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# Roe v. Wade and the Right to Abortion

The constitutional right to abortion was first recognized nearly five decades ago, and the Supreme Court has repeatedly reaffirmed its central holding. Yet this fundamental constitutional right is facing a grave and imminent threat.

## The Constitutional Right to Privacy and Liberty Predates *Roe v. Wade*

In a line of decisions going as far back as 1891, the Supreme Court recognized a right of privacy and bodily integrity, applying it to activities related to marriage, procreation, family relationships, and child rearing and education.<sup>1</sup> In *Griswold v. Connecticut*, the Supreme Court ruled that the constitutional right to privacy reaches a married couple's decision to use birth control,<sup>2</sup> and extended that right to unmarried individuals in *Eisenstadt v. Baird* in 1972.<sup>3</sup> The Supreme Court clarified that "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>4</sup>

## In *Roe v. Wade*, the Supreme Court Affirmed that the Constitutional Right to Liberty Protects the Right to Abortion

In the 1973 landmark case *Roe v. Wade*, the Supreme Court, by a vote of 7-2, recognized an individual's right to decide whether to terminate a pregnancy.<sup>5</sup> The Court made clear that the Due Process Clause's guarantee that no individual shall be deprived of "liberty" applies to the decision of whether to have an abortion. As the Court said, the constitutional right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>6</sup>

The Court also held that the right to abortion is "fundamental," meaning that governmental attempts to interfere with the right are subject to the highest level of review by courts.<sup>7</sup> The Court recognized "the detriment that the State would impose upon the pregnant woman by denying this choice altogether" including psychological harm, harm from pregnancy complications, a possible "distressful life and future," and "the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."<sup>8</sup>

At the same time, the Court said the right to abortion had to be considered against state interests in protecting a woman's health and protecting the "potentiality" of life.<sup>9</sup> The Court developed a trimester framework to balance the individual's right to abortion against these governmental interests:<sup>10</sup> during the first trimester, the decision must be left completely to the individual and their doctor; during the second trimester, a state could only regulate abortion if necessary to protect patient health; in the third trimester, after fetal viability—government could regulate and even ban abortion to further its interest in the potentiality of life, but it must safeguard the patient's life and health.<sup>11</sup> In other words, *Roe* firmly established the core constitutional principle that government cannot ban abortion prior to viability, and could only regulate it before viability in ways that help pregnant people.

In the years after *Roe*, the Court struck down most attempts to restrict the right to abortion,<sup>12</sup> facilitating the ability of pregnant people to control their reproduction, health, and course of their lives. A notable—and unfortunate—exception was *Harris v. McRae*, when the Court declined to strike down a federal law that withholds coverage of abortion from Medicaid enrollees.<sup>13</sup> The Court held that it was the individual's poverty—not the denial of Medicaid—that created the obstacle to abortion.<sup>14</sup> The Hyde Amendment continues to harm individuals qualified for Medicaid, effectively rendering the right to abortion meaningless for many who are struggling to make ends meet.<sup>15</sup>

## The Evolution of the Constitutional Right to Abortion, After *Roe v. Wade*

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>16</sup> the Court was asked to overrule *Roe v. Wade*. The Court undertook a thorough review of the evolution of the law, factual underpinnings, and the role of the Court, and expressly reaffirmed *Roe*'s "essential holding"<sup>17</sup>: "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce."<sup>18</sup> The Court also recognized the harm of taking away the right to abortion, and the importance of abortion in people's lives, affirming that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>19</sup>

In *Casey*, the Court put aside the trimester framework but made clear that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or

the imposition of a substantial obstacle to the woman's effective right to elect the procedure."<sup>20</sup> After viability, the Court reiterated that the government can restrict or ban abortion as long as there is an exception for a woman's life or health.

At the same time, the Court in *Casey* announced a new "undue burden" standard of review for abortion restrictions.<sup>21</sup> Under the undue burden standard, states may regulate abortion so long as the regulation does not have the purpose or effect of imposing a substantial obstacle in the path of a person seeking to terminate a pregnancy. The Court also put more emphasis on the state's interest in protecting the potentiality of fetal life. In *Casey*, which challenged numerous restrictions limiting access to abortion, the only restriction struck down by the Court as an undue burden was a requirement that a woman notify her husband before having an abortion.<sup>22</sup>

The decision in *Casey* emboldened legislators hostile to abortion, who believed the undue burden standard offered them an opening for new restrictions on abortion. In the years after *Casey*, legislators passed more restrictions on abortion—and many were upheld by courts who misapplied the undue burden standard. This created a patchwork of state laws restricting abortion across the country, including mandatory delays, biased counseling requirements, and restrictions on young people's access to abortion.<sup>23</sup>

Hostile legislators became even more emboldened after the Supreme Court's 2007 decision in *Gonzales v. Carhart*.<sup>24</sup> In that case, a newly constituted Court (with Chief Justice Roberts and Justice Alito) upheld a dangerous federal ban on a medically approved abortion procedure, even though it had no exception for the health of a pregnant person, and even though the Court had struck down an identical state law only 7 years before.<sup>25</sup>

After the *Gonzales v. Carhart* decision, hostile legislators raced to introduce new restrictions on abortion, including laws meant to regulate abortion providers out of existence. These Targeted Regulation of Abortion Provider (TRAP) laws reached the Supreme Court in 2016, in *Whole Woman's Health v. Hellerstedt*.<sup>26</sup> In that case, the Court considered two TRAP laws from Texas, which required providers to have medically unnecessary admitting privileges, and required facilities to meet minimum standards for ambulatory surgical centers. These regulations resulted in almost half of the abortion clinics in Texas closing.<sup>27</sup>

The Supreme Court struck down the Texas laws and clarified that the undue burden standard is a robust standard that courts are required to apply. Courts must thoroughly examine whether a law has any benefits, and carefully balance any benefits of the law against the burdens it creates for pregnant people, striking down any laws where the burdens outweigh the benefits. The Court also made clear that the undue burden inquiry should consider the cumulative impact of abortion restrictions on a pregnant person's experience exercising their constitutional right. This decision was affirmed just four years later in an almost identical case, *June Medical Services v. Russo*.<sup>28</sup>

## The Current Challenges to *Roe v. Wade* and the Right to Abortion

A few months after *June Medical* was decided, Justice Ginsburg passed away and was replaced by Justice Amy Coney Barrett, a staunch opponent of abortion, creating a 6-3 anti-abortion majority on the Supreme Court. Following Justice Barrett's appointment, the Supreme Court agreed to hear a case striking at the heart of the constitutional right to abortion: *Dobbs v. Jackson Women's Health Organization*.<sup>29</sup> The case concerns an attempt by Mississippi to ban abortion at 15 weeks of pregnancy, well before viability and in direct conflict with the longstanding core principle of *Roe* and *Casey*. Mississippi is asking the Court to overturn *Roe* and *Casey*, claiming the decisions are "egregiously wrong" and have no foundation in the law, among other extreme and erroneous claims.<sup>30</sup> The Court heard oral argument on December 1, 2021, and a decision is expected by Summer 2022.

The *Dobbs* case is occurring against the backdrop of another case meant to eliminate the right to abortion altogether. In *Whole Woman's Health v. Jackson*, the Court considered a Texas ban on abortion at 6 weeks of pregnancy, known as SB8.<sup>31</sup> Written specifically to evade judicial review, the law creates abortion bounty hunters by authorizing citizens to sue anyone who provides or helps someone seek an abortion in Texas, and allowing them to collect a minimum of \$10,000. The law went into effect on September 1, 2021 after the Supreme Court refused to intervene,<sup>32</sup> effectively taking away Texans' constitutional right to abortion. Immediately after SB8 went into effect, there was a 49.8% decrease in abortion care being provided.<sup>33</sup> And Texans now must travel 14 times farther to get an abortion—increasing driving times to an average of 3.5 hours each way.<sup>34</sup> The Supreme Court eventually agreed to take up the case on an expedited basis. On December

10, 2021, the Court allowed SB8 to remain in effect while litigation continues,<sup>35</sup> perpetuating the devastation to Texans seeking abortion care and those who try to help them.

## We Are at the Precipice of Losing the Constitutional Right to Abortion, with Devastating Consequences

If the Court takes the opportunity presented by *Dobbs* to overturn *Roe*, whether to protect or outlaw abortion will be left to politicians in Congress and the states. Currently, about half of U.S. states are poised to make abortion illegal if *Roe* falls.<sup>36</sup> And without *Roe*, an anti-abortion Congress and president could pass a nationwide ban or restrictions on abortion that apply in every state in the country. But even if the Court declines to formally overrule *Roe v. Wade*, it could gut the protections of the constitutional right, which may be just as devastating.

Already, many pregnant people across the country—particularly communities of color, LGBTQ individuals, and people working to make ends meet—struggle to access abortion care. Medically unnecessary abortion restrictions passed by hostile legislators and approved by hostile judges compound existing systemic and structural barriers. A world without *Roe* would only exacerbate these dangerous inequities.

In the nearly 50 years since *Roe* was decided, people capable of pregnancy have come to rely upon the constitutional right to control their reproductive lives and futures. If *Roe* falls, the ripple effects will impact society for generations.

- 1 See *Roe v. Wade*, 410 U.S. 113, 152-153 (1973) (identifying cases recognizing a right to privacy).
- 2 *Griswold v. Connecticut*, 381 U.S. 479 (1965).
- 3 *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
- 4 *Id.* at 453 (citation omitted).
- 5 *Roe v. Wade*, 410 U.S. 113 (1973).
- 6 *Id.* at 153.
- 7 *Id.* at 155. The highest level of review—known as strict scrutiny—requires that the government show that its law or policy is necessary to achieve a compelling government interest. The law or policy must also be narrowly tailored to achieve the interest and must be the least restrictive means of doing so.
- 8 *Id.* at 153.
- 9 *Id.* at 162.
- 10 *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).
- 11 A case that accompanied *Roe, Doe v. Bolton*, explained that “health” must be understood “in light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.” *Doe v. Bolton*, 410 U.S. 179, 192 (1973).
- 12 See, e.g., *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (invalidating a husband consent requirement that physicians preserve the life and health of the fetus at every stage of pregnancy, and a prohibition on a particular method of abortion); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (invalidating a requirement that physicians give women anti-abortion information, a 24-hour mandatory delay requirement, a requirement that all abortions after the first trimester be performed in a hospital, a parental consent requirement, and a requirement related to the disposal of fetal remains).
- 13 *Harris v. McRae*, 448 U.S. 297 (1980).
- 14 See *id.* at 315–16 (reasoning that “[t]he financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency”).
- 15 *The Impact on Women Seeking an Abortion but are Denied Because of an Inability to Pay: H.R. Appropriations Subcomm. on the Depart. of Labor, Health & Hum. Serv., Educ., & Related Agencies*, 116th Cong., 2nd Sess. (2020) (Testimony of Fatima Goss Graves, NWLC President & CEO); <https://nwlc.org/resources/nwlc-testimony-on-the-harm-of-the-hyde-amendment/>.
- 16 505 U.S. 833 (1992).
- 17 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834 (1992).
- 18 *Id.* at 871.
- 19 *Id.* at 856.
- 20 *Id.* at 846.
- 21 *Id.* at 837.
- 22 *Id.* at 898.
- 23 See generally GUTTMACHER INST., AN OVERVIEW OF ABORTION LAWS (2021), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.
- 24 *Gonzales v. Carhart*, 550 U.S. 124 (2007).
- 25 *Stenberg v. Carhart*, 530 U.S. 914, 946 (2000).
- 26 *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).
- 27 See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2301–02 (2016).
- 28 See *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 791 (5th Cir. 2018), cert. granted, 140 S. Ct. 35 (2019) (considering the constitutionality of a Louisiana law requiring every doctor who performed abortions to have active hospital admitting privileges at a hospital within 30 miles of where abortions were performed).
- 29 *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021).
- 30 See Pet’rs’ Reply Br. 3, Oct. 13, 2021, [https://www.supremecourt.gov/DocketPDF/19/19-1392/196237/20211013162346656\\_19-1392ReplyBriefForPetitioners.pdf](https://www.supremecourt.gov/DocketPDF/19/19-1392/196237/20211013162346656_19-1392ReplyBriefForPetitioners.pdf); but see Brief of Amici Curiae National Women’s Law Center et al. in Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392); <https://nwlc.org/resources/nwlc-files-amicus-brief-on-behalf-of-72-organizations-in-supreme-court-case-deciding-the-future-of-the-right-to-abortion/>.
- 31 *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021).
- 32 *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021)
- 33 KARI WHITE, ET AL., TXPEP, INITIAL IMPACT OF TEXAS’ SENATE BILL 8 ON ABORTIONS IN TEXAS AND OUT-STATE FACILITIES (2021), <http://sites.utexas.edu/txpep/files/2021/11/TxPEP-brief-SB8-initial-impact.pdf> (as compared to abortions provided in September 2020).
- 34 GUTTMACHER INST., IMPACT OF TEXAS’ ABORTION BAN: A 14-FOLD INCREASE IN DRIVING DISTANCE TO GET AN ABORTION (2021), <https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion>. (last updated Sept. 15 2021), <https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion>.
- 35 *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 539 (2021).
- 36 GUTTMACHER INST., ABORTION POLICY IN THE ABSENCE OF ROE (2022), <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe>.