



# AFTER ROE V. WADE

## AFTER ROE V. WADE: WHAT COMES NEXT?



On June 24, 2022, the Supreme Court handed down a landmark decision in *Dobbs v. Jackson Women’s Health Organization*, concluding that the Constitution does not include a right to abortion. The decision overruled the **precedents** of *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), and returned the question of whether to allow, restrict, or ban abortion to the states.<sup>1</sup>

So, what happens now? Americans are suddenly confronting a new policy landscape in which abortion laws vary from state to state. In this Close Up-ASP Homeroom resource, we’ll examine how officials at the state and federal levels are reacting, as well as the questions still to be answered on the road ahead.

## ABORTION POLICY AND THE SUPREME COURT



In the fledgling years of the United States, there were no abortion laws. Women—not doctors—passed down the knowledge of childbirth to each other, and if a woman wished to end a pregnancy, she would self-administer a substance (a medicine or a concoction of herbs, for example) to do so. The first abortion law came about in 1821, when Connecticut made it illegal for a woman to ingest poison or another “noxious and destructive substance” to end a pregnancy after the point of **quickening**.<sup>2</sup>

Throughout the 19th century, doctors began to professionalize and assert a primary role in childbirth, and they also started to denounce abortion. State after state criminalized abortion, with nearly every state classifying the procedure as a felony by 1967.<sup>3</sup> But the tide began to turn in the early 1970s, as the ability to obtain a safe and legal abortion became a major issue pertaining to the freedoms of women. Approximately 20 states changed their laws to allow abortion in certain circumstances, including four (Alaska, Hawaii, New York, and Washington) that legalized the procedure.<sup>4</sup>

Which brings us to *Roe v. Wade*. Prior to *Roe*, states were responsible for deciding whether, and under what circumstances, to allow, restrict, or ban abortion. But in *Roe*, the Supreme Court struck down a Texas law that banned all abortions except those ordered by a doctor to save the life of a mother.

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In *Roe*, the Supreme Court ruled that the Texas law **infringed** upon an **inherent** right to privacy in the 14th Amendment, which was previously recognized in *Griswold v. Connecticut* (1965). The Court also went on to create a timeline of when a state could and could not regulate a woman's decision to have an abortion.

- During the first trimester of pregnancy (weeks 1-12), a state could not regulate the abortion decision; only a woman and her attending doctor could make the decision.
- After the first trimester through the point of **fetal viability** (cited by the Court as usually 24-28 weeks), a state could enact regulations reasonably related to protecting a mother's health.
- After fetal viability, a state could regulate or even ban abortion, except when medically necessary to save the life or health of a mother.<sup>5</sup>

In other words, *Roe* greatly limited state power to regulate abortion, except in later-term pregnancies.

Next came *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which examined a Pennsylvania law that required (1) a 24-hour waiting period before an abortion, (2) a minor seeking an abortion to obtain the consent of one parent (with a judicial bypass procedure in place), and (3) a married woman seeking an abortion to indicate that she had notified her spouse. The Supreme Court struck down the provision regarding married women but upheld the rest of the law. The decision created a new standard for determining if an abortion law was unconstitutional: if it imposed an "undue burden" or a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."<sup>6</sup>

Finally, *Dobbs v. Jackson Women's Health Organization* came about when Mississippi passed a law banning nearly all abortions after 15 weeks of pregnancy. This time, the Supreme Court upheld the law and overruled both *Roe* and *Casey*, calling *Roe* in particular "egregiously wrong from the start." The Court argued that the Constitution makes no mention of abortion and does not **implicitly** protect such a right. Among the reasons to overrule *Roe* and *Casey* were that they "short-circuited" the democratic process, established tests that were not workable, and lacked grounding in the text of the Constitution, history, or precedent. Justice Samuel Alito wrote in the majority opinion, "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."<sup>7</sup>

In addition to Justice Alito's majority opinion, Justices Clarence Thomas and Brett Kavanaugh wrote **concurring opinions** and Chief Justice John Roberts wrote an opinion concurring with the judgment to uphold the Mississippi law but disagreeing with the decision to fully overrule *Roe* and *Casey*. Justice Elena Kagan authored the dissent.

## QUESTIONS TO CONSIDER



- Is it better for a right to be granted by a court or established by a legislature? Why?
- When interpreting the Constitution, should the Supreme Court follow the original intent of the text at the time it became law? Or should it treat the Constitution as a living document that evolves over time? Explain your answer.
- Is there a danger of a court finding rights that are not written or implied in the Constitution? Explain your answer.

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## WHAT IS HAPPENING IN THE STATES?



### Track Where Abortion is Allowed, Restricted, and Banned

Prior to *Roe v. Wade*, states were responsible for deciding whether, and under what circumstances, to allow, restrict, or ban abortion. Now that *Roe* is overruled, that responsibility returns to the states.

- In 20 states and the District of Columbia, abortion is legal and likely to remain so.<sup>8</sup>
- In 13 states, the overruling of *Roe* automatically enacted a **trigger ban** (a law, already passed by a legislature, to ban abortion in most or nearly all cases should *Roe* ever be overturned). Some trigger bans went into effect immediately, others within 30 days.<sup>9</sup>
- In some states, abortion policy reverted to a pre-*Roe* ban or early-pregnancy restrictions that had been blocked by courts under *Roe*.
- In other states, abortion policy will be decided in the coming months, as the midterm elections determine who controls the legislature, the governor's office, and the setting of abortion policy.

It's a rapidly changing landscape, with more changes to come. In some states, officials are working to interpret old, vague laws that have been reenacted. Doctors are attempting to understand what is legal in their state and when. And courts are seeing a flurry of lawsuits, namely those filed by abortion rights activists who are challenging state abortion bans.<sup>10</sup>

In short, U.S. abortion policy is a patchwork of different laws in different states. Americans can expect to see bans and tighter restrictions in conservative states, widespread access in liberal states, and a great deal of continued debate in states with more moderate populations.

## QUESTIONS TO CONSIDER



- What is the abortion policy in your state? Do you agree or disagree with that policy? Why?
- What are the benefits of states setting their own abortion policies? The drawbacks?

## WHAT IS HAPPENING AT THE FEDERAL LEVEL?



Congress writes the laws of the United States, so in theory, it has the power to pass a law governing national abortion policy, as long as it does not exceed its constitutional authority. However, the 117th Congress is closely divided, with Democrats holding only slim majorities.

- **House of Representatives:** 220 Democrats, 211 Republicans, 4 vacant seats
- **Senate:** 48 Democrats, 2 independents who caucus with Democrats, 50 Republicans (*\*Vice President Kamala Harris, a Democrat, acts as the tie-breaking vote*)

Due to the slimness of those majorities, as well as the Senate's cloture rule that requires 60 votes to end debate on most legislation, it is unlikely that Congress will pass an abortion law this year.<sup>11</sup> However, with every member of the House and one-third of senators up for election in November 2022, control of the next Congress is up for grabs (although the White House will remain in Democrats' hands until at least January 2025).

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So far, the parties have introduced several bills that reveal their priorities. Democrats have introduced:

- **Women’s Health Protection Act:** Representative Judy Chu’s, D-Calif., bill would outlaw governmental restrictions on the provision of, and access to, abortion services. It passed the House by a vote of 219-210 but failed to advance in the Senate, 49-51.<sup>12</sup>
- **Ensuring Women’s Right to Reproductive Freedom Act:** Representative Lizzie Fletcher’s, D-Texas, bill would prohibit anyone acting under state law from interfering with a person’s ability to access abortion services out of state. It would prevent retaliation against patients who travel out of state to receive abortions and out-of-state providers who legally perform those services. The House passed the bill 223-205; the Senate has not taken action as of July 2022.<sup>13</sup>

Republicans have introduced:

- **Pain-Capable Unborn Child Protection Act:** Senator Lindsey Graham’s, R-S.C., bill would outlaw abortions for pregnancies at 20 weeks or more (with exceptions for abortions that are necessary to save the life of a mother or that are for pregnancies caused by rape or incest). The bill was introduced in the House and Senate, but no action has been taken as of July 2022.<sup>14</sup>
- **Reproductive Choice Act:** Senator Susan Collins’s, R-Maine, bill would set in law the protections of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. No action on the bill has been taken as of July 2022.<sup>15</sup>

While it is unlikely that any of these bills will reach President Joe Biden’s desk during the 117th Congress, the president has his own power to affect abortion policy through executive action. In July 2022, he signed an executive order emphasizing White House support for protecting access to abortion by medication, for contraceptives, and for emergency medical services. But some of President Biden’s fellow Democrats have pushed the White House to do more, with ideas that include:

- Declaring a public health emergency.
- Committing the Department of Justice to get involved in lawsuits that challenge state abortion bans or defend a person’s right to an abortion by medication.
- Committing Medicaid resources to fund travel for people who cross state lines for an abortion.
- Establishing abortion clinics on federal land.<sup>16</sup>

## QUESTIONS TO CONSIDER



- What are the benefits of Congress setting nationwide abortion policies? The drawbacks?
- What are the benefits of the president setting abortion policies by executive action? The drawbacks?
- Take a look at the abortion bills that have been proposed in Congress. Is there one you agree with? Is there something else you would like to see enacted? Explain your answer.

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## WHAT ABOUT FEDERALISM?



As states take the lead on crafting their own abortion policies, they are highlighting the benefits and drawbacks of **federalism**. In this system, power is divided and shared between federal and state authorities, with the Constitution giving the federal government specific powers over issues of national concern and state governments more broad powers that are undefined.

In the eyes of some Americans, having each state set its own abortion policy is exactly as it should be. Alabama can represent the priorities of its residents, California can reflect the desires of its residents, and voters in both states can hold their legislators accountable. “Whoever is in power in Washington, D.C., whether it’s Republicans or Democrats, roughly 50 percent of the country is angry about everything that is happening,” explained Mark Meckler, president of the Convention of States. “There’s too much being decided in D.C., and the way we solve the discord and calm everything down is to take the power away from D.C. and give it back to the states.”<sup>17</sup> But for other Americans, it is unacceptable for states to ban or restrict something that they believe should be a protected right for all.

Federalism also introduces natural tensions between the federal government and state governments, as well as the possibility for tensions between states. For example:

- What will happen if the federal government overrides state laws with a nationwide abortion policy?
- What will happen if a state bans an abortion pill that has been approved at the federal level by the Food and Drug Administration?<sup>18</sup>
- What will happen if states begin to pass laws that seek to prevent their residents from having abortions in other states, as Missouri lawmakers were considering in early 2022?<sup>19</sup>

## QUESTIONS TO CONSIDER



- Should abortion law be set by the state or federal government? Explain your answer.
- Is it right for elected officials representing California to set abortion policies that affect residents of Alabama? Or for elected officials representing Alabama to set abortion policies that affect residents of California? Explain your answer.
- What should happen if a federal law allows abortion in circumstances that conflict with a state law?

## THE FUTURE OF PRIVACY RIGHTS



The overruling of *Roe v. Wade* has also ushered in an era of uncertainty about privacy rights.

First, there’s the idea of a **right to privacy**—a right to make important personal decisions without government interference. There is no explicit right to privacy in the Constitution, but over the years, a number of court cases have found an inherent right to privacy in the 14th Amendment, including *Griswold v. Connecticut* (which dealt with the right of married people to obtain contraceptives), *Eisenstadt v. Baird* (the right of unmarried people to obtain contraceptives), *Roe*, *Lawrence v. Texas* (the right to engage in private, consensual sexual acts), and *Obergefell v. Hodges* (the right to same-sex marriage). In *Roe*, for example, the Supreme Court concluded, “The right of privacy ... founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action ... is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>20</sup>

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Now that *Roe* is overruled due to its lack of standing in the Constitution, it raises questions about the right to privacy. In his concurring opinion in *Dobbs v. Jackson Women’s Health Organization*, Justice Thomas suggested that the Supreme Court “should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.” But the Court’s majority opinion indicated this would not happen, as the abortion right is “critically different” from the rights to intimate sexual relations, contraception, and marriage found in the 14th Amendment. “Abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called ‘fetal life’ and what the law now before us describes as an ‘unborn human being,’” wrote Justice Alito.<sup>21</sup>

Still, *Dobbs* led the House to pass the Respect for Marriage Act in July 2022, by a vote of 267-157. The bill, introduced by Representative Jerrold Nadler, D-N.Y., would make a marriage legal under federal law if it was legal in the state where it took place. The bill would also prohibit anyone from denying “full faith and credit” to an out-of-state marriage on the basis of sex, race, ethnicity, or national origin. The bill was introduced in the Senate, but no action has been taken as of July 2022.<sup>22</sup>

Second, there’s the idea of digital privacy. With abortion now illegal in some states, much remains unknown about what kinds of data could be used as evidence against someone who is accused of obtaining or performing an unlawful abortion. Text messages, emails, Google searches, browser histories, location data, fertility tracking apps, or fitness apps could potentially come into play, especially because users often give up data protections when they agree to a service provider’s terms.

This has led some policymakers to pursue more substantive protections on Americans’ personal data. For example, in June 2022, four congressional Democrats wrote to Federal Trade Commission chairwoman Lina Khan asking her to investigate Apple and Google for allegedly deceiving millions of mobile phone users by enabling the collection and sale of their personal data to third parties.<sup>23</sup>

## QUESTIONS TO CONSIDER



- Is it appropriate for the government to limit how companies can use the personal data of people who sign up and subscribe for their services? Explain your answer.

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**Precedent:** An earlier case or action regarded as a guide to be considered in subsequent cases with similar circumstances

**Quickening:** The point at which a pregnant woman feels a baby's movements in the womb

**Infringe:** To limit, undermine, encroach on

**Inherent:** Part of the nature of a person or thing

**Fetal viability:** The point at which a fetus can survive outside the womb

**Implicit:** Implied but not plainly expressed

**Concurring opinion:** An opinion that agrees with the decision made by a court but not the reasons behind the decision

**Trigger ban:** A law, already passed by a legislature, to ban abortion in most or nearly all cases in the event that *Roe v. Wade* was overturned

**Federalism:** A system of government in which power is divided and shared between federal and state authorities

**Right to privacy:** A right to make important personal decisions without government interference; it is not explicitly written in the Constitution but it has been found to exist within the 14th Amendment

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