

Roe v. Wade in Red and Blue

January 28, 2022



It is a safe bet that *Roe v. Wade* will not fare well in the Supreme Court's 2021-22 Term. Women all over the country are likely to see the constitutional guarantee of their reproductive freedom recede, but the practical implications will differ greatly depending upon the state in which they live. Women in Texas have already felt the tip of the Supreme Court's spear. They woke up on September 1 to find that their rights under *Roe* expire after six weeks.

In September we witnessed the Court's cavalier refusal to allow abortion providers to bring an emergency challenge to the Texas law that bans abortion after six weeks of gestation. That law is commonly known as "SB8," shorthand for "Texas Senate Bill 8." The SB8 case before the Supreme Court is *Whole Woman's Health v. Jackson*. In that case, Texas providers asked the Court to stay the ban—delay its going into effect—until they had a chance to challenge it in federal court. Were it not for some shocking features of SB8 and its treatment in the Supreme Court this fall, all eyes would be on an abortion case the Court is hearing in December. In that case, *Dobbs v. Jackson Women's Health Organization*, the Court will consider the constitutionality of a Mississippi law banning abortion after 15 weeks. *Dobbs* is the case where legal observers anticipated the abortion action would be this Term. It could be the occasion for the demise of *Roe*. There are now six justices who believe that *Roe* was wrongly decided. At least three, Thomas, Alito, and Gorsuch, are ready to overturn *Roe*. By the end of this Term, we will know whether Roberts, Kavanaugh, and Barrett will join them or adhere to a more gradual path of destruction.

Roe v. Wade was decided half a century ago, in 1973. History provides some context needed to understand the Texas and Mississippi challenges to *Roe* and what the loss of *Roe* would mean.

Casey v. Planned Parenthood "Saved" Roe in 1992

In 1992 the Court also boasted six Republican appointees; reproductive rights advocates anticipated that *Roe* would go. But three of the six "saved" *Roe* by opting to cut back the constitutional right to abortion rather than stifle it. *Roe* had declared a right to choose abortion until the end of the second trimester of pregnancy. During the second trimester, *Roe* allowed states to regulate abortion in the interests of women's health. In the third trimester, states were allowed to ban abortion unless the health or life of the pregnant woman was at risk. *Casey* scrapped the trimester framework. It delineated "viability," that is, when a fetus can be sustained in life outside the womb, as the endpoint of the right to choose. Viability occurs at 24-28 weeks. But the shortening of the span of

time to be covered by the right in *Roe* was not *Casey's* only innovation. *Casey* also allows states to regulate throughout the *entire* course of a pregnancy, provided regulation does not *unduly burden* the “essential right” in *Roe*. Regulation can be in favor of fetal life or to protect the health of the pregnant woman. *Casey* ended a 20-year era in which the Constitution underwrote uniform protection of reproductive rights in every state in the country until the end of the second trimester. Since *Casey*, women in what we have learned to call Red and Blue states live under different reproductive rights regimes.

In Blue states, abortion law follows the *Roe* trimester pattern. Blue states have made state funds available to aid poor women who want abortions. Congress has forbidden the use of federal funds for abortion since 1980 under numerous iterations of the “Hyde Amendment.” Red states have passed hundreds of laws restricting abortion, taking advantage of every inch *Casey* allows and pushing beyond to test its limits in the courts. These restrictions come in two flavors. One type drives home to women that their reproductive freedom is not immune to patriarchal surveillance and disruption; examples include mandatory counseling and waiting periods. Red states also generate a stream of laws that raise the cost of abortion by requiring abortion providers to maintain all sorts of medically unnecessary “safeguards” in the way of equipment, medical qualifications, and hospital affiliations. Raising the cost of providing abortion services has helped to shrink the number of abortion providers and clinics in Red states. The brutal fact is that there are reproductive health deserts in Red states, and public funding is unavailable.

What Happens if *Roe* Is Overturned in this Supreme Court Term?

If the Supreme Court overturns *Roe*, the authority to regulate abortion will once again reside entirely with the states, as it did before *Roe*. If in this Term the Court merely blesses Mississippi’s 15-weeks ban, women in Red states will soon have a 15-week version of *Roe* (or whatever other down-sized time span the Court decides to leave intact). Red-state legislatures will rush to enact commensurate bans. Women in Blue states will continue to enjoy full *Roe*-level protection as a matter of state law. The conservative domination of the Supreme Court means that that the divide between Red and Blue state abortion regimes will accelerate and expand.

The Texas and Mississippi Abortion Bans in the Supreme Court this Term

On September 1 the Court refused to halt the implementation of the Texas six-week ban. In a bland one-paragraph order devoted to an esoteric issue of court procedure, and avoiding any discussion of constitutional reproductive rights, the majority declined to stay SB8. The ruling deprived Texas women of the protection of *Roe* and *Casey* without a legal airing of the patent violation of their constitutional rights. Any court challenge would have to come after the ban went into effect.

Red state statutes aimed at carving back *Roe* are a dime a dozen. But SB8 is not a run-of-the-mill statute. The SB8 innovation is that it accords no enforcement power to officials of the state of Texas. The law relies upon private individuals to sue anyone who performs an abortion or who “aids or abets” performance after a fetal heartbeat is detectable, normally six weeks. Successful plaintiffs receive *at least* \$10,000 and legal costs. The Supreme Court’s majority mused that the novel enforcement method raised “complex and novel antecedent procedural questions.” They concluded that the petitioning abortion providers had not shown that Texas state officials were responsible for any legally cognizable harm within the purview of the federal courts.

What was obscure to the majority seemed clear enough to the four dissenters. Chief Justice Roberts saw the use of private plaintiffs as a method to “insulate” Texas from responsibility for the ban and avoid constitutional test of the law in federal courts. Justice Breyer had no trouble discerning immediate and serious injuries that warranted a stay: Women will be unable to get abortions. Clinics

will be forced to close because they cannot withstand the threat of myriad suits inspired by the law. Justice Kagan was blunt. By failing to stay the ban, she wrote, the “Court ... rewards Texas’s scheme to insulate its law from judicial review by deputizing private parties to carry out unconstitutional restrictions on the State’s behalf.” Justice Sotomayor was unsparing: “The Texas Legislature has deputized ... citizens as bounty hunters, offering them cash prizes for civilly prosecuting their neighbors’ medical procedures.”

It was soon clear that the Supreme Court had stubbed its toes on abortion politics in issuing the September 1 order. The majority may have supposed that their robes and the arcane nature of the order would discourage the intense scrutiny that greeted the most consequential evisceration of reproductive rights in 50 years. But a storm of media attention tracked the mayhem in Texas. Women in the vast and second-most populous state in the country were fleeing to neighboring states, trying with varying success to have abortions before the six-week deadline, and girding to have babies by order of the Texas Legislature. Red state legislatures rushed to enact copycat bans. The anti-abortion movement was thrilled by this confirmation that *Roe* was “disfavored” by the Supreme Court. But the overall tenor of public reaction reflected shock and dismay. The justices were reminded that most Americans favor legal abortion.¹ A question of fairness hovered over the reaction: Women had had the protection of *Roe* and *Casey* for 50 years. Did the Court not owe them a full and forthright accounting before it swept those rights away? The newest justice, Amy Coney Barrett, felt moved to give a public address reassuring the country that the justices were not “partisan hacks.”²

To make matters worse, the Court’s willingness to tolerate Texas’s slick private enforcement gambit was criticized, if not ridiculed, by lawyers on both left and right. They pointed out that the same ploy could be used to evade the power of the Supreme Court to protect constitutional rights it favored, such as religious liberty and Second Amendment rights. Blue and Red state legislatures could use the same device to dispose of other constitutional protections. The Court looked slapdash, as if in an improvident hurry to dismember *Roe*. By late October, the Court wanted a do-over to stem the slide in its prestige and counter the optics of shoddy legal craft.

Legal experts were surprised again when late in October the Court took up the Texas abortion ban a second time. The case was hastily scheduled for hearing on November 1. This time the justices allowed full briefing and oral argument. But their review of SB8 was limited to the legitimacy of delegating enforcement to the general public. Oral argument revealed that at least two of the justices in the majority the first time around, Kavanaugh and Barrett, were critical of the SB8 private-enforcement scheme. The Court stuck to the enforcement question. It will eventually issue an opinion on whether Texas and other states can use SB8-style enforcement tactics. The Court has not blocked SB8. The justices were not ready to take up *Roe* and reproductive rights—or to admit that by allowing Texas to unleash SB8 it already had.

Which brings us back to *Dobbs v. Jackson Women’s Health Organization*, the Mississippi 15-week ban case. The Supreme Court heard oral argument in *Dobbs* on December 1. Oral argument solidified the expectation that *Roe* will not survive intact. The decision will be handed down by early summer.

Notes

1. Pew Research Center, *Fact Sheet*, May 6, 2021. Pew Surveys 1995-2020 find one brief dip below 50% circa 2009. Current support for legal abortion is at 59%.

2. Chandelis Duster, “Justice Amy Coney Barrett says Supreme Court is ‘not a bunch of partisan hacks,’” CNN, Sept. 13, 2021.