like bans on partial birth abortion — that have wide popular support.

Rightly did Justice Byron White, who dissented from *Roe*, call the decision "an exercise of raw judicial power".

**MYTH: The Supreme Court is only one vote away from overturning *Roe* and criminalizing abortion.**

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**FACT: Only three of the nine Supreme Court Justices have ever voted to overturn *Roe*.**

This myth is often used by “pro-choice” political candidates and advocacy groups to energize their supporters. But the fact is that only Justices Rehnquist, Scalia and Thomas have voted to overrule *Roe*, and no Supreme Court Justice has ever said that they would make abortion illegal or that the right to life is guaranteed by the Constitution. There are five Justices who have consistently voted to uphold *Roe*.

**MYTH: If *Roe* is overturned, abortion would be illegal.**

**FACT: Even if *Roe* were overruled today, abortion would still be legal and prevalent.**

More than two-thirds of the states have changed their abortion laws to copy the standards of *Roe* and *Doe* — to permit abortion on demand throughout pregnancy. Most of the other states — like New York — have laws or court decisions that would permit abortion under virtually all circumstances. Only six states have enforceable laws that would significantly restrict abortions. And only one — Arkansas — has a law that would prohibit them entirely.

The saddest fact, however, is that over 90% of current abortions — over a million each year — would still be legal, even if *Roe* were overturned today.

**MYTH: The Supreme Court’s decision *Roe* is widely respected among legal scholars.**

**FACT: Virtually no legal scholar — now or at the time — would consider *Roe* to be a well-reasoned decision.**

There are very few people — even abortion supporters — who would defend the Court’s decision in *Roe* on its merits.

Despite its virtually sacred status in politics and the legal profession, *Roe* was described as “a very bad decision” (John Hart Ely, Yale law professor and later dean of Stanford Law School), and “indefensible.... one of the most intellectually suspect constitutional decisions of the modern era” (Edward Lazarus, former clerk to Justice Blackmun, who wrote the majority opinion in *Roe*). One legal scholar said that “One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found” (Laurence Tribe, Harvard law professor). Another said that “Neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution” (Archibald Cox, late Harvard law professor).

And these are comments from people who supported the outcome in *Roe*.

Supreme Court Justices who have voted to uphold *Roe* have also been critical. Justice Ginsburg said “Women were lobbying around that issue. The Supreme Court stopped all that by deeming every law - even the most liberal - as unconstitutional. That seemed to me not the way courts generally work”. And Justice O’Connor wrote “This Court’s abortion decisions have already worked a major distortion in the Court’s constitutional jurisprudence.”

Perhaps Justice Clarence Thomas said it best, calling *Roe* “grievously wrong”.

**MYTH: *Roe* is settled law, which the Supreme Court should not overturn.**

**FACT: The Supreme Court has never shied away from reversing earlier decisions that were manifestly wrong when decided, or judged to be wrong in hindsight.**

Every year, the Court overturns a handful of decisions, and is urged to overrule others. Some of these rejected decisions have been on the books for far longer than *Roe*. One of the most revered Supreme Court decisions, *Brown v. Board of Education*, which outlawed school segregation, overturned an earlier case that had been the law of the land for 58 years.

While respect for an earlier decision (the legal term for which is “precedent”) is an important part of the rule of law, the late Justice John Marshall Harlan, a widely respected jurist, once said “a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason”.

The first question the Supreme Court should ask is whether an earlier decision was correctly decided. If not — as with *Roe*, *Doe*, and *Casey* — it should be overturned and the law should be placed back on the right path.

Like the infamous *Dred Scott* case, which protected slavery, *Roe* has perverted constitutional law to deny American citizens the ability to protect the basic rights of an entire class of persons. *Roe* was wrong in 1973, it was wrong when it was “affirmed” in 1992, it is wrong today, and it will always be wrong. American law will never escape the stain of this injustice until *Roe* is overturned.

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