

EDITORIAL

Abortion laws in the United States: Turning the calendar back 50 years?

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Just as nations around the world have begun to revise their laws that restrict women's access to safe, legal abortions, the United States is moving rapidly in the opposite direction. The past few years have seen several countries in Latin America enact new legislation; these include Argentina, Mexico, and Colombia as well as Chile [1], which formerly had an absolute ban that prohibited abortion even to save the life of the pregnant woman. In Africa, Tunisia, Zambia, South Africa, and other countries have loosened their restrictions on abortion [2]. In the US, despite nearly 50 years of having a constitutionally protected right to abortion, women now face an array of current and pending restrictions in about half of the fifty states. A case before the Supreme Court promises to upend that constitutional right. Recent developments leading up to the Court's decision promise to reverse a half century of women's right to abortion in the United States. When hard-won rights such as this are overturned, it not only requires an explanation; it also calls for a look at what other well-established structures are at risk in a liberal democracy.

Past history: Supreme Court decisions on abortion

Prior to 1973, laws and court cases in the US existed only at the level of the individual states. There was no law or judicial ruling that applied nationwide. All that changed with *Roe v. Wade*, the landmark Supreme Court case that made abortion legal in all 50 states. The Supreme Court is the ultimate court of appeal; its role is to interpret the US Constitution. The Court demarcates the limits of authority between the states and the federal government, between one state and another, and between the government and the citizenry. The Court has the power to reaffirm and overturn previous Supreme Court decisions. Members of the Court are appointed by the current US president and have lifetime tenure. Historically, presidents from the two major US political parties—the Democratic and Republican—have chosen incoming justices who are members of their own party. Members of the Court appointed by Republican Presidents tended to be conservative, while those appointed by Presidents who were Democrats tended to be more liberal. Nevertheless, the Court was rarely sharply divided and for the most part, the justices had amicable relations with one another. All that changed during the four years that Donald Trump was the US President. Following the death or retirement of three long-serving justices, Trump appointed two male and one female justices, each more conservative than the next [3].

Two Supreme Court decisions established a federal right to abortion. The first of these was *Roe v. Wade* in 1973 and the second was *Planned Parenthood v. Casey* in 1992. The ruling in *Roe v. Wade*, announced on January 22, 1973, made abortion a constitutional right in all 50 states. This meant that individual states were not permitted to prohibit abortion prior to the time of foetal viability—that is, when the foetus could survive outside the woman's uterus. At the time, all justices of the Supreme Court were men. Seven of the nine justices voted in favour, with two against. Many states at the time had laws that banned abortion, so *Roe v. Wade* marked a major change.

The case involved a law in the state of Texas, which prohibited abortion except to save the life of the pregnant woman. The framework established in *Roe v. Wade* was based on the trimesters of pregnancy. During the first three months, the decision to abort was left to the pregnant woman; almost no restrictions were placed on abortion during this trimester. During the second trimester, the state could regulate but not prohibit abortion; regulations that protect women's health were allowed. After the second trimester, when the foetus became viable, the state could regulate or prohibit abortions in the interest of the potential

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life of the foetus. Decisions to regulate abortion in the third trimester were left to the individual states, with the proviso that the life and health of the pregnant woman remain protected. In its ruling in *Roe*, the Supreme Court based its decision on the woman's constitutional right to privacy, which had been established in an earlier court case dealing with the right to contraception. The justices voted 7-2 in favour of the decision.

A second Supreme Court case in 1992—*Planned Parenthood v. Casey*—affirmed the central ruling regarding foetal viability but introduced minor restrictions. The Court abandoned the trimester system but maintained viability as the time when the state may intervene to protect the life of the foetus. The ruling maintained that the state has a “legitimate interest” in protecting the health of the woman and the life of the foetus. The Supreme Court vote in this case was 5-4 in favour of upholding the decision in *Roe*. Sandra Day O'Connor, the first woman to serve on the Court, was a member of the Republican Party and was appointed by then-president Ronald Reagan, also a Republican. Justice O'Connor voted with the majority in upholding a woman's right to abortion.

When those two Supreme Court cases were decided, the Court had not yet become highly politicised. While it is true that justices appointed by Democratic US presidents were more liberal than those appointed by Republican presidents, the justices acted in a spirit of mutual respect. For example, one of the court's most conservative justices, Antonin Scalia, maintained amicable relations with Ruth Bader Ginsburg, one of the most liberal. Both are now gone. Justice Scalia died near the end of President Barack Obama's term in office. Although Obama had every right to appoint a replacement, that action was blocked in an unprecedented action by senator Mitch McConnell, an arch conservative Republican from Kentucky (another conservative southern state), who was then the majority leader in the Senate. That left the door open for the next president, Donald Trump, who during his four years in office had the opportunity to appoint three Supreme Court justices. The current makeup of the court is six conservative members (known as a “super majority”) and three liberal members. With one of the remaining liberal justices about to retire, current President Joe Biden appointed a liberal woman as his replacement. That replacement will not take place until the next session of the Court and will not change the balance of liberal and conservative members.

Recent actions by individual states

As recently elected representatives from the Republican Party have included more right-wing conservatives than their predecessors, the US Congress has become polarised. Almost all voting is strictly along party lines. Even the minority party can block legislation proposed by the majority party, given the somewhat bizarre rules. Southern and mid-western states (referred to as “red” states) are largely conservative, with a few exceptions, while states on both coasts (known as “blue” states) are more liberal. A few states are referred to as “purple,” since the way the majority votes in elections frequently switches between Republicans and Democrats. As the Supreme Court has become more conservative with the Trump appointees, southern and mid-western states recently began enacting anti-abortion legislation in anticipation of the Supreme Court overturning *Roe v. Wade*. A few examples of those laws passed in conservative states are illustrative.

Mississippi, in the southeast United States, is the poorest state (based on median household income) and is joined by other conservative states in that region that are among the poorest. The state has only one abortion clinic. A law enacted in 2018 bans abortion after the gestational age of the foetus is more than 15 weeks. The law's constitutionality was challenged by Jackson Women's Health Organization, and the law never went into effect because it was blocked by two higher courts. *The case, Dobbs v. Jackson Women's Health Organization*, was then scheduled for review by the Supreme Court, which heard arguments in December 2021 but has not yet rendered a final decision. If, as is now anticipated, the court approves the law, the standard of viability established in *Roe v. Wade* would be overturned. This is the first time since the decision in *Roe v. Wade* that the court will confront the viability standard for the acceptability of abortion. The appeal from Mississippi not only asks the court to prohibit abortion at this early stage of foetal development; it also asks the court to rule that there does not exist a constitutional right to abortion.

An even more draconian law, with several novel features, was enacted in Texas in October 2021. Known as “the Heartbeat Act”, the law bars most abortions after six weeks of pregnancy, which is when cardiac activity can be detected. That is well before the viability standard established in *Roe v. Wade* and weeks earlier than the Mississippi law now before the Supreme Court. Many women do not even know they are pregnant that early. The law remains in effect until a court finds it to be unconstitutional. With the Supreme Court decision on the Mississippi law still pending, the Texas law can be enforced within the state. Since September 1, 2021, women who are more than six weeks pregnant have been unable to access abortion care in Texas. Many have traveled to other states in their desperate attempt to have a safe, legal abortion. Ironically, it was a previous anti-abortion law in Texas that the Supreme Court overturned in establishing a Constitutional right to abortion in *Roe v. Wade*.

The current Texas law is highly unusual not only because of the early ban on abortion. It is cleverly designed to avoid review in a federal court. A novel aspect of the law allows private citizens to sue anyone who assists in an abortion after the six-week limit. This unusual feature prohibits officials from enforcing it. Ordinary citizens—even those who do not live in Texas—can sue

abortion clinics, and if the lawsuit is successful, the citizens are awarded \$10,000 or more for each abortion that violates the Texas law. Any person who assists a woman obtaining an abortion can also be sued—the physician performing the abortion, someone who provides payment for the abortion, and even the Uber driver who brings the woman to the hospital. In a neighboring state, the Oklahoma state legislature followed the precedent set in Texas and passed the “Oklahoma Heartbeat Act” in April 2022. Like the Texas law, the one in Oklahoma prohibits abortion at the time a physician can detect early cardiac activity in an embryo or foetus. The only exceptions are medical emergencies that threaten the life or health of the pregnant woman. There are no exceptions if the pregnancy is the result of rape or incest. An unprecedented feature of the laws in these two states is that it would allow private citizens to bring a lawsuit against any other private citizen who supports a woman in obtaining an abortion.

The laws just enacted in Texas and Oklahoma transform ordinary citizens into “vigilantes” who would function legally and even be paid lots of money if their lawsuits are successful. Vigilantes are a heritage from the old, wild west in the United States. Traditionally, they were a self-appointed group of citizens who took law enforcement into their own hands, without legal authority. The justification given for vigilante behaviour at that time was that those responsible for enforcing the law were thought to be inadequate. The only difference between that historical behaviour and what is being written into law in these two states is that the vigilantes are now legally authorised to spy on their fellow citizens and to sue those who break the law. Encouraging ordinary citizens to spy on and report their neighbors is reminiscent of similar practices in Nazi Germany and in Communist countries during the Cold War. The East German secret police, known as the Stasi, had a “vast network of informants and unofficial collaborators...who spied on and denounced colleagues, friends, neighbours, and even family members [4].” Is that the direction in which the United States is headed?

It is not inconceivable to imagine a future in the United States in which opponents of abortion from the gun-friendly, radical right wing are eager to enforce the draconian abortion laws being enacted in some states. Not only will these people be authorised to take the law into their own hands; they will also be paid lots of money if their efforts are successful. Most of the red states enacting these stringent anti-abortion laws have the fewest restrictions on gun sales and ownership [5]. It is ironic that the so-called “pro-life” states in the abortion controversy are the ones with fewest restrictions on ownership of lethal weapons used in mass shooting episodes killing innocent people, which occur with increasing frequency.

Another legal development taking place in some US states would prohibit residents from seeking an abortion in another state. A Bill in Missouri—like those in Texas or Oklahoma—would allow private citizens to sue anyone who helps a resident of the state have an abortion. But it would also allow a citizen to sue anyone who helps transport a woman across the state line to an abortion clinic in another state. It is becoming evident that providers of abortion need legal protection. There have been threats to their personal safety and to their medical licences. Some states have enacted “safe at home” laws that would protect ordinary citizens from threats against them, and these could be used in the context of abortion.

Leaked Supreme Court draft

The US Supreme Court operates in secret. Journalists are not permitted at sessions when the court deliberates or votes. Until a recent episode, there has never been a leak of the Court’s draft opinion in an ongoing case. A leaked draft of the forthcoming opinion on abortion was obtained by *POLITICO*, a political journalism company in the US. The Supreme Court’s Chief Justice Roberts ordered an investigation of the leak, which is ongoing at the time of this writing. The draft opinion was written by Samuel Alito, one of the Court’s most conservative justices. Although many knowledgeable people had predicted that the Court would overturn *Roe* and *Casey*, the contents of the leaked draft leave no doubt about the outcome. *POLITICO*’S website lists ten key passages from Alito’s draft opinion, accompanied by a warning that the ultimate ruling and the line-up of justices in support could change before late June or early July, when the final judgment is released. Portions of those passages are as follows.

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision....

Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences....It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.

[*Roe v. Wade*] represented the “exercise of raw judicial power”...and it sparked a national controversy that has embittered our political culture for a half-century.

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions....

On many other occasions, this Court has overruled important constitutional decisions....Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country [6].

When the draft opinion was leaked, commentators noted that the Supreme Court has become highly politicised. An article in the *New York Times* said the court's "reputation was in decline even before the extraordinary breach of its norms of confidentiality." Sonia Sotomayor, one of the three remaining liberal justices (two of whom are women) who will vote on the final draft opinion, said: "Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts [7]?" So, in addition to the controversy surrounding the right to abortion in the United States, debate now swirls around the Supreme Court itself: whether it has become so politicised that it is no longer the highly regarded, neutral body of legal and constitutional experts whose opinions command respect.

Worries about the future

While it is no doubt true that the Court has become more politicised than ever before, it is not surprising given the increasing polarisation in the US between the two major political parties and their adherents. It is the Republican party, the one supporting draconian abortion laws and permissive gun laws, that has moved far to the right. A large percentage of Republicans in Congress adhere to the false belief that the 2020 presidential election was "stolen" from Donald Trump by the Democrats. A large percentage of the gullible public believes the outright lies that are prevalent on a variety of social media platforms. Concerns are already being raised about rights other than abortion that may be at risk. Chief among these is the right to contraception [8] affirmed by a Supreme Court decision in 1965. One can imagine all sorts of anti-feminist legislation being passed in the United States if the arguments made by Justice Alito in the current draft ruling are upheld.

The fact remains that a majority of the population continues to support laws that permit abortion, at least in the early months of pregnancy. But the extent to which the United States remains a representative democracy is under challenge. Republican members of Congress are more right-wing than the majority of voters, even in red states. If, as predicted, the coming Supreme Court ruling overturns the two earlier precedents that established a constitutional right to abortion, it will return the nation's women to a form of subordination they have not experienced in half a century or more.

References

1. Garcia M. Latin America moves forward in legalizing abortion as the US rolls back access. What gives? *Boston Globe*. 2022 Feb 28 [cited 2022 May 30]. Available from: <https://www.bostonglobe.com/2022/02/28/opinion/latin-america-moves-forward-legalizing-abortion-us-rolls-back-access-what-gives/>
2. Bankole A, Remez L, Owolabi O, Philbin J, Williams P. From Unsafe to Safe Abortion in Sub-Saharan Africa. *Guttmacher Institute*. 2020 Dec [cited 2022 May 30]. Available from: <https://www.guttmacher.org/report/from-unsafe-to-safe-abortion-in-subsaharan-africa>.
3. Kumar A. Trump's Legacy is Now the Supreme Court. *POLITICO*. 2020 Sep 26 [cited 2022 May 30]. Available from: <https://www.politico.com/news/2020/09/26/trump-legacy-supreme-court-422058>.
4. Cameron JD. Stasi. East German government. *Britannica*. Date unknown [cited 2022 May 30]. Available from: <https://www.britannica.com/topic/Stasi>.
5. McGee K, McCullough J. Confronted with mass shootings, Texas Republicans have repeatedly loosened gun laws. *Texas Tribune*. 2022 May 24 [cited 2022 May 30]. Available from: <https://www.texastribune.org/2022/05/24/texas-gun-laws-ualde-mass-shootings/>
6. Gerstein J. 10 key passages from Alito's draft opinion, which would overturn Roe v. Wade. *POLITICO*. 2022 May 2 [cited 2022 May 30]. Available from: <https://www.politico.com/news/2022/05/02/abortion-draft-supreme-court-opinion-key-passages-00029470>.
7. Liptak A. A Supreme Court in disarray after an extraordinary breach. *New York Times*, 2022 May 3 [cited 2022 May 30]. Available from: <https://www.nytimes.com/2022/05/03/us/politics/supreme-court-leak-roe-v-wade-abortion.html>.
8. Elsesser K. After Roe v. Wade vote, access to contraception could be under scrutiny. *Forbes*. 2022 May 3 [cited 2022 May 30]. Available from: <https://www.forbes.com/sites/kimelsesser/2022/05/03/after-roe-v-wade-vote-access-to-contraception-could-be-under-scrutiny/?sh=6a8ccaad66a2>.