



For the Supreme Court decision see [https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf)

## Federal abortion rights end, but not legal challenges

The US Supreme Court's decision to overturn *Roe v Wade* is due to spark further court cases.

Susan Jaffe reports from Washington, DC.

The Supreme Court's momentous decision to abolish the half-century-old federal right to abortion not only rapidly reconfigures the political and legal landscape in the USA, threatening a host of other long-held personal freedoms. The seismic shift also ignites new legal battles within states that ban or severely restrict abortions, only 4 months before the mid-term elections that will establish which party controls Congress for the next 2 years.

Put simply, the ruling is "the legal equivalent of a nuclear bomb", according to legal affairs correspondent for National Public Radio and veteran Supreme Court observer, Nina Totenberg.

On June 24, a majority of five justices, including all three of former President Donald Trump's conservative appointees, overturned the court's landmark 1973 *Roe v Wade* decision. Their ruling in *Dobbs v Jackson Women's Health Organization* concludes that the Constitution does not guarantee a right to abortion nationwide; therefore, US states are free to decide if abortion should be permitted within their borders. The decision does away with *Roe* and a 1992 ruling in *Planned Parenthood of Southeastern Pennsylvania v Casey*, which allowed states to regulate abortion as long as they did not put an "undue burden" in the way of women seeking abortions before fetal viability.

Supreme Court Chief Justice John Roberts would not go as far as scrapping *Roe* and argued that the court only needed to address the Mississippi law challenged in the *Dobbs* case. Failing to persuade any of his conservative colleagues to adopt this more moderate strategy, he provided a sixth and only vote simply to uphold Mississippi's ban on abortions after 15 weeks of pregnancy.

The court's three liberal justices issued a rigorous dissent defending the right to a safe and legal abortion, as established by *Roe*.

### Immediate fallout

By the end of June 24, eight of the 26 US states poised to ban or severely restrict the procedure had done so, while protests against the decision flared in dozens of cities and towns across the country. The remaining Democratic-led states nestled mostly on the east and west coasts have vowed to become abortion havens for those health-care refugees who can afford to travel for an abortion no longer available at home.

So far, health-care providers have filed lawsuits to block abortion bans or restrictions in Arizona, Florida, Idaho, Kentucky, Louisiana, Texas, and Utah, with more challenges expected to follow. In the Florida case, providers claim that the state's constitution ensures a right to privacy, which includes abortion access. "Abortion is a standard and necessary part of maternal health care", Dr Alan Braid, a Texas abortion provider who is suing his state, said in a statement. "Nobody should be forced to travel across state lines for basic, time-sensitive health care." As this article went to press, courts in Louisiana and Utah have temporarily blocked abortion bans in these states, allowing the procedures to resume.

Speaking from the White House hours after the Supreme Court's decision, President Joe Biden said that the state abortion laws taking effect in the wake of *Roe's* demise are "jeopardising the health of millions of women, some without exceptions. [Laws] so extreme that women could be punished for protecting their health", he continued. "So extreme

that doctors will be criminalised for fulfilling their duty to care."

Biden also appealed to Americans to elect members of state legislatures and Congress who will restore the legal protections that *Roe* provided. "This fall, *Roe* is on the ballot. Personal freedoms are on the ballot. The right to privacy, liberty, equality, they're all on the ballot."

Until then, the Biden Administration is expected to announce several measures to mitigate the harmful effects of the *Dobbs* ruling. One such step is likely to ensure access to mifepristone and misoprostol, medications used to induce abortions, especially in states that ban or substantially restrict abortion.

The *Dobbs* decision marks the first time that the Supreme Court has taken away "an individual personal liberty", said Nancy Northup, president and chief executive officer of the Center for Reproductive Rights, which defended the clinic that challenged the Mississippi abortion law. *Roe* "changed the arc of women's lives for the better, reducing maternal mortality and increasing educational and job opportunities". Losing *Roe's* protections is "the biggest setback to women's rights in United States history".

"Today is a very dark day in health care", said Dr Iffath Abbasi Hoskins, president of the American College of Obstetricians and Gynecologists, which led a coalition of two dozen medical associations in filing a friend-of-the-court legal brief in support of the Mississippi clinic. "It is a dark day, indeed, for the tens of millions of patients who have suddenly and unfairly lost access to safe, legal, and evidence-based abortion care." In addition, thousands of clinicians will "have to live with the threats of legal,



Mario Tama/Getty Images

civil, and even professional penalties while providing health care for the patients when they need it”, she said.

Republicans celebrated their victory, after a battle of almost four decades waged on the campaign trail and in the courts. “Since the 1973 *Roe v Wade* decision, over 60 million American children have not seen the light of day”, Attorney General of Oklahoma, John O’Connor, said shortly after the *Dobbs* ruling was announced. “That makes this Supreme Court decision the most life-saving decision in the history of our nation”, he added. “The womb is now in Oklahoma, the safest place for a child to be.”

He then authorised immediate implementation of Oklahoma’s 1910 abortion ban. Under the law, anyone who provides an abortion, or advises or assists someone in obtaining the procedure can be imprisoned for 2–5 years. A second law, which takes effect in August, raises potential prison time to 10 years and includes a maximum fine of US\$100 000. Both laws allow abortions to save the life of a pregnant woman “in a medical emergency”.

In Arkansas, Attorney General Leslie Rutledge permitted the state’s 2019 abortion ban to take effect, which also has an exception for abortions needed to save the life of the mother. Doctors who violate the ban can be fined up to \$100 000, imprisoned for 10 years, or

both. “I want to thank God because God is so good that he made today possible in America and in Arkansas”, she said.

But Trump credited himself for “the biggest WIN for LIFE in a generation”, he said in a written statement. The victory was “only made possible because I delivered everything as promised, including nominating and getting three highly respected and strong Constitutionalists confirmed to the United States Supreme Court”. During his 2016 presidential campaign, Trump pledged to appoint justices to the Supreme Court who would overturn *Roe*.

### “Egregiously wrong”

The five-vote majority decision overturning *Roe* written by Associate Justice of the Supreme Court, Samuel Alito, is nearly identical to the draft leaked in May. He was joined by the court’s longest-serving member, Associate Justice Clarence Thomas, and its three newest members, Trump’s nominees Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.

Kavanaugh won Senate approval by just two votes after assuring senators in public and private meetings that *Roe* was a settled legal precedent. After the ruling was released, two senators who helped put Kavanaugh onto the court in 2018—Maine Republican Susan Collins and West Virginia Democrat Joe Manchin—told reporters that he had betrayed them. The two senators said that Associate Justice Gorsuch had also misled them a year earlier, when he expressed support for *Roe* before the Senate approved his nomination by a margin of ten votes in 2017.

“*Roe* was egregiously wrong from the start”, Alito wrote. “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”

His argument has a major flaw called the Ninth Amendment, said Laurence Tribe, university professor emeritus of constitutional law at Harvard Law School (Cambridge, MA). That provision says that the omission of any rights in the document should not be interpreted to mean that they do not exist. “The Constitution was never intended to name all of the rights that we have”, he said. “In America, if something isn’t outlawed, it’s protected.”

### “A willing ear”

As the majority tells “the tale, *Roe* and *Casey* are aberrations: they came from nowhere, went nowhere—and so are easy to excise from this nation’s constitutional law”, Associate Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, wrote in their dissenting opinion. Both decisions upholding abortion rights have “deep connections to a broad swath of this Court’s precedents”, they continue. And the right to terminate a pregnancy, they add, along with “other settled freedoms involving bodily integrity, familial relationships, and procreation” are “all part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions”.

Thomas also recognised the connection and, in his opinion, concurring with the majority urged that “future cases” should review the court’s previous decisions granting the rights to obtain contraception, to engage consensual sexual activity, and to same-sex marriage. “We have a duty”, he wrote, to correct any errors in those rulings.

Thomas is signalling that “all these other rights are up for grabs”, said Tribe. “Just come and challenge them and you’ve got a willing ear.” As the three liberal Supreme Court justices warned in their dissenting opinion, “no one should be confident that this majority is done with its work”.

Susan Jaffe