

The complicated history of

By Giselle Barajas

In light of a now conservative majority in the Supreme Court, different states have attempted to pass anti-abortion legislation in hopes of chipping away at the infamous Roe v Wade (1973) case. Notably, Texas has made numerous attempts to pass anti abortion laws. Recently, they've been able to pass a trigger law, making abortion illegal in the state if the courts were to ever reverse Roe. The city of Lubbock was even able to successfully ban abortion. Now, there is a heartbeat law that will go into effect in the entire state, September 1st. However, heartbeat laws and legal challenges to Roe are not something new. Infact, by anti-abortion activists slowly challenging Roe year by year, they have been able to weaken Roe overtime.

Despite abortion still being "legal," women and people with uteruses still struggle to get abortions. Here we are 40 years after Roe, and in an even worse state of reproductive justice than we were back then.

That being said, I decided to compile a list of the progression of abortion law since the inception of Roe to help illustrate how it has changed since 1973.

Roe v Wade (1973)

- Established that the right to privacy (Griswald v Connecticut) protects a pregnant woman's choice whether to have an abortion. However, her right to an abortion balances against the state's interest in protecting "the potentiality of human life."
- Established the trimester framework
- In the first trimester, the state cannot regulate abortions
- In the second trimester, the state can impose regulations on abortion that are reasonably related to the health of the woman
- In the third trimester (the point of "viability"), the state can regulate abortions or prohibit it entirely, except when the life or health of the woman is in danger

Essentially what Roe established was that abortions for women are a constitutional right. However, once a fetus is "viable" the state may completely step in (except when the health of the woman is in danger). At this point, it's muddy what the term "viable" even means. As medical advances are made, the point of "viability" may become blurred.

Planned Parenthood v Casey (1992)

- Creates a new standard that a state can regulate abortion before viability as long as the regulation does not impose an "undue burden" on the woman seeking an abortion.
- Two examples of regulations that passed the "undue burden" test in Casey was the 24 hour waiting period, and a minor needing consent of a parent or guardian for an abortion.

What you can see here is that Casey added the "undue burden" test on abortion regulations. Thus, making it easier for a state to place regulations on abortion. As a result, since then, 26 states have added 24 hour waiting periods for women seeking an abortion, between when they initially seek counseling for abortion to when they can receive the abortion. Although the Supreme Court may consider a waiting period as not being an "undue burden," I respectfully disagree. A waiting period may make it more difficult to obtain an abortion for poor people, rural residents, woman of color, and disabled folks.

ABORTION L

1973

ROE V WADE

The right to an abortion balances against the state's interest in protecting "the potentiality of human life." In the first trimester the state cannot regulate abortions. In the second trimester the state can impose regulations. In the third trimester, the state can regulate abortions or prohibit it entirely

2016

WHOLE WOMAN'S HEALTH V. HELLERSTEDT

it is unconstitutional for the state of Texas to require admitting privileges within 30 miles for a physician performing an abortion.

SEPTEMBER 2021

"HEARTBEAT BAN" *

TEXAS SENATE BILL 8 (S.B. 8)

Abortions banned as early as 6 weeks (when a fetal heartbeat is detected).

*Currently being legally challenged

on the battle for abortions

LAW TIMELINE

1992

PLANNED PARENTHOOD V CASEY

a state can regulate abortion before viability as long as the regulation does not impose an “undue burden” on the woman seeking an abortion.

2021-2022

DOBBS V. JACKSON WOMEN'S HEALTH

The courts are deciding whether all pre-viability prohibitions on elective abortions are unconstitutional or not.

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Whole Woman's Health v. Hellerstedt (2016)

- Using the “undue burden” test, it was established that Texas House Bill 2’s provision placed a undue burden on a woman seeking an abortion. The provision required that a physician performing an abortion must have admitting privileges at a hospital within 30 miles. Hence, it is unconstitutional for the state of Texas to require admitting privileges.

While it may seem like a win that admitting privileges failed the undue burden test, it’s evident that abortion rights are constantly under scrutiny and attack. In this case, if the admitting privileges would’ve been allowed then about half of Texas’s abortion clinics would’ve been forced to close. Just a few years after Whole Woman’s Health, the state of Louisiana attempted to pass admitting privileges as well, but their attempts got struck down by the courts once again in June Medical v Russo 2020.

Dobbs v. Jackson Women's Health (2022)

- The state of Mississippi attempts to completely abolish the “viability” standard from Roe and go further than the undue burden test from Planned Parenthood v Casey
- The courts are being asked: “Whether all pre-viability prohibitions on elective abortions are unconstitutional?”
- This case will be decided in 2022

Notably, Dobbs attempts to abolish the previously muddy “viability” standard from Roe. Even though Planned Parenthood v Casey already allows restrictions on abortion pre-viability. Currently, constitutional law only allows pre-viability restrictions if it passes the undue burden test. In Dobbs, Mississippi is attempting to completely ban abortions after 15 weeks (pre-viability), claiming that “a fetus can feel pain after 15 weeks.” With a current conservative majority in the court, there’s reasonable worry that the court will rule in favor of the state, further restricting women in getting an abortion. Not to mention that Jackson Women’s Health is the only licensed abortion clinic in Mississippi. Women seeking its services often have to travel hundreds of miles to obtain an abortion. By shortening the time period a women can seek an abortion, it can become even harder for women. That being said, at this point we now have an abortion case that will further restrict the possibility to get an abortion once again. It begs the question: how far will the courts go one day?

“Heartbeat ban” Texas Senate Bill 8 (S.B. 8)

- Goes into effect September 1st, 2021
- Abortions banned as early as 6 weeks (when a fetal heartbeat is detected).
- The burden is on the citizens to report illegal abortions with a reward of a minimum of \$10,000
- Currently being legally challenged

By this point it can be easily deciphered that abortion becomes harder and harder to obtain overtime, with more and more legal challenges. SB8 is unique however, in that it places the burden on citizens to report abortions past 6 weeks. This unique provision was arguably an attempt from the state to make it harder for a legal challenge to arise. The onus being on the citizens also creates some worrisome dangers for women in Texas. Particularly, placing the burden on the citizens can lead to the rise of femicides. It’s uncertain whether or not anti-abortion protestors may use SB8 as an excuse to commit violence against women, and it may even fuel more misogynistic anger and animosity towards women.