

- 24 The Associated Press, “Ginsburg: *Roe* decision seemed ‘not the way courts generally work,’” March 11, 2005 (quoting Supreme Court Justice Ruth Bader Ginsburg).
- 25 The Alan Guttmacher Institute, “Abortion in Context: United States and Worldwide,” 1 *Issues in Brief* 3-5 (1999).
- 26 Lawrence B. Finer and Stanley K. Henshaw, “Abortion Incidence and Services in the United States in 2000,” 35.1 *Perspectives on Sexual and Reproductive Health* 8 (Jan./Feb. 2003).
- 27 See *supra* notes 2-7.
- 28 “Progress and Perils: How Gender Issues Unite and Divide Women, Part Two,” Center for Gender Equality, April 7, 2003 (conducted by Princeton Survey Research Associates) at 9-10.
- 29 *Id.* Approximately 2% of abortions are done for these reasons. See Torres, *supra* note 8. See Data from Centers for Medicare & Medicaid Services, U.S. Department of Health and Human Services (showing drop in Medicaid-funded abortions by over 99%— from 294,600 in Fiscal Year 1977 to fewer than 1,000 in FY 1982 and subsequent years—after the federal Medicaid program began funding only abortions to save the mother’s life).
- 30 “More girls in sports” was ranked last. “Progress and Perils”, *supra* note 28 at 4.
- 31 Moore and Persaud, *supra* note 14 at 70.
- 32 Only 23% are done before or during the 6th week of “gestational age” counting from the last menstrual period, or the 4th week of development. Centers for Disease Control and Prevention, “Abortion Surveillance - United States, 2000,” 52 *Morbidity and Mortality Weekly Report* (SS-12) Table 7 (Nov. 28, 2003).
- 33 The Alan Guttmacher Institute, “Induced Abortion,” *Facts in Brief* 1 (2003).
- 34 Centers for Disease Control and Prevention, “Abortion Surveillance - United States, 2001,” 53 *Surveillance Summaries* Table 13 (Nov. 26, 2004).
- 35 “An Abortion Rights Advocate Says He Lied About Procedure,” *The New York Times*, February 26, 1997, A11.
- 36 “Medicine adds to debate on late-term abortions,” *American Medical News*, March 3, 1997, 54, 56.
- 37 *Stenberg v. Carhart*, 530 U.S. 914, 929-30 (2000) (“The question before us is whether Nebraska’s statute, making criminal the performance of a ‘partial birth abortion,’ violates the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973). We conclude that it does...”).
- 38 Paul Benjamin Linton, “*Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court,” 13 *St. Louis University Public Law Review* 15, 24-26 (1993).
- 39 See *supra* note 24. See also Linton, *supra* note 38, at 27 (stating that, at the time *Roe* was decided, “[n]o State allowed unrestricted abortion throughout pregnancy, as *Roe* effectively does”).
- 40 See *supra* notes 2-7.
- 41 See Wittes, *supra* note 17, at 48.
- 42 See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).
- 43 *American Academy of Pediatrics v. Heckler*, 561 F.Supp. 395, 403 (D.D.C. 1983).
- 44 *In re Eichner*, 73 A.D.2d 431, 466 (N.Y. App. Div. 1980).
- 45 *People v. Kevorkian*, 1993 WL 603212 (Mich. Cir. Ct. Dec. 13, 1993).
- 46 *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996).
- 47 See Stanley K. Henshaw, “Abortion Incidence and Services in the United States, 1995-1996,” 30 *Family Planning Perspectives* 263, 268 (Nov./Dec. 1998), available at [www.guttmacher.org/pubs/journals/3026398.pdf](http://www.guttmacher.org/pubs/journals/3026398.pdf).
- 48 See *supra* note 26, at 6, 12, Table 5. The other kinds of clinics are described as those where less than half of patients are obtaining abortions.
- 49 Jack Hitt, “Who Will Do Abortions Here?,” *New York Times Magazine*, January 18, 1998, 23.
- 50 Physicians for Reproductive Health and Choice, 9 *Choice Notes* 1 (June 2004), available at [www.prch.org/publications/choice\\_notes/June04\\_ChoiceNotes.pdf](http://www.prch.org/publications/choice_notes/June04_ChoiceNotes.pdf).
- 51 Stanley K. Henshaw and Kathryn Kost, “Abortion Patients in 1994-1995: Characteristics and Contraceptive Use,” 28 *Family Planning Perspectives* 140, 147 (July/Aug. 1996).
- 52 Survey conducted by host of [www.afterabortion.com](http://www.afterabortion.com), a pro-choice, post-abortion support site. Survey available at [www.geocities.com/Athens/Parthenon/1362/surveyresults1.html](http://www.geocities.com/Athens/Parthenon/1362/surveyresults1.html).
- 53 Feminist Women’s Health Center, “Abortion is OK - A Call to Action,” at [www.fwhc.org/take-action/ok.htm](http://www.fwhc.org/take-action/ok.htm).
- 54 See the stories of Serena, Barbara, and Natalie at [www.fwhc.org/stories/story1.htm](http://www.fwhc.org/stories/story1.htm). For more, see [www.afterabortion.com](http://www.afterabortion.com) and [www.hopeafterabortion.com/hope.cfm?sel=C18L](http://www.hopeafterabortion.com/hope.cfm?sel=C18L).
- 55 For full text see [www.usccb.org/comm/archives/2005/05-004.shtml](http://www.usccb.org/comm/archives/2005/05-004.shtml).
- 56 Edward Lazarus, “Liberals, Don’t Make Her an Icon,” *The Washington Post*, July 10, 2005, B3.

# Roe Reality Check

1 *myth*: “High Court Rules Abortions Legal the First 3 Months.”<sup>1</sup>

**FACT**: Abortion is legal through all 9 months of pregnancy.

In *Roe v. Wade* the Supreme Court ruled that abortion may not be restricted at all in the first trimester; in the second trimester abortion may be regulated only for the mother’s health.<sup>2</sup> After “viability,”<sup>3</sup> abortion may be prohibited except where necessary to preserve the mother’s health.<sup>4</sup>

*Roe*’s companion case, *Doe v. Bolton*, defined maternal “health” as: “all factors — physical, emotional, psychological, familial, and the woman’s age — relevant to the well-being of the patient.”<sup>5</sup>

Thus, abortion is legal — and cannot be prohibited — in the 7th, 8th, or 9th months of pregnancy if any of these reasons is invoked.<sup>6</sup>

“[N]o significant legal barriers of any kind whatsoever exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy.”<sup>7</sup>

*Roe* Reality Checks were originally published as postcards sent to Congress, media, and others. The complete Reality Check series and other facts about *Roe* may be found at:

[www.usccb.org/prolife/issues/abortion/roevwade](http://www.usccb.org/prolife/issues/abortion/roevwade).

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**2** *myth:* Most abortions are done because of maternal or fetal health problems, or in cases of rape or incest.

**F A C T:** Abortions are rarely done for these reasons.

According to an Alan Guttmacher Institute survey,<sup>8</sup> women cite these as the main reason for an abortion in a very small percentage of cases each year:

- 1% “rape or incest”
- 3% “woman has health problem” (physical or mental)
- 3% “fetus has possible health problem”<sup>9</sup>

For all other abortions, the main reason cited is:

- 21% “unready for responsibility”
- 21% “can’t afford baby now”
- 16% “concerned about how having a baby could change her life”
- 12% “has problems with relationship or wants to avoid single parenthood”
- 11% “is not mature enough, or is too young to have a child”
- 8% “has all the children she wanted, or has all grown-up children”
- 1% “husband or partner wants woman to have abortion”
- 1% “doesn’t want others to know she has had sex or is pregnant”
- <0.5% “woman’s parents want her to have abortion”
- 3% “other”

Under *Roe v. Wade*, abortions for these reasons or any other reason must be legally permitted.<sup>10</sup>

**3** *myth:* Most Americans favor U.S. abortion law.

**F A C T:** Most Americans actually oppose it.

A 2005 Harris Interactive poll claims 52% of Americans favor *Roe v. Wade* and 47% oppose it.<sup>11</sup> But the poll describes *Roe* as “the U.S. Supreme Court decision making abortions up to three months of pregnancy legal.”

That’s wrong. The fact is, *Roe* made abortion legal through all 9 months of pregnancy.<sup>12</sup>

In the same poll, 72% of Americans said abortion should be *illegal* in the second three months of pregnancy, and 86% said abortion should be *illegal* in the last three months of pregnancy.

Even support for abortion in the first three months is open to question. In a 2004 Zogby International poll, 61% of Americans said abortion should not be permitted after the fetal heartbeat has begun.<sup>13</sup> This occurs in the first month.<sup>14</sup>

So why do 52% of Americans say they favor *Roe v. Wade*?

**Because they don’t really know what *Roe* did.**

**15** Cardinal William H. Keeler, in a January 6, 2005 letter to all U.S. Senators,<sup>55</sup> noted the following points — each of which was documented throughout this series:

- “For over three decades, *Roe* has sparked more informed criticism and public resistance than any other court decision of the late 20th century.”
- “Even legal scholars who support abortion have criticized *Roe* for not being grounded in the U.S. Constitution.”
- “Further, in 2000, the Supreme Court relied on *Roe* to rule that the gruesome and inhumane practice of partial-birth abortion must be constitutionally protected.”

Or, in the words of a former law clerk to Justice Blackmun, the *Roe* opinion’s author, *Roe* is a poor choice for a “litmus test” for judicial nominees, for “as a matter of constitutional interpretation, even most liberal jurists - if you administer truth serum - will tell you it is basically indefensible.”<sup>56</sup>

“By any measure,” said Cardinal Keeler, “support for the Supreme Court’s 1973 *Roe v. Wade* decision is an impoverished standard for assessing judicial ability.”

**Endnotes**

- 1 *New York Times*, January 23, 1973, A1; see also Associated Press-Ipsos Poll, November 19-21, 2004: “*Roe v. Wade* made abortion in the first three months of pregnancy legal.”
- 2 In the first trimester, “the abortion decision ... must be left to the medical judgment of the pregnant woman’s attending physician.” In the second trimester, the State may “regulate the abortion procedure in ways that are reasonably related to maternal health.” *Roe v. Wade*, 410 U.S. 113, 164 (1973).
- 3 “[T]hat is, potentially able to live outside the mother’s womb, albeit with artificial aid.” *Roe*, 410 U.S., at 160.
- 4 After viability, the State may “proscribe” abortion “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Roe*, 410 U.S., at 164-65.
- 5 *Doe v. Bolton*, 410 U.S. 179, 192 (1973). The “*Doe v. Bolton* ... opinion and this one, of course, are to be read together.” *Roe*, 410 U.S., at 165.
- 6 In *Planned Parenthood v. Casey*, the Court abandoned the trimester framework but reaffirmed the legality of abortion “subsequent to viability” for the “preservation of the ... health of the mother.” 505 U.S. 833, 879 (1992).
- 7 Senate Rep. No. 98-149, at 6 (1983).
- 8 A. Torres and J. Forrest, “Why Do Women Have Abortions?,” 20.4 *Family Planning Perspectives* 169-76 (July / Aug. 1988); still the best source of U.S. data according to A. Bankole et al., “Reasons Why Women Have Induced Abortions: Evidence from 27 Countries,” 24.3 *Family Planning Perspectives* 117-125, & 152 (Aug. 1998).
- 9 In most of these cases, no doctor had told the woman her child would have a defect or abnormality. See Torres, *supra* note 8, at 172.
- 10 See *supra* notes 2-7.
- 11 The Harris Poll #18, March 3, 2005.
- 12 See *supra* notes 2-7.
- 13 Zogby International Poll, April 15-17, 2004.
- 14 Keith L. Moore and T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology*, 7th edition: Philadelphia: W.B. Saunders Co., 2003, at 330.
- 15 “The Wages of Crying Wolf: A Comment on *Roe v. Wade*,” 82 *Yale Law Journal* 920, 947 (1973).
- 16 “The Lingering Problems with *Roe v. Wade*,” *FindLaw’s Writ*, Oct. 3, 2002, <http://writ.news.findlaw.com/lazarus/20021003.html>.
- 17 “Letting Go of *Roe*,” *The Atlantic Monthly*, January / February 2005, 48.
- 18 “Toward a Model of Roles in the Due Process of Life and Law,” 87 *Harvard Law Review* 1, 7 (1973).
- 19 *Doe v. Bolton*, 410 U.S. 179, 221-22 (1973) (White, J., with whom Rehnquist, J., joins, dissenting).
- 20 *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O’Connor, J., with whom Rehnquist, J., joins, dissenting) (internal citation omitted).
- 21 *Planned Parenthood v. Casey*, 505 U.S. 833, 995 (1992) (Scalia, J., with whom Rehnquist, C.J., White and Thomas, JJ., join, concurring in the judgment in part and dissenting in part).
- 22 *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., with whom Rehnquist, C.J., and Scalia, J., join, dissenting).
- 23 Ruth Bader Ginsburg, “Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*,” 63 *North Carolina Law Review* 375, 376 (1985).

13

*myth:* Abortion is standard medical practice; only religious hospitals and some physicians refuse to provide it.

**F A C T:** Even abortion advocates acknowledge that abortion is outside mainstream medicine.

The vast majority (86%) of all U.S. hospitals whether religious or secular, public or private, do not participate in abortions.<sup>47</sup>

71% of abortions in the United States are performed in free-standing abortion-dedicated clinics. Only 5% are performed in hospitals, 2% in physicians' offices and 22% in other kinds of clinics.<sup>48</sup>

A *New York Times Magazine* article reports, "The overwhelming majority of abortions are performed by a small group of doctors. (Some 2 percent of OB-GYN's carry the burden, performing more than 25 per month)."<sup>49</sup>

The medical community's stigmatization of abortion is acknowledged by Physicians for Reproductive Choice and Health, which says one of its "primary strategic goals is to eradicate the stigma that has become attached to abortion and abortion providers within mainstream healthcare."<sup>50</sup>

14

*myth:* *Roe v. Wade* empowers women to choose freely whether abortion is their best option.

**F A C T:** Legalized abortion has made it easy for others to pressure women into having abortions.

Not freedom, but "lack of control over one's life" is associated with high abortion rates, as is "lack of financial and social resources."<sup>51</sup>

An on-line survey of women who had abortions showed that many women feel pressured by the baby's father: 85% of fathers offered no encouragement to continue the pregnancy. When women said they wanted to continue the pregnancy, the fathers' dominant reactions were: "Slightly Upset 60%, Mad 38%, Very Angry 43%," compared to "Happy 0.7%." 73% of fathers suggested an abortion.<sup>52</sup>

80% of the women surveyed experienced guilt, 83% regret, 79% loss, 62% anger, and 70% depression.

Even a website which encourages women to consider abortion "so they can *freely* decide if it is their choice"<sup>53</sup> elsewhere posts personal stories describing pressure, coercion or abandonment by the baby's father.<sup>54</sup>

4

*Roe* said the Constitution includes a right to abortion.

**Yet even legal commentators who support legal abortion have said *Roe* is not good constitutional law.**

*Roe v. Wade* is "a very bad decision ... because it is *not* constitutional law and gives almost no sense of an obligation to try to be."<sup>15</sup>

- John Hart Ely, *Yale Law School professor*

"As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible ... [It is] one of the most intellectually suspect constitutional decisions of the modern era."<sup>16</sup>

- Edward Lazarus, *former clerk to Justice Blackmun (who authored Roe)*

"Since its inception *Roe* has had a deep legitimacy problem, stemming from its weakness as a legal opinion."<sup>17</sup>

- Benjamin Wittes, *Washington Post legal affairs editorial writer*

"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."<sup>18</sup>

- Laurence Tribe, *Harvard Law School professor*

5

**Supreme Court justices have criticized *Roe v. Wade*.**

"I find nothing in the language or history of the Constitution to support the Court's judgment" in *Roe v. Wade*.<sup>19</sup>

- Justice Byron White

"This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence ... no legal rule or doctrine is safe from ad hoc nullification by this Court ... in a case involving state regulation of abortion."<sup>20</sup>

- Justice Sandra Day O'Connor

*Roe v. Wade* "destroyed the compromises of the past, [and] rendered compromise impossible for the future ... [T]o portray *Roe* as the statesmanlike 'settlement' of a divisive issue ... is nothing less than Orwellian."<sup>21</sup>

- Justice Antonin Scalia

*Roe v. Wade* "was grievously wrong."<sup>22</sup>

- Justice Clarence Thomas

"*Roe v. Wade* ... ventured too far in the change it ordered and presented an incomplete justification for its action."<sup>23</sup>

- Justice Ruth Bader Ginsburg

6

*myth:* The U.S. abortion rate is relatively low.

**F A C T:** It is among the highest of all developed countries in the world.

In 1973, the Supreme Court in *Roe v. Wade* deemed "every [abortion] law — even the most liberal — as unconstitutional."<sup>24</sup>

Today the U.S. has the highest abortion rate in the western world, and the third-highest of all developed nations worldwide.<sup>25</sup>

There are 1.31 million induced abortions annually in the U.S., or 3,500 every day; 24.5% of all U.S. pregnancies end in abortion.<sup>26</sup>



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months.

**7** *myth:* Most American women support *Roe v. Wade*.

**FACT:** Most do not.

*Roe v. Wade* legalized abortion throughout pregnancy, for virtually any reason.<sup>27</sup> Yet according to a national survey of women published by the Center for Gender Equality, “only 30% think abortion should be generally available.”<sup>28</sup>

In fact, most women say abortion should be substantially limited or never permitted:

- 17% said abortion should never be permitted.
- 34% said abortion should be permitted only in cases of rape, incest, and to save the woman's life.<sup>29</sup>

And when asked to rank 12 issues in order of importance for the women's movement, women ranked “Keeping abortion legal” next to last.<sup>30</sup>

**8** *myth:* Most abortions are done before fetal organs are functioning.

**FACT:** Actually, the vast majority are done after the fetal heart has begun beating.

A fetal heart begins to beat at about 21 or 22 days after fertilization.<sup>31</sup>

That's at about 3 weeks of development.

77% of abortions in the United States are done well after this point.<sup>32</sup>

**9** *myth:* U.S. abortion law has not encouraged the use of abortion as a method of birth control.

**FACT:** Nearly half of all abortions are performed on women who have already had at least one.

Today, 48% of women having an abortion in the United States have had at least one previous abortion.<sup>33</sup>

In some states the rate of repeat abortions is much higher.

In Maryland, for example, 71.4% of those having an abortion have already had at least one. And 16.4% have had at least three prior abortions.<sup>34</sup>

**10** *myth:* Abortion is legal only when the fetus is in the womb.

**FACT:** Even a child who is partially-born can be legally aborted.

Partial-birth abortion kills a fetus during the process of delivery. At first, abortion providers said it was rare, and used only on women whose lives were in danger or whose fetuses were damaged. But Ron Fitzsimmons, then the Executive Director of the National Coalition of Abortion Providers, admitted he had “lied through my teeth.”<sup>35</sup>

He admitted that most partial-birth abortions are not done for “extreme circumstances” but are “primarily done on healthy women and healthy fetuses.”<sup>36</sup>

In 2000, the Supreme Court said states cannot ban partial-birth abortion even with an exception to save the mother's life.

The Court said such a ban violates “the woman's right to choose” established by *Roe v. Wade*.<sup>37</sup>

**11**

*myth:* If *Roe v. Wade* is overturned, abortion will automatically be illegal in the U.S.

**FACT:** If *Roe* is overturned, abortion policy will be decided through the democratic process in each state.

Before *Roe v. Wade*, all states permitted abortion if necessary to save the mother's life, and some permitted abortion in additional circumstances.<sup>38</sup> But *Roe* deemed “every [abortion] law — even the most liberal — as unconstitutional.”<sup>39</sup> As a result, no state can prohibit any abortion at any time during pregnancy.<sup>40</sup>

If *Roe* is overturned, policy decisions about abortion will be made by the citizens of each state through the democratic process, rather than by courts. Some states will place limits on abortion, in others there will likely be few limits.<sup>41</sup>

*Not until Roe v. Wade is reversed will the people again be able to govern themselves on the important public policy issue of abortion.*

**12**

*myth:* *Roe v. Wade* is only about a woman's right to abortion, not about a right to take life in general.

**FACT:** *Roe* has often been cited by state and federal judges to endanger human beings already born.

In 1986, relying on *Roe*, the Supreme Court invalidated a law intended to ensure care for children *born alive* during attempted abortions.<sup>42</sup>

In 1983, a U.S. district court invalidated a federal regulation to prevent medical neglect of handicapped newborns in hospitals receiving federal funds. The court said the regulation may “infringe upon the interests outlined in cases such as ... *Roe v. Wade*.”<sup>43</sup>

In 1980, a New York court cited *Roe* in a “right to die” case, arguing that the “claim to personhood” of a terminally ill comatose patient “is certainly no greater than that of the fetus.”<sup>44</sup>

In 1993, a Michigan judge cited *Roe* in dismissing criminal charges against Jack Kevorkian and declaring that the state law against assisted suicide was unconstitutional.<sup>45</sup>

And in 1996, the U.S. Court of Appeals for the Ninth Circuit relied heavily on *Roe* and its successor, *Planned Parenthood v. Casey*, in finding a constitutional “right” to assisted suicide.<sup>46</sup>

While some of these rulings were later modified or reversed, they all underscore how *Roe v. Wade* has been used to argue that ideas of privacy and liberty can trump life itself — after as well as before birth.