

# A History of Key Abortion Rulings of the U.S. Supreme Court

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During the past 35 years, federal courts, particularly the U.S. Supreme Court, have superseded states as the driving force in crafting abortion policy. Indeed, since the high court's 1973 decision in *Roe v. Wade*, which granted women the constitutional right to terminate their pregnancies, state legislatures and governors have encountered a number of limitations in the ways they can regulate abortion.

Prior to *Roe*, and throughout much of American history, states banned or severely restricted abortion. State abortion laws, many of which were enacted in the 19th and early 20th centuries, often targeted those who performed abortions rather than the pregnant women who sought to have the procedure performed. The aim of many of these laws was to protect pregnant women (and their fetuses) from injury, not to prosecute them.

Despite the near-universal prohibition on abortion in the early 20th century, social forces in the decades that followed – such as the fight for women's suffrage and later the feminist movement – pushed the country toward greater political and sexual freedom for women. In 1967, Colorado became the first state to greatly broaden the circumstances under which a woman could legally receive an abortion. By 1970, 11 additional states had made similar changes to their abortion laws and four other states – New York, Washington, Hawaii and Alaska – had completely decriminalized abortion during the early stages of pregnancy.

Meanwhile, abortion rights advocates launched a series of court challenges to many older state abortion laws, often arguing that these statutes were overly vague or that they violated the right to privacy or the right to equal protection under the law guaranteed under the U.S. Constitution. State and lower federal courts usually rejected these arguments.

## ***Roe v. Wade***

In the early 1970s, the Supreme Court agreed to hear two cases challenging laws that restricted abortion. In *Roe v. Wade* (1973), the high court considered a challenge to a Texas law outlawing abortion in all cases except those in which the life of the mother was at risk. The second case, *Doe v. Bolton* (1973), focused on a more lenient Georgia law that allowed a woman to terminate her pregnancy when either her life or her health was in danger. In both cases, lower federal courts had declared the statutes unconstitutional, ruling that denying a woman the right to decide whether to carry a pregnancy to term violated basic privacy and liberty interests contained in the Constitution.

In two separate but related decisions, the Supreme Court affirmed the lower courts' conclusions and struck down both statutes by a vote of 7-2. In *Roe*, the more significant of the two decisions, the court concluded that constitutional rights to privacy and liberty protected a woman's right to terminate her pregnancy. Writing for the majority, Justice Harry Blackmun acknowledged that while "the Constitution does not explicitly mention any right to privacy," a number of prior decisions had found "a guarantee of certain areas or zones of privacy." This guarantee of privacy,

Blackmun added, is grounded in several amendments within the Bill of Rights and in the 14th Amendment's guarantee of liberty, which taken together create zones of privacy in areas of society such as marriage, contraception, family relationships and child-rearing.

Justice Blackmun's argument for the right to privacy in *Roe* grew out of earlier high court decisions, most notably *Griswold v. Connecticut* (1965). In *Griswold*, the court had struck down a Connecticut anti-contraception law on the ground that it intruded on the right to marital privacy. Justice William Douglas, writing for the majority, had asserted that "zones" of personal privacy are fundamental to the concept of liberty under "the protected penumbra of specific guarantees of the Bill of Rights."

Having concluded in *Roe* that access to abortion is a "fundamental right," the court declared that only a "compelling state interest" could justify the enactment of state laws or regulations that limit this right. The court also recognized that the state has an "important and legitimate interest" in protecting the health of the mother and even "the potentiality of human life" inside her. The court then asked: When does the state's legitimate concern for maternal and fetal protection rise to the level of compelling interest? To answer this question, Blackmun created a three-tiered legal framework, based on the nine-month period of pregnancy, which gave the state greater interest and regulatory latitude in each successive tier.

### **Drawing Lines: The Three Tiers of Justice Blackmun's Trimester Framework in *Roe***

#### ***Tier 1***

**Time Period Covered:** First trimester of pregnancy

**Legal Standard:** State has no real interest in protecting mother's health

**Legal Limits:** State can only require basic health safeguards and cannot limit access to abortion

#### ***Tier 2***

**Time Period Covered:** End of first trimester to point of fetal viability

**Legal Standard:** State has interest in protecting mother's health

**Legal limits:** State can regulate abortion only to protect health of mother

#### ***Tier 3***

**Time Period Covered:** Period after point of fetal viability

**Legal Standard:** State has interest in protecting "potential life"

**Legal Limits:** State can restrict or even ban abortion as long as procedure still allowed when mother's life or health at risk

The first tier in Blackmun's framework encompassed the first trimester of pregnancy. Given that during these first three months the risks associated with abortion are actually lower than those associated with childbirth, the state has no real interest in limiting the procedure in order to protect a woman's health, Blackmun argued. During this period, the state can only impose basic health safeguards – such as requiring that the procedure be performed by a qualified health professional – and can in no way limit access to abortion.

The second tier of Blackmun's framework encompassed the period from the end of the first trimester to the point of fetal viability – the point at which a fetus can survive outside the womb, either through natural or artificial means, which typically takes place between about 24 and 28 weeks into a pregnancy. At this point, Blackmun determined, the state has an interest in protecting maternal health and can regulate abortion only to protect the health of the mother. In other words, regulations have to be directed toward ensuring maternal health and cannot be aimed at protecting a fetus or limiting access to abortion services. Thus, a state law requiring a doctor to describe to a woman seeking an abortion the risks associated with the procedure before receiving her informed consent would be constitutional – as long as the requirement aimed to protect maternal health and was not created to dissuade a woman from terminating her pregnancy.

The third tier of Blackmun's framework encompassed the period after the point of fetal viability. During this time, Blackmun wrote, the state has an interest in protecting “potential life” and can even proscribe abortion, as long as the procedure is still allowed in cases in which the life or health of the mother is at risk.

In *Doe*, the same seven-justice majority largely restated and fleshed out its ruling in *Roe*. Again writing for the majority, Justice Blackmun determined that state regulations that could create procedural obstacles to abortion – such as, in this particular case, the requirement that an abortion be performed in a hospital or be approved by two doctors – violate a woman's right to terminate her pregnancy.

## **The Post-*Roe* Court**

Timeline courtesy of [Stateline.org](https://www.stateline.org)

*Roe* proved to be one of the most significant decisions ever handed down by the Supreme Court and is perhaps rivaled in public attention in the 20th century only by the landmark 1954 school desegregation case, *Brown v. Board of Education*. Unlike *Brown*, however, *Roe* has remained controversial in the decades since it was decided.

In the years immediately following *Roe*, the Supreme Court grappled with a host of issues that arose from the decision. These included questions about laws requiring informed consent, parental consent, spousal consent and waiting periods for women seeking abortions. In these early cases, the high court generally struck down most laws regulating abortion and upheld only a few that, in the court's view, did not significantly limit a woman's right to terminate her pregnancy. In these cases, the court also affirmed *Roe* and its three-tiered framework.

The first small crack in *Roe* jurisprudence came in 1989 when the high court decided *Webster v. Reproductive Health Services*. This case concerned a Missouri statute that barred public facilities from being used to conduct abortions and prohibited public health workers from performing abortions unless the life of the mother was at risk. The statute also defined life as beginning at conception and directed physicians to perform fetal viability tests on women who were 20 or more weeks pregnant and seeking abortions.

In a highly fractured 5-4 decision, the court upheld the constitutionality of the statute. Writing for the majority, Chief Justice William Rehnquist stated that the law's declaration that life begins at conception does not contradict *Roe* because the declaration is contained in the statute's preamble and thus should have no real impact on access to abortion. The majority also held that prohibiting the use of government workers or facilities to perform abortions is acceptable because the right to an abortion established in *Roe* does not include the right to government assistance in obtaining one. The majority also ruled that the requirement of viability testing at 20 weeks is constitutional, although the justices offered different reasons for this ruling.

In one opinion, Chief Justice Rehnquist, joined by Justices Byron White and Anthony Kennedy, argued for dispensing with part of *Roe*'s three-tiered system, the second tier of which allows only laws aimed at protecting the mother's health. According to Rehnquist, the framework had come to resemble "a web of legal rules" rather than "constitutional doctrine." The three justices also maintained that the state has an interest in protecting potential life before viability, making the 20-week requirement valid even if fetal viability normally occurs after 20 weeks. "We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability and should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability," Rehnquist wrote.

In a concurring opinion, Justice Antonin Scalia argued that the majority opinion was "indecisive" and "stingy" and that *Roe* should be overturned. Justice Sandra Day O'Connor, the fifth and final member of the majority, also concurred in the decision, but for very different reasons. Unlike her colleagues in the majority, O'Connor argued that *Roe*'s trimester system, while problematic, should neither be modified nor overturned in this case. She determined rather that the testing requirement passed constitutional muster because it does not impose an "undue burden" on a woman considering an abortion.

In a blistering dissent, Justice Blackmun took Justices Rehnquist, White and Kennedy to task for attempting to overturn *Roe* by what he claimed were stealth tactics; he described their written opinion as "filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly."

### **The Divided Court in *Casey***

Although *Roe* and its three-tiered system survived *Webster*, Blackmun's fears were at least partially realized. The *Webster* decision revealed a new majority on the court with a greater willingness to uphold state restrictions on abortion. And while legal scholars and others were not immediately certain of the ruling's impact, *Webster* ultimately set the stage for more significant changes in *Roe*'s three-tiered framework, changes that would come a mere three years later in the 1992 decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

*Casey* involved a challenge to a wide-ranging abortion law that included an informed-consent requirement as well as a 24-hour waiting period for women seeking abortions. In addition, the statute required a minor to obtain the consent of at least one parent or guardian, and for a wife to inform her husband of her plans to terminate her pregnancy. In the cases of both the minor and spousal requirements, various waivers were available for extenuating circumstances.

In *Casey*, the court rendered an even more splintered decision than it had in *Webster*. The court's three centrists – Justices Kennedy, O'Connor and David Souter – took the unusual step of issuing a joint opinion authored by all three justices. They were joined by the court's liberal wing – Justices Blackmun and John Paul Stevens – in affirming *Roe*'s core principle: that the state may not prohibit pre-viability abortions. But the three centrists were joined by the court's more conservative wing – Justices Rehnquist, Scalia, White and Clarence Thomas – in upholding all of the Pennsylvania statute's requirements, except the provision concerning spousal notification.

In affirming *Roe*, the high court argued in favor of maintaining the constitutional status quo for reasons that went beyond legal precedent. "The Constitution serves human values," wrote Justices Kennedy, O'Connor and Souter, "and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed." In other words, the justices were arguing, *Roe* has created expectations that should not easily be discarded.

At the same time, the court significantly modified the three-tiered framework that *Roe* had created. First, under *Casey* states could now regulate abortion during the entire period before fetal

viability, and they could do so for reasons other than to protect the health of the mother. The court also dismantled *Roe*'s prohibition on the regulation of abortion during the first trimester (Blackmun's first tier) and its limitation of regulation between the end of the first trimester and the point of fetal viability (Blackmun's second tier). The result was that a state's interest in and regulation of potential life could now arguably extend throughout a woman's pregnancy.

In addition, the court in *Casey* also established a less rigorous standard for determining whether state abortion laws are constitutional. In *Roe v. Wade*, the court had declared access to abortion to be a fundamental right and had determined that states could only regulate abortion (before fetal viability) if there was a "compelling state interest." Thus, subsequent abortion statutes had been evaluated under the "strict scrutiny" standard, the most rigorous legal standard for determining whether a law passes constitutional muster. As a result, in the years immediately following *Roe*, many abortion regulations were declared unconstitutional.

But in *Casey* the court replaced strict scrutiny with a new and less rigorous "undue burden" standard. Under the new standard, regulating abortion before the point of fetal viability would be deemed unconstitutional only if it imposed an undue burden on a woman's right to terminate her pregnancy.

*Casey* appeared to accommodate both sides in the abortion debate. By partially dismantling the three-tiered framework and creating the less rigorous undue burden standard for determining the constitutionality of abortion regulations, the high court gave states greater latitude to regulate abortion before the point of fetal viability. Indeed, in *Casey* the court applied the less rigorous undue burden standard to the Pennsylvania laws and, with the exception of the spousal-consent requirement, found all to be constitutional.

But abortion opponents had viewed *Casey* as an opportunity to overturn *Roe*, and many believed the court, bolstered by new Republican-appointed members Clarence Thomas and David Souter, would do so. By ultimately affirming *Roe*, however, the court solidified the decision's status as legal precedent, thus affording *Roe* greater protection from future challenges. The addition of two abortion rights supporters to the court in the 1990s, Justices Ruth Bader Ginsburg and Stephen Breyer, effectively eliminated the threat to *Roe*, *for the time being*, by creating a solid six-justice majority in favor of keeping abortion a fundamental right.

### **The Partial-Birth Abortion Decisions**

In 2000, the Supreme Court accepted *Stenberg v. Carhart*, a case challenging the constitutionality of a Nebraska law prohibiting partial-birth abortion. The term "partial-birth abortion" refers to a procedure known in the medical community as "dilation and extraction" (D&X), which involves terminating a pregnancy by partially extracting a fetus from a uterus, then collapsing its skull and removing its brain. This procedure is usually performed late in the second trimester, between 20 and 24 weeks into a pregnancy. Violation of the Nebraska law was made a felony, and punishment included possible fines and jail time, as well as the automatic revocation of a convicted doctor's state license to practice medicine.

In a 5-4 decision, the high court ruled that the Nebraska law violated the Constitution as interpreted in *Casey* and *Roe*. Justice Breyer, delivering the majority opinion, stated that the statute lacked the requisite exception "for the preservation of the ... health of the mother." Citing *Casey*, Breyer determined that the state may promote but not endanger a woman's health when it regulates the methods of abortion.

In addition, the majority found the wording of the Nebraska ban unclear because it could be interpreted by doctors to include not only the D&X procedure but other abortion methods as well. The majority ruled that this ambiguity imposed an undue burden on a woman's ability to choose

an abortion, as well as on those who perform abortions using methods similar to the partial-birth procedure who might face prosecution.

Even though the decision effectively rendered similar bans in more than 30 states unenforceable, the vote was unexpectedly close for a court in which support for the right to abortion was expected to garner the support of six justices. In a surprising shift, Justice Kennedy dissented, emphasizing what he described as the “consequential moral difference” between the dilation and extraction method and other abortion procedures.

Even so, in 2003 Congress passed and President George W. Bush signed the Federal Partial Birth Abortion Ban Act, the first federal law banning the D&X procedure. Abortion rights advocates immediately challenged the law, and lower courts, citing *Stenberg*, struck it down.

But in 2007, in the case *Gonzales v. Carhart*, the Supreme Court reversed course and upheld the federal ban by a vote of 5-4, giving abortion opponents a major victory and prompting many states to consider passing tougher restrictions on abortion. The ruling was significant because the high court declared the federal statute to be constitutional even though it does not contain an explicit exception in cases in which a woman’s health is in danger. This was a significant departure from earlier abortion rulings, including the *Stenberg* decision, which require that laws restricting abortion include such a health provision.

The decision also reflected the impact of recent changes on the high court, notably the replacement in 2006 of the retired Justice O’Connor with Justice Samuel Alito. O’Connor had provided the fifth and deciding vote in *Stenberg*. By ruling with the court’s conservative wing, Alito provided the crucial fifth vote needed to uphold the law.

The majority opinion was penned by Justice Kennedy, who in 2006 had replaced O’Connor as the person most likely to be the court’s “swing vote” in very close decisions. Indeed, prior to this ruling, some legal analysts had argued that Kennedy’s recent attempts to position himself between the court’s liberal and conservative wings meant that, even though he had voted with the conservative minority in *Stenberg* and had authored a passionate dissent criticizing the majority for striking down Nebraska’s partial-birth abortion ban, he could not be reliably placed with either side in the partial-birth decision. But Kennedy’s decision made clear that his views had not significantly changed since *Stenberg*. The only difference was that now he was writing for the majority.

Kennedy devoted a substantial part of his majority opinion to differentiating the federal partial-birth abortion ban from the Nebraska ban that had been struck down by the high court in *Stenberg*. Although he had strenuously dissented in *Stenberg*, Kennedy did not overturn the court’s decision in that case; instead, he attempted to fit the Federal Partial Birth Abortion Ban Act within *Stenberg*’s parameters.

The decision in *Gonzales v. Carhart* has already prompted some state legislatures to consider and, in a number of cases, pass new abortion requirements. For instance, in 2008, Oklahoma enacted a measure requiring women who seek abortions to first submit to an ultrasound test that shows an image of the fetus. Two other states passed laws in 2008 requiring doctors at clinics to offer to perform ultrasounds on women seeking abortions, joining 14 states that already have such a requirement. In addition, in November 2008, voters in California, South Dakota and Colorado will decide whether three ballot initiatives restricting abortion will become law.

This whirlwind of action in the states could produce accompanying gusts at the nation’s court houses, since some new abortion restrictions are likely to be challenged. Federal district and appeals courts, in particular, would be charged with trying to understand the contours of *Carhart* in order to apply the ruling to these new laws and policies. If a plethora of resulting lower court

cases produces different and contradictory decisions, the Supreme Court may once again need to revisit its abortion jurisprudence.

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