

News Analysis: What Happens if *Roe v. Wade* is Overturned?

Currently, the right to abortion is protected under landmark US Supreme Court decisions, *Roe v. Wade* (and its lesser-known companion *Doe v. Bolton* decided on the same day) in 1973 and *Planned Parenthood v. Casey* in 1992. "Viability" is defined to occur when a fetus is sufficiently developed to live, with artificial aid, outside the womb, usually about 24 weeks (6 months) into a pregnancy. Prior to viability, the government cannot impose an "undue burden" that interferes with a woman's right to an abortion. After viability, the government cannot impose an "undue burden" that interferes with a woman's right to an abortion medically necessary to preserve her life or health.

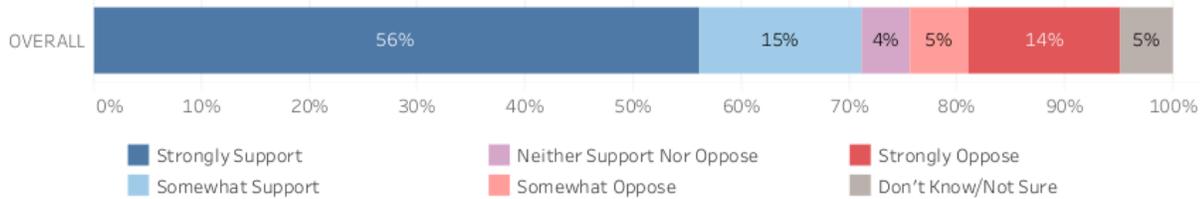
But in the 46 years since *Roe* was decided, political efforts to overturn it have never stopped, and Donald Trump while campaigning for the presidency explicitly promised to make that happen. In the third and final candidates debate in October 2016, moderator Chris Wallace asked, "Do you want the [Supreme] Court, including the justices that you will name, to overturn *Roe v. Wade*, which includes - in fact, states - a woman's right to abortion?" Trump answered, "Well, if we put another two or perhaps three justices on... that will happen... because I am putting pro-life justices on the court. I will say this: It will go back to the states, and the states will then make a determination."

Since then, Trump has appointed two justices, Neil Gorsuch in April 2017 and Brett Kavanaugh in October 2018, both of whom are believed to be friendly to the possibility of overturning *Roe* should the opportunity arise in a future case, providing the necessary votes to form an anti-*Roe* bloc on the nine-member court. If *Roe* is overturned, Trump is correct: Each state would again be free to make its own law, prohibiting or allowing abortion, imposing whatever conditions and restrictions resulted from the political process. What would that mean in practice?

The Reproductive Privacy Act (H.5125) and the Reproductive Health Care Act (H.5127) were introduced into the RI House of Representatives on Jan 16. The stated goal of each is to write into RI state law the current federal standards even if the Supreme Court overturned or weakened those. Both were given hearings on January 25 and then on January 29 were "held for further study" - which means their legislative future is anybody's guess. (Note: On March 7, the House passed H.5125 Substitute A and sent it to the Senate for consideration. On June 19, H.5125 Substitute B was enacted in concurrence by the Senate and House, and promptly signed into law by the governor.)

An October 2018 poll of RI voters conducted by the University of New Hampshire Survey Center asking "Thinking about the next session of the General Assembly, would you support or oppose the General Assembly passing a bill to protect legalized abortion in the state?" found 71% support, 20% oppose and 9% neutral or not sure. Abortion opponents have questioned the accuracy and legitimacy of the poll, and have asserted contrary polling data.

Figure 24: Thinking about the next session of the General Assembly, would you support or oppose the General Assembly passing a bill to protect legalized abortion in the state?



UNH poll of RI voters, Oct 2018
(UNH Survey Center)

A group calling themselves “Citizens for Life, Liberty, and the Pursuit of Happiness” (under the auspices of the Gaspee Project that advocates for a range of anti-progressive causes such as opposing an HPV vaccine mandate) have made absurd claims that the proposed state legislation would legalize infanticide, stating on their website (including the all capital letters) “Rhode Island Progressives are trying to legalize the killing of an unborn baby - for any reason - UP UNTIL BIRTH,” and conducting their own poll that bizarrely found “an overwhelming majority of Rhode Islanders - 73.8% - believe that abortion should not be legal up until birth.” Of course, no sane person supports “abortion” until immediately before birth - it’s puzzling what the remaining 26.2% might have been thinking - and the proposed laws would allow no such thing.

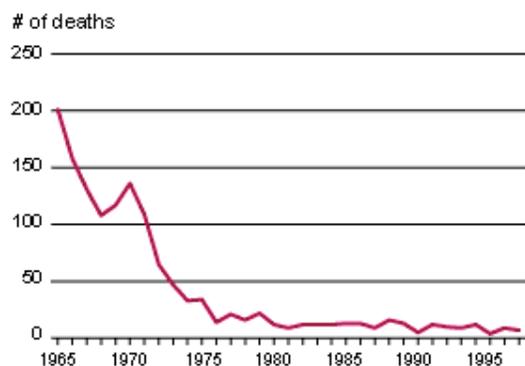
Before *Roe* in 1973, nearly all states still had laws on the books, often enacted a hundred years earlier, making it a crime to provide abortion services, but 17 states made exceptions. Often a woman was allowed to have an abortion if she could convince a panel of doctors to sign off on the basis of medical necessity.

David A. Grimes, former chief of the Abortion Surveillance Branch at the Centers for Disease Control (CDC), in 2015 wrote in *The Huffington Post*, “Women of means sometimes could find a physician to help, or they could travel to a country like Sweden where abortion was available. In the 1950s, access to safe, hospital abortions was related to socioeconomic status and race.”

By 1970, four states - Alaska, Hawaii, New York, Washington - legalized abortion under substantially the same rules that *Roe* would impose, eliminating hospital panels and other obstacles. Of the four, only New York declined to impose a 30-day residency requirement, making it the destination for women throughout the country who could not get an abortion in their own state. Only women who were wealthy enough to travel to New York or had the resources to convince a panel of doctors had access to safe abortion, and many poor women chose unsafe abortion.

Abortion Mortality

The number of deaths from abortion has declined dramatically since *Roe v. Wade*.



Source: The Alan Guttmacher Institute, *Trends in Abortion in the United States, 1973-2000*, January 2003.

Abortion mortality, 1965-1997 (Guttmacher Institute)

A half-century ago, before *Roe*, as many as 1.2 million abortions took place in the US each year, despite being illegal, the Guttmacher Institute estimates. We know this because abortion was the official cause of death for 2,700 women in 1930; the true number was likely several times that. Improvements in medicine, especially the discovery of antibiotics that were effective in treating the septic infections resulting from unsafe abortion, reduced the official death toll to 1,700 in 1940, to 300 in 1950, and to 200 in 1965. Even if botched illegal abortion did not result in death, it could leave women seriously disabled and often infertile. Treating the large number of medical emergencies resulting from illegal abortion placed enormous stress on the healthcare system, especially for poor women: Just in 1962, Harlem Hospital Center in New York City admitted 1,600 women for abortion complications, most life-threatening.

A week before the 2016 presidential election, *Cosmopolitan* interviewed two doctors old enough to remember what it was like before *Roe*. One provided illegal but safe abortions beginning in 1967, aided by - interestingly - an underground network of Protestant ministers; he is quoted saying, "The frightening thing about what Donald Trump said is, yes, reversing *Roe v. Wade* is a possibility. I hope it's no more a possibility than Donald Trump being elected president, but there is that possibility. It's frightening to think, 'What if that happened?' After all we've fought for, we're only one Supreme Court justice away from reversing *Roe v. Wade* completely."

Sources

Anyone interested in the history of abortion in law and politics should consult two definitive texts, both by coincidence 407 pages.

- *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (1997) by

Leslie J. Reagan is the only treatment of the century prior to *Roe*, explaining the surprisingly dynamic circumstances that chipped away locally at theoretically total prohibition.

- *Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling* (2013) by Linda Greenhouse and Reva B. Siegel of Yale Law School is a masterpiece of research assembling primary source material in a single volume focusing on the legal and political environment leading up to *Roe*, and it is available for https://documents.law.yale.edu/sites/default/files/BeforeRoe2ndEd_1.pdf free download under a Creative Commons license. (Greenhouse, before retiring to teach at Yale Law, covered the Supreme Court for *The New York Times* from 1978 to 2008, for which she won the Pulitzer Prize in 1998.) Kali Borkoski of SCOTUSblog interviewed Greenhouse in 2013 upon the release of the second edition of the book.