



Roe Must End:

The Legal, Historical, and Cultural Reasons to Overturn *Roe v. Wade*

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Key Points

Ever since the Supreme Court's *Roe v. Wade* decision in 1973, over 60 million people are missing from our country due to legalized abortion.

Jurisprudence, cultural, and scientific advancements demonstrate that *Roe* should by no means be considered "settled law."

There is currently broad public support to limit abortion. America is an outlier in extreme abortion laws internationally. The Supreme Court's flawed abortion jurisprudence must end.

Summary

Ever since the Supreme Court decided *Roe v. Wade* in 1973, unborn children have been killed at exponential rates in America. Over 60 million people are missing from our country due to legalized abortion. Public opinion, jurisprudence, and scientific advancements demonstrate that *Roe* should by no means be considered "settled law." *Roe* is an abomination in our country's history, and it is time for it to be overturned and for the horrendous practice of legalized abortion to end.

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The Law

The U.S. Constitution does not include a right to an abortion. Nevertheless, the U.S. Supreme Court held in *Roe v. Wade* that a woman has a constitutional right to an abortion under the Fourteenth Amendment's Due Process Clause.¹

The Court's decision in *Roe* set up a trimester framework for abortion laws (a framework that the Court would later abandon). In the first trimester, states could not restrict abortion for any reason. In the second trimester, regulations designed to protect a pregnant woman's health were permitted, but regulations to further a state's interest in the unborn child's life were not. In the third trimester, states could completely outlaw abortion, except when "necessary to preserve the life or health of the mother."² A companion case, *Doe v. Bolton*, was decided the same day. *Doe* has been interpreted to say that *Roe*'s health exception had to include a mental health component. This component made it almost impossible to restrict abortion in the third trimester.³ However, Justice Thomas has argued that even though *Doe* included emotional and psychological considerations, it in no way required as a matter of federal constitutional law, a mental health requirement after viability.⁴

In 1992, the Supreme Court revisited the constitutionality of abortion. In *Planned Parenthood v. Casey*, the Court retained *Roe*'s "central holding" that a woman has a right to an abortion. However, the Court rejected *Roe*'s trimester framework and instead held that a state may place restrictions on abortion prior to viability (*i.e.*, the point at which an unborn child can survive outside the womb) as long as the restrictions do not create an "undue burden" (*i.e.*, "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"). Furthermore, *Casey* maintained *Roe*'s holding that a state could prohibit abortion after viability.

In *Casey*, the Court once again acted with pure judicial activism. In his written opinion, Justice Antonin Scalia observed that the Court's justices had become and would continue to be "abortion umpires":

Roe fanned into life an issue that has inflamed our national politics in general, and has

obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees.⁵

Many lawyers on both sides of the abortion debate agree that *Roe* was poorly reasoned. Even Justice Ruth Bader Ginsburg, though supportive of “the woman’s choice,” was critical of the legal reasoning behind *Roe*.⁶ She agreed that the decision was far too sweeping of a decision by the Supreme Court.⁷ Justice Ginsburg also thought *Roe* should not have been decided under a right of privacy.⁸

Legal Issues with *Roe* and *Casey*

Casey upheld *Roe*'s “central holding” that a woman has a right to an abortion prior to viability under *stare decisis*. *Stare decisis* (Latin for “to stand by things decided”) is a legal principle that says courts should abide by their prior decisions (precedent) when deciding similar cases. *Stare decisis* provides predictability and strengthens the institution of the Court, but it is not absolute.⁹ For example, in *Plessy v. Ferguson*, the Court held that racial segregation was constitutional. This undermined an entire class of humans and treated them as sub-human. Thankfully, in *Brown v. Board of Education*, the Court corrected this grievous error and overturned *Plessy*. The Court rightfully struck down racial segregation and did not give *stare decisis* deference to *Plessy*.

Roe and *Casey* are far from settled law. The March for Life, held around *Roe*'s anniversary every year, draws hundreds of thousands of people. This large, peaceful protest of the Court's decision and many other similar protests across the nation indicate that the country has far from accepted *Roe* as “settled” law. No other Court decision continues to draw the same amount of controversy and dissatisfaction as *Roe*. In addition, states are increasingly challenging the Supreme Court's abortion jurisprudence, and at least one circuit court has already asked the Supreme Court to reexamine the viability standard. In 2019, Alabama's governor signed into law an almost total ban on abortion starting at conception.¹⁰ In 2021, the Eighth Circuit asked the Supreme Court to review its abortion jurisprudence.¹¹

Furthermore, *Roe* and *Casey* fail the *stare decisis* test outlined in *Casey*. This four-factor test asks:

- (1) whether the prior decision is unworkable (if the legal test is hard to apply),
- (2) whether related principles of law now undermine doctrine,
- (3) whether facts have changed so much that the rule has little practical application, and
- (4) whether there is a reliance factor (people have planned their life around it).¹²

Stare decisis is especially weak with respect to constitutional precedents because they can only be altered or overruled by the Supreme Court itself or by a constitutional amendment.¹³

What follows is an explanation of why *Roe* and *Casey* do not meet the criteria for *stare decisis* outlined in *Casey* and, consequently, do not have the strength to survive.

1. *Roe* and *Casey* Are Unworkable

The viability standard in the abortion jurisprudence of *Roe* and *Casey* is unworkable and hard to apply. Therefore, both decisions fail to meet the criteria of the first part of the *stare decisis* test. Viability is an arbitrary and continuously moving marker, making it a poor standard of when a state should be allowed to protect unborn human life. In the 47 years since *Roe*, the average age of viability has moved up, from 28 weeks¹⁴ to anywhere between 22-24 weeks.¹⁵ Multiple babies have even survived at 21 weeks.¹⁶ Whether or not a child is viable is a case-by-case question, not a standard that applies to every unborn child.

In addition, the Court ruled in *Casey* that a state regulation restricting abortion cannot have the effect of imposing an “undue burden” on the woman’s ability to attain an abortion before the baby is viable. The undue burden standard has left lower courts without much guidance. What constitutes an undue burden to one judge does not to another. Does having to drive 26 miles to obtain an abortion constitute an undue burden, while driving 25 does not? Lower courts need concrete guidance, not a subjective standard.

Abortion is one of the most litigated and controversial issues in our country. Rather than settling the issue, the broad sweep of *Roe* created enormous upheaval. The controversy surrounding viability and undue burden, together with constant circuit splits, proves that the Court has not provided proper guidance or a workable test. For example, one panel of judges in the Sixth Circuit held that Tennessee is currently able to enforce its abortion ban based on a prenatal diagnosis of Down syndrome, sex, or race of the unborn child.¹⁷ However, the Seventh Circuit struck down Indiana’s laws forbidding abortion based on the same prenatal diagnoses.¹⁸ This further illustrates the point that the Supreme Court should remove itself from the business of judicial activism and mandating abortion as a constitutional right.

2. Related Principles of Law Undermine Abortion Doctrine

Related principles of law, such as fetal homicide laws, undermine the abortion doctrine found in *Roe*. Therefore, *Roe* fails to meet the criteria of point two of the *stare decisis* test. In *Roe*, the Supreme Court famously observed that “[w]e need not resolve the difficult question of when life begins.” In criminal law, however, many jurisdictions charge the perpetrator with homicide in instances of feticide, thus protecting and recognizing unborn lives. Under the *Roe/Casey* framework, it would be unconstitutional for a state to protect an unborn child from abortion prior to viability; yet, in the same jurisdictions, it is legally permissible to charge a third party with homicide for ending the life of the unborn. In fact, 38 states have fetal homicide laws.

The feticide criminal laws demonstrate that states, contra *Roe*, are not required to remain neutral concerning the question of when human life begins. Rather, the scope of homicide laws implicates core concerns of due process and equal protection—whose life is entitled to protection from unjustified killing, and who may be punished to the fullest extent of the law for taking an unborn life? Feticide laws, which resolve this question in favor of protecting unborn life, reveal a fundamental inconsistency

in the law that arises from *Roe*'s agnostic approach to when life begins. While some states recognize feticide as a form of homicide, *Roe* requires those same states to provide an exception for abortion. If the taking of an unborn life constitutes a homicide, then the criminal law should not distinguish between a medical abortion and a third party harming the unborn. Inconsistencies between *Roe* and state feticide laws raise philosophical and legal questions that scholars and judges must confront and resolve.

There is a fundamental inconsistency in the current legal landscape in the protection of the unborn. No one has seriously challenged states' right to protect the unborn as human persons under homicide laws and to prosecute third parties as murderers for terminating such life. But because of the constitutional right to an abortion recognized in *Roe*, those same laws must provide an exception for abortion. Only when the Supreme Court and state legislatures recognize the right to life of unborn children will the law be able to fully and consistently protect the most vulnerable among us.

3. Facts Have Changed

Justice Blackmun's 1973 majority opinion in *Roe* claimed that it was unknown when human life begins. Science has progressed significantly since 1973—and since 1992, when *Roe* was affirmed in *Casey*. The developing science further proves that life begins at conception. We know that:

- a baby's heart starts to beat at around six weeks;
- a baby's heartbeat can be heard through an ultrasound examination at around eight weeks;
- a fetal Doppler can detect a fetal heartbeat as early as 10 weeks;¹⁹
- ultrasound imaging shows the developing child in utero; and
- it is possible to know the baby's sex, determined at conception, at around 10 weeks.

Abortion stops the development of a human being. Fetuses are not toddlers, toddlers are not teenagers, and teenagers are not adults, yet each person is no less of a person based on their stage of human development. The moment of a child's viability does not determine her humanity. While a person on life support may be fully dependent on a machine to keep her alive, she is no less human. Whether one is able to survive on her own does not determine her right to exist.

In addition, as mentioned above, the viability standard previously set forth by the Court has proved undependable due to scientific advancements. The viability of a premature baby has moved up from about 28 weeks at the time of *Roe* to about 22 weeks today. This date of viability is bound only to get earlier as science progresses.

Fetal surgery has also progressed. Doctors are now able to operate on children in the womb to save their lives. Because these children are capable of feeling pain, they are administered anesthesia to prevent the pain from the surgery.²⁰ Despite this, children of the same gestational age are not protected from abortion under *Roe*. Unborn children who are being aborted are no less human than the unborn children receiving life-saving operations. The medical and scientific advancements prove the truth about the humanity of children in the womb.

Take the case of Ellie Schneider. Born at 21 weeks, *Roe* and *Casey* offered her no legal protections. She could have been aborted because she was younger than most viable children. Today, she is a thriving three-year-old girl.²¹ Even if viability somehow conferred humanity on the unborn, prenatal science is constantly progressing, making *Roe* and *Casey*'s viability marker a constantly-moving target. Abortion is an affront to human dignity. With the scientific facts we know, it is unacceptable to keep abortion legal.

4. Reliance

In deciding to apply *stare decisis* to a case, the justices analyze whether there is a strong reliance interest. This means whether people have settled expectations around a certain legal understanding. Some may argue that women have a reliance interest in the ability to obtain an abortion. However, there is little reliance interest at stake, making *Roe* fail the last portion of the *stare decisis* test. Reliance interest holds more weight in terms of contract or property law—neither of which are involved in abortion jurisprudence.²² Recently, in *Janus v. AFSCME*, the Supreme Court emphasized that reliance is not as important as the other factors when overruling a decision that will only have a short-term impact on expectations and when affected parties have the ability to protect themselves against the changes that would result.²³ Reversing *Roe* would merely have a short-term effect on existing pregnant women, and it would be unconscionable to permit the right to life to be abridged in order to preserve reliance that will expire in nine months or less.

In conclusion, the Supreme Court's broad judicial overreach in *Roe* and *Casey*, creating ever-evolving standards that do not stand the test of time, illustrate that the Court is in over its head when it comes to its abortion jurisprudence. Neither case is worthy of *stare decisis* deference.

The Eugenic Roots of the History and Current Practice of Abortion

Roe and *Casey* can be overturned, and there are very good reasons why they should be. One of them is abortion's long shared history with eugenics in the United States. We know much more about this shared history than we did in 1973 when *Roe* was decided.

Margaret Sanger,²⁴ the founder of America's largest abortion business, Planned Parenthood, embraced eugenic philosophy and believed birth control to be "nothing more or less than the facilitation of the process of weeding out the unfit" and the "greatest and most truly eugenic method." Sanger believed in "racial health" and reducing the "ever increasing, unceasingly spawning class of human beings who

never should have been born at all.” In 1933, Planned Parenthood (then known as the American Birth Control League) and the American Eugenics Society (AES) attempted an unsuccessful merger. Dr. Alan Guttmacher, for whom a leading abortion research organization, the Guttmacher Institute, is named, served as vice president of the AES and president of Planned Parenthood Federation of America from 1962-1974.

Although eugenics is a philosophy largely disavowed today, there is considerable evidence that the present-day corporate practices of abortion businesses disproportionately impact the birthrates of minority communities. For example, 79 percent²⁵ of Planned Parenthood’s surgical abortion facilities are located within walking distance of communities identified as Black or Hispanic by the 2010 census. In 2016, the Centers for Disease Control and Prevention (CDC) reported that African American women are 3.5 times more likely to have an abortion than white women.²⁶ Also, the U.S. Census Bureau reports that the black population “grew at a slower rate than most other major race and ethnic groups in the country” between 2000 and 2010.

The *Roe v. Wade* decision was laced with population control ideals, citing many eugenic references.²⁷ Justice Ginsburg said in a *New York Times* interview, “Frankly I had thought that at the time *Roe* was decided, there was concern about population growth and particularly growth in populations that we don’t want to have too many of.”²⁸ In *Elle* magazine,²⁹ Justice Ginsburg also insinuates that poor people should have ready access to abortions because “[i]t makes no sense as a national policy to promote birth only among poor people.”³⁰ Abortion being used as a tool of eugenics is something we all know is true, “but we only whisper it,” said a co-counsel to *Roe* and advisor to Bill Clinton.³¹

But minorities and the poor are not the only groups victimized by abortion. Sex or a disability diagnosis can also make an unborn child vulnerable to being aborted. In May 2019, Justice Clarence Thomas wrote a lengthy opinion in *Box v. Planned Parenthood*³² in which he cited the eugenic roots of abortion and its continued eugenic potential to rid society of those least wanted:

Whereas Sanger believed that birth control could prevent “unfit” people from reproducing, abortion can prevent them from being born in the first place. Many eugenicists therefore

supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher—endorsed the use of abortion for eugenic reasons. Technological advances have only heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability.³³

Ninety-two percent of children diagnosed with Down syndrome are aborted.³⁴ Sixty-seven percent of these abortions are in the United States.³⁵ It should go without saying that children with Down syndrome deserve to live, and the targeting of them in the womb is yet another example of why abortion should not be legal nor accepted. The targeting of vulnerable populations in the womb highlights the culture of death and suppression that surrounds abortions.

Typically, sex-selective abortion is thought of as an evil that plagues countries in Asia, but evidence shows that from 2014-2018, sex-selective abortions occurred in the United States. During those years, the sex ratio at birth for third children of foreign-born mothers of Indian ethnicity is at least 10 points higher than it would naturally occur. Additionally, from 2014-2018, the sex ratio at birth for third children of foreign-born women of Chinese ethnicity is at least 17 points higher than it would occur naturally.³⁶ These anomalies account for approximately 8,400 missing female newborns due to parental “intervention,” also known as sex-selective abortion. While reporting laws make it impossible to tell where these abortions took place, the number of missing newborn baby girls is evidence that they, too, are targeted by abortions.

It's the Right Time to Overturn *Roe* and *Casey*

Morally, it has always been the right time to overrule *Roe* and *Casey*. However, it has never been more the right time politically than it is right now. Pro-life momentum around the country is hard to deny, and evidence showing the need to protect unborn human life is greater than ever before. On the Supreme Court (often seen as an obstacle to life), Justice Amy Coney Barrett has replaced Justice Ginsburg, creating a 6-3 conservative majority. This should embolden the Court to overrule *Roe* with a decision decided by a larger majority of the justices, making it more likely to endure.

There is also currently broad public support to limit abortion. While *Roe* and *Casey* allow abortion at any age for any reason, they are out of step with the American people. The Marist Poll released data from 2019 showing that only 29 percent of Americans believe abortion should be legal after the first trimester.³⁷ While the Left is loud in claiming that Americans want *Roe*, the fact remains that the American people don't support abortion after the first trimester. In addition, America is an outlier in extreme abortion laws. Most countries around the world limit abortion. The most common gestational limit is 12 weeks; America has none.³⁸

Conclusion

The barbaric practice of killing our youngest and most vulnerable humans is past-due to end. The Supreme Court should have never legislated it in *Roe* and *Casey*. It is time that the unborn are protected from abortion. The Supreme Court's flawed abortion jurisprudence must end.

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² *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

³ *Ibid.*

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