



POLICY BRIEF

ROE IN THE CROSSHAIRS: DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

MAJOR U.S. SUPREME COURT ABORTION CASES

Roe v. Wade was a landmark U.S. Supreme Court case decided in 1973 in which the court first recognized the constitutional right to terminate a pregnancy as an aspect of the liberty protected by the due process clause of the 14th amendment - the so-called "right to privacy." *Roe v. Wade* was a seven-to-two decision, with both Democrat- and Republican-appointed justices joining the opinion. The groundwork for this decision had been laid by earlier cases that recognized the right to use contraception. *Roe v. Wade* protected a pregnant person's right to an abortion before fetal viability, which was considered to be the third trimester of pregnancy in 1973. During the first trimester, the court ruled that the decision to terminate a pregnancy was the decision of the pregnant person and that states could not intervene.

In the decades that followed this ruling, anti-abortion forces mobilized an incremental political strategy that attempted to chip away at *Roe v. Wade*. Tactics included isolating abortion practice from mainstream medicine and introducing and passing increasingly restrictive abortion legislation at the state level, as well as mobilizing to ensure the appointment of anti-abortion judges to the federal courts. Additionally, legislators unsuccessfully tried to pass anti-abortion legislation at the federal level.

The next landmark abortion rights case was *Planned Parenthood v. Casey* in 1992. In this case, the U.S. Supreme Court considered several abortion restrictions which had previously been struck down under the Supreme Court's interpretation of the right to privacy in *Roe v. Wade*, such as mandated informed consent scripts, and 24-hour waiting periods that resulted in the need to make at least two trips to a clinic. Between *Roe* and *Casey*, three new justices were appointed to the Supreme Court by Republican Presidents – Justices O'Connor, Kennedy, and Souter. All were expected to be in favor of overturning *Roe v. Wade*. But unexpectedly, these three justices joined the more liberal justices in upholding the right to privacy and protecting the "essence" of *Roe*. However, the court revised other parts of *Roe*. It announced a new standard for considering the constitutionality of abortion restrictions that did not rely on the trimester system. Under this new standard, the court established that states could regulate abortion before viability (i.e., 23- or 24-weeks gestation) if the regulation did not pose an "undue burden" on abortion access. This interpretation meant that states could regulate, but not ban, abortion before viability. However, this undue burden standard *Casey* established was much less protective of abortion rights than the trimester standard established under *Roe*. Under this new standard, the court upheld every restriction in *Casey* except for one - a spousal notification requirement.

The three Justices' opinion in *Casey* expounded the importance of stare decisis, or the principle that courts should respect precedent. For example, the Supreme Court is generally expected to follow its precedents and not re-decide previously settled constitutional issues. Thus, stare decisis requires courts to overturn prior decisions only if there is a particularly compelling reason to do so, and not simply because a new court thinks the prior ruling was wrong. The Supreme Court used this logic to justify its ruling in *Casey* as one that upheld *Roe*, despite the drastic changes it made to *Roe* that left many anti-abortion restrictions untouched.

Decades later, the landmark *Whole Woman's Health v. Hellerstedt* case was decided in 2016. In this case, the Supreme Court struck down a Texas law that included admitting privileges and ambulatory surgical center requirements for abortion clinics. Such restrictions threatened to shut down three-quarters of the state's abortion clinics. The case was decided five to three (Justice Antonin Scalia had passed away and not yet been replaced), with Chief Justice Roberts, Thomas, and Alito dissenting; Justice Kennedy served as a crucial swing vote. In *Whole Woman's Health v. Hellerstedt*, the court upheld *Casey*'s undue burden standard.

Following *Whole Woman's Health v. Hellerstedt*, the Supreme Court's composition changed when Donald Trump appointed three nominees during his administration. The first, Neil Gorsuch, succeeded the late Justice Scalia, a conservative, in early 2017. The second, Brett Kavanaugh, replaced Justice Kennedy, a moderate conservative, in June 2018 after Justice Kennedy retired. This left the court with five conservative, anti-abortion justices (Roberts, Thomas, Alito, Gorsuch, Kavanaugh) and four liberal, pro-choice justices (Ginsburg, Breyer, Sotomayor, Kagan).

In 2020, the Supreme Court again ruled on a major abortion case – *June Medical Services LLC v. Russo*. In this case, the court ruled that a Louisiana admitting-privileges law was unconstitutional. This law was almost identical to the one previously struck down in *Whole Woman’s Health*. Despite this, Louisiana pressed the case back up to the Supreme Court, where Justice Kavanaugh had recently replaced Justice Kennedy (the fifth vote in *Whole Woman’s Health*). The Supreme Court struck down the admitting privileges law, with four justices applying the precedent of *Whole Woman’s Health*. The justices said that *June Medical Services v. Russo* was unconstitutional for the same reasons that *Whole Woman’s Health* was unconstitutional in Texas – its purported safety benefits did not outweigh its burden on abortion access. Chief Justice Roberts, who had dissented in *Whole Woman’s Health*, now switched his opinion to rule with the four justices who found Louisiana’s law unconstitutional. In his dissent, Roberts said that he disagreed with, and continues to disagree with, the Texas ruling but was willing to strike the Louisiana law down based on stare decisis. Since the Louisiana law was identical to the Texas law, he ruled against it based on precedent, even if he disagreed with the precedent set.

Justice Ginsberg, a liberal and strongly pro-choice justice, died in September 2020 and was replaced by conservative Amy Coney Barrett. As a result, the balance on the Court shifted to six conservative, anti-abortion justices and only three liberal, pro-choice justices. With this new anti-abortion supermajority, the current Supreme Court is now considering watershed case known as *Dobbs v. Jackson Woman’s Health Organization*. At issue in *Dobbs* is a Mississippi law that bans abortion starting at 15 weeks of pregnancy. Because the 15-week limit is well before viability, the law is clearly unconstitutional under *Roe* and *Casey* and violates the essential holding of *Roe*. Two lower courts struck down the Mississippi law, including the conservative Fifth Circuit Court of Appeals. Despite this, Mississippi continued to appeal the ruling until the Supreme Court decided to hear the case, specifically to determine whether all bans on abortion before viability are unconstitutional. This question directly challenges the fundamental holding of *Roe v. Wade*.

ORAL ARGUMENT - DECEMBER 1, 2021

Much of the argument centered on whether the viability line - before which states may not ban abortion outright - should remain. The Supreme Court is now composed of three liberal justices (Breyer, Sotomayor, and Kagan) and six conservative justices (Roberts, Thomas, Alito, Gorsuch, Kavanaugh, and Barrett). The conservative justices suggested that the viability line was arbitrary; that abortion is a matter that should be left to the states to decide; and that pregnant people do not need abortion as an option. The liberal justices emphasized three themes during the oral argument: stare decisis, the court’s legitimacy, and the consequences of overturning *Roe v. Wade* with a focus on gender equality. Several excerpts exemplify these points.

EXCERPT ONE: JUSTICE BREYER ON STARE DECISIS AND LEGITIMACY

*And they say Roe is special. What’s special about it? They say it’s rare. They call it a watershed. Why? Because the country is divided. Because feelings run high. And yet the country, for better or for worse, decided to resolve their differences by this court laying down a constitutional principle, in this case, women’s choice. What the court said follows from that is that it should be more unwilling to overrule a prior case, far more unwilling we should be, whether that case is right or wrong, than the ordinary case. And why? Well, they have a lot of words there, but I’ll give you about 10 or 20. There will be inevitable efforts to overturn it. Of course, there will. Feelings run high. And it is particularly important to show what we do in overturning a case is grounded in principle and not social pressure, not political pressure. **Only “the most convincing justification can show that a later decision overruling,” if that’s what we do, “was anything but a surrender to political pressures or new members.”** And that is an unjustified repudiation of principles on which the court stakes its authority. (*Dobbs v. Jackson Women’s Health Organization*, 2021:9 – 11)*

This excerpt reflects Breyer’s plea for the court not to give in to political pressure or appear political. To the same effect, Judge Sotomayor made this statement about the viability standard and how it relates to the court’s legitimacy.

EXCERPT TWO: JUSTICE SOTOMAYOR ON VIABILITY AND COURT LEGITIMACY

*What hasn’t been at issue in the last 30 years is the line that Casey drew of viability. There has been some difference of opinion with respect to undue burden, but the right of a woman to choose, the right to control her own body, has been clearly set for -- since Casey and never challenged. You want us to reject that line of viability and adopt something different. **Fifteen justices over ... 30 [years] since Casey have reaffirmed that basic viability line.** Four have said no, two of the members of this court. But 15 justices have said yes, of varying political backgrounds. Now the sponsors of this bill, the House bill, in Mississippi, said we’re doing it because we have new justices. The newest ban that Mississippi has put in place, the six-week ban, the Senate sponsors said*

we're doing it because we have new justices on the Supreme Court. Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts? (14 – 15)

Justice Sotomayor's statement echoes Justice Breyer's legitimacy argument while emphasizing the fact that the court has repeatedly reaffirmed the viability line established in *Casey* and *Roe*: to get rid of the viability line would be to repudiate *Roe*. Later in her argument, Justice Sotomayor also points out that childbirth is riskier than abortion, and that to force pregnant people to carry a pregnancy to term is to force them to risk their lives.

Justices on both sides questioned what would replace the viability line, and neither lawyer presenting an oral argument provided an alternative. Viability was identified in both *Roe* and *Casey* as the principled line because it was less arbitrary than other cut offs, specifically because a fetus can survive independently after that point; at that point, the court reasoned, a state could be considered to have a compelling interest in the fetus.

EXCERPT THREE: JUSTICE KAVANAUGH ON COURT NEUTRALITY

In contrast, the conservative justices all seemed skeptical of *Roe v. Wade* as a precedent worth keeping. Justice Kavanaugh, who may be a possible swing vote, appeared uninterested in maintaining it as precedent, saying that he believes the Constitution is neutral on the issue of abortion and therefore, the court should be impartial as well - which means leaving it to each state to decide abortion policy:

Because the Constitution is neutral, ... this Court should be scrupulously neutral on the question of abortion, neither pro-choice nor pro-life, but, because, they say, the Constitution doesn't give us the authority, we should leave it to the states, and we should be scrupulously neutral on the question... (77)

EXCERPT FOUR: JUSTICE BARRETT ON SAFE HAVEN LAWS

Justice Amy Coney Barrett suggested that "Safe Haven" laws, which allow people to give up newborns for adoption with no legal consequences, may eliminate the need for abortion:

*[I]n all 50 states, you can terminate parental rights by relinquishing a child after abortion, and I think the shortest period might have been 48 hours if I'm remembering the data correctly. So, it seems to me, seen in that light, both *Roe* and *Casey* emphasize the burdens of parenting, and insofar as you and many of your amici focus on the ways in which forced parenting, forced motherhood, would hinder women's access to the workplace and to equal opportunities, it's also focused on the consequences of parenting and the obligations of motherhood that flow from pregnancy. Why don't the safe haven laws take care of that problem? It seems to me that it focuses the burden much more narrowly as, without question, **an infringement on bodily autonomy, you know, which we have in other contexts, like vaccines.** However, it doesn't seem to me to follow that pregnancy and then parenthood are all part of the same burden. And so it seems to me that the choice more focused would be between, say, the ability to get an abortion at 23 weeks or the state requiring the woman to go 15, 16 weeks more and then terminate parental rights at the conclusion. Why -- why didn't you address the safe haven laws and why don't they matter? (56-57)*

EXCERPT FIVE: CHIEF JUSTICE ROBERTS ON COMPROMISE

Chief Justice Roberts, the swing vote in *June Medical Services v. Russo*, appeared willing to entertain a compromise. He repeatedly asked whether the 15-week cut off proposed in *Dobbs* might provide a reasonable substitute for the viability line:

*If you think that the issue is one of choice, that women should have a choice to terminate their pregnancy, that supposes that there is a point at which they've had the fair choice, opportunity to choice, and why would 15 weeks be an inappropriate line? ... I'd like to focus on the 15-week ban because **that's not a dramatic departure from viability.** It is the standard that the vast majority of other countries have. (53-54)*

However, even if Chief Justice Roberts sides with the three liberal judges, the court will still have five conservative judges who appear ready to uphold Mississippi's law.

POSSIBLE OUTCOMES

The decision in *Dobbs v. Jackson Women's Health Organization* is expected in June 2022. There are no fixed timelines for Supreme Court decisions, but it usually hands down important decisions at the end of the term in June.

Outcome One – Status Quo

The court upholds *Roe* and *Casey* and keeps the established 23- or 24-week viability line in place. This outcome seems unlikely based on oral arguments.

Outcome Two – Middle Ground

This scenario would require two conservative justices to join the liberal justices to compromise, which seems unlikely given the oral arguments. For example, the court could adopt a fixed line, like the 15 weeks suggested by Justice Roberts. However, the proposed new limits (e.g., six weeks, 12 weeks, 15 weeks, something else entirely) seem more arbitrary than viability as a principled line.

Alternatively, the court could preserve *Roe* in name only. In this scenario, the court could claim that *Roe* is still intact while allowing states to pass pre-viability bans on abortion, which may not be ruled unconstitutional.

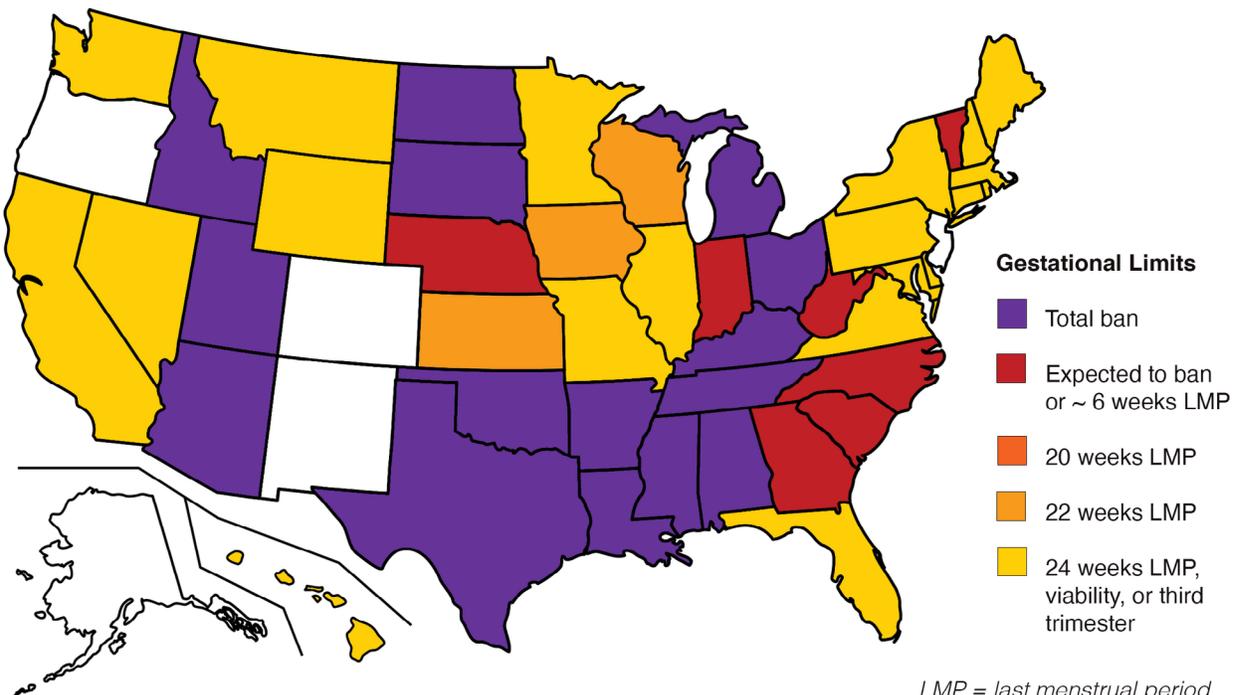
Either option may activate abortion trigger bans in 12 states that have them, depending on how those bans are written. Trigger bans are state laws that immediately ban abortion within that state upon *Roe* being overturned or weakened by the U.S. Supreme Court. Legal battles over the constitutionality of anti-abortion restrictions at the state level would likely continue. As a result, the status of *Roe* would likely be called into question again by courts.

Outcome Three – Overturning Roe

The court overturns *Roe* and rules that states may decide whether and under what circumstances abortion is legal. There would no longer be a constitutional right to choose abortion. In this scenario, all extant abortion trigger bans in the U.S. would go into effect immediately, and courts would apply the new legal rule in any pending litigation challenging abortion restrictions.

This outcome seems likely based on the oral arguments. The map below indicates the eventual expected impact of this decision nationwide. The map was created using state level information from The Guttmacher Institute and Center for Reproductive Rights.

Anticipated Post-Roe Scenario (Assumes Passage of Ohio's Trigger Ban Law - SB 123)



WHAT HAPPENS IN A POST-ROE OHIO?

What a post-*Roe* Ohio looks like depends on the legislation currently moving through the Ohio General Assembly and on presently enjoined, or blocked, laws.

Currently Enjoined Laws

Enjoined laws are those that a court blocks from taking effect while litigation occurs. If *Roe* is weakened or overturned, litigation around the currently enjoined laws would respond to the new federal ruling. As a result, some laws that are currently blocked could potentially become enforceable. For example:

- **“Six Week” Ban (Senate Bill 23):** Bans abortion after fetal cardiac activity is detected, around six weeks of pregnancy. Currently blocked by a federal court.
- **Dilation and Evacuation (“D&E”) Ban (Senate Bill 145):** Bans dilation and evacuation, the most common second-trimester abortion procedure. Currently partially blocked.

Currently Proposed Legislation

The following legislation is currently moving through the Ohio General Assembly. If SB 123 passes before the Supreme Court decides *Dobbs* and that subsequent ruling weakens or overturns *Roe*, abortion could automatically become illegal in Ohio when that federal decision occurs. If SB 123 does not pass, but HB 480 does, abortion could become illegal in Ohio regardless of the outcome of *Dobbs*.

- **Abortion Trigger Ban (Senate Bill 123):** This law would immediately make abortion in Ohio illegal if the Supreme Court ruling “upholds, in whole or in part, a state’s authority to prohibit abortion.” It is possible that this law could therefore outlaw abortion in the wake of outcomes two and three of the *Dobbs* case.
- **Complete Abortion Ban (House Bill 480):** A Texas SB 8 copycat bill where citizens enforce a total abortion ban via private lawsuits. This bill goes beyond SB 8 to include a personhood provision, which would confer personhood on any biological product of conception (i.e., a zygote would be a person). This language would criminalize abortion so that it is legally akin to murder.

POSSIBILITIES FOR FUTURE LEGAL ACTION TO PROTECT ABORTION RIGHTS

Litigation: There will still be legal arguments that can be made under the U.S. Constitution and the Ohio Constitution to protect abortion rights to a greater or lesser degree. Many of these arguments are as yet untested, however, so their likelihood of success is uncertain.

State Legislation: The Ohio General Assembly could vote to permit abortion in some circumstances or up to a particular gestational age. This outcome seems unlikely based on the Ohio legislature’s past hostility to abortion, but a future legislature may prove more responsive to public opinion and the health care needs of pregnant people.

State Constitutional Amendment: The Ohio Constitution could be amended to protect abortion rights—either through action by the Ohio General Assembly, or by a ballot initiative. This change would be more enduring than state legislation because future state legislation could not be passed if it would contradict this amendment.

Federal Legislation: Federal legislation has been proposed to protect abortion rights nationwide if *Roe* is overturned. However, it is unlikely to pass with the current composition of the U.S. Senate. And even if it did pass, it would face a legal challenge, and it is questionable whether the Supreme Court would uphold it.

REFERENCES

Center for Reproductive Rights. “What If Roe Fell”. <https://maps.reproductiverights.org/what-if-roe-fell>

Guttmacher Institute. “State Bans on Abortion Throughout Pregnancy”. <https://www.guttmacher.org/print/state-policy/explore/state-policies-later-abortions>

Transcript of Oral Argument, *Dobbs v. Jackson Women’s Health Organization* (19-1392). Retrieved at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_gfbi.pdf