



Beyond Roe: The Floor, Not The Ceiling

With recent changes to the makeup for the U.S. Supreme Court, there is a concern that *Roe v. Wade* will be overturned. The Supreme Court is set to review Mississippi's 15-week abortion ban, which is a direct challenge to *Roe* and the nearly 50 years of precedent that the landmark decision has established. But the Supreme Court does not have to officially overturn *Roe* for people to be unable to exercise their right to abortion. Since the Supreme Court's decision in *Roe*, states have enacted over 1,300 abortion restrictions.¹ In 2021 alone, nearly 600 abortion restrictions have been introduced by state-level legislators in 47 states, and 90 of those bills have been enacted into law — more than in any year since *Roe* was decided.^{2,3} With the recent enactment of Texas Senate Bill 8 (SB 8), arguably the most restrictive abortion ban in the U.S., *Roe* could be considered overturned already as it is now effectively meaningless for one out of 10 women of reproductive age.^{4*} SB 8 is one of the latest and most severe attacks, but it will not be the last. Protecting and expanding upon the legal right to abortion established by *Roe* is vital, especially now. The stakes could not be higher. But in the midst of this struggle, it is important to recognize that *Roe* is not and has never been enough to ensure that everyone has access to abortion who needs it.

A CONSTITUTIONAL RIGHT

The Supreme Court affirmed that a person's right to privacy to make their own medical decisions, including the decision to have an abortion, is a protected right under the U.S. Constitution in its 1973 decision in *Roe v. Wade*. For almost 50 years, the Supreme Court has honored this precedent, evident in its decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Whole Woman's Health v. Hellerstedt*, among others.^{5,6} However, the Supreme Court's 5-4 decision through a "shadow docket" to formally hold that SB 8 may take effect, and their refusal to grant an emergency request to block the law, has called into question the present strength of precedent. Yet, this attempt to restrict access to abortion is not unprecedented. Even before SB 8 took effect in Texas, many people across the country have been unable to access abortion services.

*Population Institute (PI) is intentionally using women in statements where the data do not include the nonbinary people or trans men in the research. Otherwise, PI uses gender-inclusive language to include all individuals who may seek abortion services.

THE CONSTITUTIONAL RIGHT TO ABORTION EXPLAINED

In 1970, Jane Roe (a name used to protect the plaintiff's identity) challenged a Texas law that made abortion illegal, except in the event to save a woman's life, in the case of *Roe v. Wade*. The case made its way through the federal courts and eventually before the Supreme Court. In a 7-2 decision, the Supreme Court found that inherent in the Due Process Clause of the Fourteenth Amendment is a fundamental right to privacy that protects a pregnant person's choice to have an abortion. However, the ruling also found that this right is not absolute and must be balanced against the government's interests in protecting the health of a pregnant person and protecting "the potentiality of human life." The Supreme Court advanced a trimester framework that followed:

First Trimester — a state may not regulate a person's abortion decision in the first trimester, as that decision lies between a pregnant person and their attending physician.

Second Trimester — the state may impose regulations on abortion in the second trimester that are reasonably related to maternal health.

Third Trimester — once the fetus reaches the point of "viability" or the third trimester, a state may regulate or prohibit abortions, except when necessary for the preservation of the life or health of the pregnant person.⁷

In its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992, the Supreme Court reaffirmed its decision in *Roe*, but abandoned the trimester framework and replaced it with a new test to determine whether a state abortion regulation has the purpose or effect of imposing an "undue burden," which it defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."⁸ The Supreme Court has not quantified viability, but rather has defined it as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection."⁹ Without the quantification of viability, states are left to define it as they see fit.¹⁰ However, most experts say the point of viability is around 24 weeks of pregnancy.¹¹

A RIGHT IN NAME ONLY

Abortion is a common health care service, with 1 in 4 women in the U.S. obtaining this health care service during their lifetime.¹² However, since the Supreme Court's decision in *Roe*, anti-abortion legislation has made abortion care difficult to obtain in some regions of the country. Even without overturning *Roe*, abortion is already a right in name only for many. Whether it is government bans on insurance coverage for abortion, the imposition of medically unnecessary requirements on providers and clinics, or laws allowing providers or healthcare systems to deny a person abortion care in the name of religion, multiple barriers impede abortion access for people across the country.

With these laws implemented, the constitutional right to abortion established by *Roe* is effectively meaningless for many. Restrictive abortion laws and policies can be broken down into several categories, including:

Gestational Age Bans

Gestational age bans restrict abortion after a specific point in pregnancy. Forty-three states prohibit abortions after a certain point in pregnancy, with 20 states banning abortion at viability and another 21 states adopting bans that specify limits from 20 to 24 weeks after the last menstrual period (LMP).¹³ Fifteen states have attempted to ban abortion at or before 18 weeks LMP, but these bans have been stopped by court order — with the exception of Texas' SB 8.¹⁴ The efforts to pass early gestational age bans have been viewed by many to be an attempt to bring a case before the Supreme Court to directly challenge *Roe* and point to Mississippi's 15-week as an example. And now, with SB 8 in effect, Texas has created a gestational age ban blueprint for other states to replicate.

TEXAS SENATE BILL 8

Recently, the Texas legislature passed a gestational age ban that prohibits abortions as early as six weeks, with no exceptions for rape or incest. The law, known as SB 8, also creates a bounty system where regular citizens enforce the law by suing anyone who “aids and abets” someone in seeking an abortion. The Supreme Court denied an emergency request to block the law from going into effect; therefore, on September 1, 2021, abortions after the sixth week of pregnancy became illegal. The Biden administration has filed a lawsuit seeking a permanent injunction from the Supreme Court — a final order from the high court that the law must be halted.¹⁵

Hyde Amendment

The Hyde Amendment, a federal-level policy, prohibits the use of federal funds for abortions except in cases of life endangerment, rape, or incest. This restriction denies abortion coverage to many of those enrolled in Medicaid, the nation's primary health insurance program for low-income individuals and families.¹⁶ Other individuals impacted by the Hyde Amendment include people insured by Indian Health Service, Medicare, the Children's Health Insurance Program, the military's TRICARE program, federal prisons, immigration detention centers, the Peace Corps, and the Federal Employees Health Benefits Program.¹⁷

Insurance Coverage Bans

Insurance coverage plays a major role in affordable and equitable access to abortion care. Twenty-two state governments have passed bans on abortion coverage in public employees' insurance policies, as well as 11 states that have laws restricting abortion coverage in all private health insurance plans. Currently, 25 states restrict abortion coverage in plans offered through the health insurance exchanges established under the *Affordable Care Act*.¹⁸

Method Bans or Restrictions

These laws ban methods of abortion care, including the safest and most common method of abortion care in the second trimester: dilation and evacuation (D&E) procedures. Currently, three states have bans on the D&E method.¹⁹ Other restrictions include those around telemedicine and the provision of medication abortion, a safe, nonsurgical abortion practice that can expand access to abortion, particularly for individuals in rural areas and regions with few abortion providers.²⁰

More Medically Unnecessary Requirements

Medically unnecessary requirements are often touted as protecting pregnant people's health, but in reality, they place additional burdens of cost and time on people seeking abortion care. These types of requirements can include mandatory counseling that incorporates medically misleading information, mandatory waiting periods, and forced ultrasounds. Currently, 33 states require that patients receive counseling before an abortion is performed. Nearly all of those states require that the

counseling include information about the abortion procedure and fetal development—five states even requiring providers to inform patients that personhood begins at conception—and 26 states have mandatory waiting periods between counseling and the abortion.²¹ Furthermore, 27 states regulate the provision of ultrasounds by abortion providers with six states mandating that a provider perform an ultrasound on each person seeking an abortion and require the provider to show and describe the image.²²

Parental Involvement Laws

Parental involvement laws require parental notification, consent, or judicial approval for minors seeking abortion care. These laws often delay or prevent young people's access to abortion services and disproportionately affect immigrant youth.²³ As of 2020, 37 states require young people seeking an abortion to notify or obtain consent of a parent or guardian.²⁴

Religious Refusals

Religious refusal laws allow most health care workers to deny patients access to certain types of health care services if that worker deems it contrary to their personal beliefs. Forty-six states allow some health care providers to refuse to provide abortion services, and 44 states allow health care institutions to refuse to provide abortion services.²⁵

TRAP Laws

Targeted restrictions on abortion providers—known as TRAP laws—impose medically unnecessary requirements on providers and clinics under the guise of protecting pregnant people's health. To date, 23 states have laws or policies that regulate abortion providers and go beyond what is medically necessary to ensure a patient's safety, including nine states that have regulations on the size of procedure rooms and eight states requiring a specific corridor width within an abortion clinic.²⁶ The enactment of these regulations has become unnecessarily burdensome on providers and clinics, forcing some of them to stop providing care.²⁷

Trigger Bans

Twenty-two states have passed laws to restrict the legal status of abortion should the Supreme Court overturn *Roe*. These “trigger bans” are designed to take effect immediately upon a Supreme Court decision, without the need for further state-level legislation.²⁸

All of these anti-abortion laws interact with one another to create a suite of hostile policies that severely undermine abortion rights. While individually these policies create barriers that limit a person's access to abortion services, they also work in tandem to make it virtually impossible to obtain abortion care in some regions of the country.

NOT EQUAL ACCESS FOR ALL

While *Roe* establishes the right to abortion, restrictions at the state-level make it difficult for some individuals to be able to exercise that right. TRAP laws, in particular, are responsible for clinic closures, forcing people to travel extended distances in order to reach the nearest abortion provider.²⁹ Increased travel for abortion services is associated with delays in care and increased costs, including lost wages, child care, lodging, and adequate transportation.^{30,31} This disproportionately affects low-income earners and people living in rural or other medically underserved areas who are more likely to have to travel longer distances to the nearest clinic.³² Findings from the Turnaway Study—a ten-year longitudinal study of women seeking abortion care at 30 facilities across the U.S.—indicate that for more than half of women who received an abortion, their out-of-pocket costs were equivalent to more than one-third of their monthly personal income.³³ Moreover, some people experience a cycle of delays in order to be able to raise the funds for their abortion care, which in turn can lead to additional costs and delays in care. Fifty-four percent of women in the Turnaway Study reported that having to raise money for an abortion delayed their obtaining abortion care.³⁴

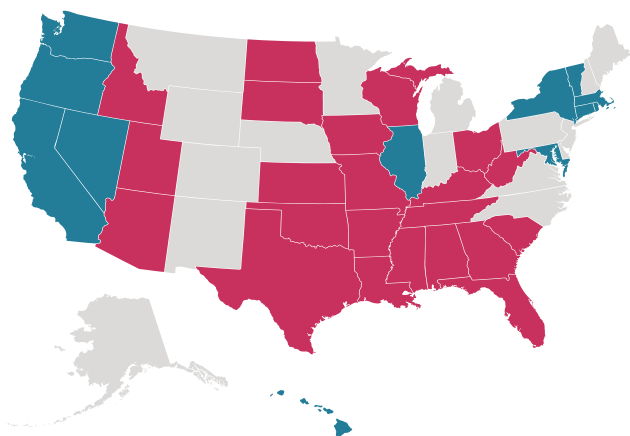
Racism, income inequality, and other forms of structural discrimination are further perpetuated by harmful abortion bans and restrictions as they impose logistical and financial burdens on patients already facing systemic barriers to healthcare.³⁵ Because of longstanding social and economic disparities, Black, Indigenous, and people of color (BIPOC) have a higher likelihood of being eligible for government health insurance coverage like Medicaid, and therefore also disproportionately subjected to abortion restrictions such as the Hyde Amendment or insurance coverage bans, or disproportionately uninsured compared to their white counterparts and forced to pay for health expenditures out-of-pocket.^{36,37} Furthermore, the majority of Black people in the U.S. live in the South, where many states are deemed hostile to very hostile to abortion rights.^{38,39} Due to restrictive abortion policies in this quadrant of the country, particularly Texas' new SB 8 law, people seeking abortion services after a certain point in pregnancy have to travel nearly 250 miles one way, which may not be a realistic solution for some.⁴⁰ This not only creates a burden for those seeking abortion services, but it can also place strain on facilities in neighboring states that may be unable to meet increased demand.⁴¹

Being denied an abortion can have serious consequences for a person's overall well-being and contribute further to the structural inequalities that exist, such as social and economic inequality. Women who are denied abortion care due to restrictive bans are more likely than women who receive an abortion to experience economic hardship and insecurity lasting years.⁴² Furthermore, restrictions and bans on abortion care exacerbate existing health disparities, including those that exist in maternal health and mortality.⁴³

THE U.S. WITHOUT ROE

For the first time, the Supreme Court — with a 6-3 conservative majority—has agreed to review a previability gestational age ban case, *Dobbs v. Jackson Women's Health Organization (JWHO)*, that directly challenges its decision in *Roe*. Should the Supreme Court decide that some previability bans are constitutional, access to abortion services could become severely limited across the country. If *Roe* is formally reversed by the Supreme Court, the power to legalize abortion would essentially return to individual states, putting **more than 36 million women**, and even more people who can become pregnant, at risk of losing access to abortion care in the U.S.⁴⁴ While 15 states and the District of Columbia have laws that protect the right to abortion in the absence of *Roe*, a reversal of *Roe* could allow for other states' pre-1973 abortion bans and currently unenforced post-1973 bans to take effect.⁴⁵

The U.S. Without *Roe*: If the Supreme Court overturns *Roe*, the power to restrict or legalize abortion will return to the individual states.⁴⁶



■ States that have laws that could be used to restrict the legal status of abortion

■ States that have laws to protect the right to abortion

More must be done to expand abortion rights, until everyone, regardless of race, income level, zip code, gender identity, or immigration status, has access to abortion services they need.

DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

Dobbs v. JWHO represents a direct challenge to the Supreme Court's landmark decision in *Roe*. At the heart of the case is a Mississippi ban that would make nearly all abortions illegal starting at 15 weeks of pregnancy. The main question the Supreme Court will address in this case is whether states can ban at least some abortions before fetal viability. The Supreme Court will hear oral arguments in December 2021 and a decision from the high court can be expected in 2022 as to if the viability standard should be retained. If the 6-3 conservative majority bench determines that it is no longer upheld, it may be possible for states to implement abortion bans much earlier in pregnancy or even attempt to ban the procedure outright.

RIGHTS BEYOND ROE

The Supreme Court has the most important role to play in protecting *Roe*. At the end of 2021, the nine justices will hear oral arguments in the Mississippi case of *Dobbs v. JWHO* and their decision as to whether some pre-viable abortion bans are constitutional will be made sometime in 2022.

Though the fate of *Roe* rests with the Supreme Court, Congress has a crucial role to play in safeguarding the right to abortion for *all* people in the U.S. and ensuring that a person's ability to access their rights does not depend on their race, income level, zip code, gender identity, or immigration status. The *Women's Health Protection Act (WHPA)* is a piece of federal legislation that would ensure that the right to access abortion care is actually a reality for all people in the U.S., free from medically unnecessary restrictions and bans, no matter where they live. WHPA would create a statutory right for health care providers to provide abortion care, and a corresponding right for patients to receive abortion care.⁴⁷ Most importantly, should the Supreme Court overturn *Roe*, WHPA would protect abortion rights in its stead. Should the Supreme Court not overturn *Roe*, it is still crucial that Congress passes WHPA in order to ensure abortion rights are protected from the numerous anti-abortion restrictions at the state-level. In addition to passing WHPA, Congress must also ensure that people across the country, regardless of their income level or source of health insurance, can afford the care they need by putting an end to the Hyde Amendment and related abortion coverage restrictions by passing the *Equal Access to Abortion Coverage in Health Insurance Act (EACH Act)*.⁴⁸

The fight for abortion rights is so much more than keeping it legal on paper. While *Roe* has always been an important baseline, more must be done to ensure that everyone can access abortion care when and how they need it.

Endnotes

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