



Seattle, USA

joanne.silberner@gmail.com @jsilberner  
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## ABORTION RIGHTS

# Unborn in the USA: what happened and what's next for *Roe v Wade* and abortion rights?

The US appears poised to remove the guaranteed right of access to abortion—but it was already halfway there, reports **Joanne Silberner**

Joanne Silberner *freelance journalist*

Obstetrician-gynaecologist Sarah Prager lives and works in Washington state, in the far northwestern corner of the US. “I’ve never felt any pressure not to provide [abortion services],” she tells *The BMJ*. She feels supported not just by the clinics where she practises but by the state government as well.

When anti-abortion legislators in Washington state introduce bills to outlaw abortion, the bills don’t progress. The state legalised abortion in 1970, three years before it was legalised across the country. Washington requires private health insurers that cover obstetric care to cover abortions as well. And it includes abortion in the joint state and federal programme for people on low incomes, even though the federal government is not allowed to finance abortions, by shouldering the full cost.

The situation in Texas is the reverse. The state has some of the most restrictive laws in the US. An obstetrician there who spoke to *The BMJ* prefers to remain anonymous because of the possibility of legal threats to their ability to practise medicine and maintain their medical licence, as well as the risk of criminal prosecution. “As long as I’ve been here, it’s been a fraught time for abortion access,” they said.

Nearly 10 years ago, soon after the doctor moved to Texas, the state enacted a restrictive law that required all abortion facilities to meet the full standards of outpatient surgery centres and all providers to have hospital admitting privileges. Nearly half the abortion clinics in the state shut down.

State law also requires patients to wait at least a day after an ultrasound examination to consider their decision. That’s tough because many of them have travelled several hundred miles to the clinic, leaving jobs and children at home.

These two states bookend the range of access to abortion services in the US—a situation that has come under the spotlight in the past six months as the Supreme Court considered a controversial case that would overturn the 1973 *Roe v Wade* ruling that made abortion legal across the US (box 1).

### Box 1: *Roe v Wade*: the history

In January 1973, the US Supreme Court announced a decision in the case of Jane Roe (a pseudonym), who lived in Texas where, at the time, abortion was legal only to save the mother’s life. Unlike today’s deeply divided court, several justices appointed by Republican presidents joined in with those appointed by Democrats for a clear 7 to 2 vote favouring Roe.

*Roe v Wade* now looks set to be overturned, if a draft of a US Supreme Court decision leaked to news website Politico in May is finalised.<sup>1</sup> The draft plan would reduce access to abortion from a national right to one that individual states could rule on separately—and, according to the human rights organisation Center for Reproductive Rights, abortion could end up being severely limited or outlawed in more than half the states.<sup>2</sup>

### Mississippi and Texas

The current court case stems from a 2018 law passed in Mississippi state that prohibited most abortions after the first 15 weeks of pregnancy.<sup>3</sup> That was immediately blocked by the precedent set by *Roe v Wade* and never enacted. But it was enough to bring it to the attention of the Supreme Court, the highest court of law in the US.

Fast forward to September 2021 and the Texas state legislature passed what may be the most sweeping anti-abortion law in the country: the Texas Heartbeat Act (box 2). Where abortions were once allowed up to 20 weeks after fertilisation, the new law prevents doctors and clinics from providing medical or surgical abortions (except in life threatening medical emergencies) once they can detect fetal cardiac activity—which is generally about six weeks into a pregnancy, before many people realise they’re pregnant. That has meant doing extra ultrasound examinations and often turning patients away.

### Box 2: State of play

The Guttmacher Institute, a pro-choice research organisation, says that as of 1 May, 23 states are primed to restrict or further restrict access to abortion.<sup>4</sup> Thirteen of them have so called “trigger laws” already on the books, which would go into effect if the Supreme Court overturns *Roe v Wade*. Texas has one, signed in June 2021, that would put doctors performing an abortion at risk of life in prison. Other states have restrictions that have been blocked in the courts but would become active with the demise of *Roe*. And there are states with laws expressing intent to add restrictions, which would be likely to be pursued in the wake of the Supreme Court’s decision. Restrictions and rules exist in some states already. While *Roe* guarantees access through fetal viability—about 24 to 28 weeks after a last menstrual period—22 states ban abortion between 13 and 24 weeks after a last menstrual period, according to Guttmacher.<sup>5</sup> The Institute also identifies five states (Alaska, Kansas, Mississippi, Oklahoma, and Texas) that require doctors to discuss a possible link between breast cancer and

abortion,<sup>6</sup> even though the American Cancer Society explicitly states that no causal relation has been found.<sup>7</sup>

In eight states doctors are required to discuss long term mental health consequences of abortion. In five states patients must be told that personhood begins at conception. Doctors in Texas must provide a booklet that refers to the fetus as “your baby” and includes graphic representations of fetal development.

The state of Missouri has considered allowing private citizens to sue anyone who helps a Missourian get an abortion, even in another state. “This is going to be the new thing, trying to put your criminal law on people in other states,” says Columbia University law professor Carol Sanger. She thinks that it will ultimately be unsuccessful because Americans have a right to travel across state lines.

The Texas law was specifically written to make it “judge proof.” Rather than rely on state officials to prosecute abortion providers, which would make it subject to a constitutional challenge in a federal court, it calls for private citizens to sue anyone who helps a prohibited abortion to occur.

Just as crucially, Texas’s law exposes to prosecution not just physicians but insurers that pay for abortions and taxi drivers who bring women to clinics. “It’s basically creating a vigilante system,” says Carol Sanger, a law professor at Columbia University and author of *About Abortion: Terminating Pregnancy in the 21st Century*. For the Texas obstetrician, the “aiding and abetting” provision “has been really complicating in terms of what I can and cannot inform patients about their options.”

In December 2021, the Supreme Court finally heard the case of the Mississippi law, with a majority of the justices backing Mississippi in a private vote. A decision could have just applied to Mississippi, but the draft goes further.

In February 2022, Samuel Alito, associate justice of the Supreme Court, drafted a decision (called an opinion) to represent the majority decision. This is a normal court process—a justice representing the majority circulates a draft, works on it after comments, and may circulate it some more until a final version is reached. What wasn’t normal was that the full 98 page draft was leaked to Politico, which published it on 2 May.<sup>8</sup>

It detailed just how the law would be overturned, with the key being privacy. The 1973 *Roe v Wade* decision was based on the concept that the US Constitution protects people’s liberty and privacy, and thus their right to choose an abortion without excessive government restrictions. (It followed another Supreme Court ruling a decade earlier against the state of Connecticut, which tried to outlaw contraceptive use even among married couples. The court decided that contraception was a private issue and government shouldn’t intervene.) In the draft opinion, Alito, a conservative Catholic and longtime critic of *Roe v Wade*, discarded the privacy concept that was its basis.

## Repercussions

Back in Texas, the number of abortions in clinics dropped drastically in the months after the Texas rule passed. But the actual number of Texans getting abortions dropped only about 10%, according to the *New York Times*<sup>9</sup>—people were going to other states or getting medical abortions. The Texas obstetrician provides abortions in another state for one week a month, but that state may be tightening up its access rules as well. In May 2022, just a day after the Supreme Court draft opinion was leaked, the governor of Oklahoma signed legislation modelled on Texas into law.<sup>10</sup> And the state of Louisiana considered (and then dropped) a bill that would have allowed

murder charges against women in the state who found ways to have abortions.<sup>16</sup>

On the other hand, 16 states plus the capital, Washington, DC, have laws protecting the right to abortion, and the leaked opinion has only bolstered their stance. On 2 May, the governor of New York state tweeted an invitation to anyone who needs access to care to come to her state; the governor of New Jersey assured every New Jerseyan that abortion remains available there. The governor of the state of Washington said at a rally the day after the draft opinion was leaked, “Washington state is a pro-choice state, and we are going to fight like hell to keep Washington a pro-choice state.” He too promised “sanctuary” to people from other states.

Prager says she’s seen patients from Idaho—a drive of 300 miles or more to her clinic—and that she and others are considering setting up clinics on the Idaho-Washington state border. Clinics in states near Texas have also reported a large rise in business. Medication abortions have also been rising—as of February 2022 more than half of all abortions in the US rely on pills that can be taken at home, sometimes obtained by mail order,<sup>11</sup> and as a result of the covid-19 pandemic the Food and Drug Administration allowed providers to arrange to send pills by post. (Nineteen states, however, require the provider to be physically present, and some states are now considering further restrictions.)

Within a few days of Politico publishing the draft opinion, the state of Connecticut enacted legislation that prevents its state agencies from cooperating with other states prosecuting abortion providers and patients in Connecticut and protects the medical records of people from other states who seek care in Connecticut.<sup>12</sup>

Support has also come from over the border, with government officials in Canada and women’s rights groups in Mexico indicating that they would help patients who came from the US seeking abortion services.<sup>13</sup>

Alito’s draft is not likely to be the final version of the Supreme Court ruling—occasionally some justices change their votes in the process and change the ultimate outcome. But court watchers are not expecting a change in the final decision to reverse *Roe*, which is expected in late June. If the opinion holds, “we’ll have 50 little countries deciding whether abortion will be legal or not, or how legal it will be,” said Sanger. In Alito’s words, “It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”

Some think restrictions could go farther. Mary Ziegler is a visiting professor at Harvard Law School and author of *Abortion and the Law in America: Roe v Wade to the Present*. “If *Roe* is overturned,” she said, “a lot of conservative states are counting on criminally punishing doctors, not just allowing lawsuits against them.” And there is already concern among some physicians that aiding the completion of a miscarriage will be seen and prosecuted as abortion care.

Ziegler and others also think some reproductive technologies could be banned, most notably the creation of embryos for implantation. “It’s not clear how states that ban abortion are going to view the disposal of embryos or storage of embryos,” says Ziegler.

And Sanger says that if the reasoning in the draft opinion turns out to be close to the final ruling, states could go after other privacy rights, including same-sex relations and marriage equality. It’s something Justice Sonia Sotomayor warned about when she and her fellow justices heard the case last year. The legal counsel for anti-abortion group Alliance Defending Freedom told the *New York Times* that claims that the movement wants to go beyond abortion

is “hysteria and scaremongering,” but another legal expert pointed out to *The BMJ* that few people in the American mainstream thought the anti-abortion movement would get as far as it has.

The American College of Obstetricians and Gynecologists, which represents 60 000 doctors, has vowed to continue support “in defense of comprehensive reproductive medical care and against legislative interference in the patient-physician relationship,” and promised continued education and training in abortion care and referrals, as well as efforts in state legislatures to preserve access.<sup>14</sup>

The head of the 6000 member American Association of Pro-Life Obstetricians and Gynecologists told an internet newsletter that “she hopes the final court decision matches the leaked draft.” Meanwhile other anti-abortion groups noted that the decision doesn’t make abortion illegal, it just turns the option back to the states, and they say that much work needs to be done on the state level.<sup>15</sup>

The Texas obstetrician sees increasing restrictions on abortions as a reflection of how their state is failing a certain segment of the population—those who don’t receive education about contraception, can’t afford it, or don’t want to bear a child because they can’t afford another mouth to feed. “Many of my patients have experienced sexual assault, have restricted choices because of intimate partner violence, are adolescents who cannot talk to their parents about reproductive health and contraception. I think that’s lost in this conversation,” they say. “It’s hard not to get emotional about it. These are the people who need the most help.”

#### Timeline of recent events

- 19 March 2018: Mississippi signs into law a measure banning almost all abortions after 15 weeks of pregnancy, though the law is never enacted
- 21 September 2021: Texas passes the Texas Heartbeat Act
- 2 December 2021: Supreme Court hears the case of the Mississippi law
- 10 February 2022: Samuel Alito, associate justice of the Supreme Court, drafts an opinion to represent the majority decision
- 2 May 2022: Leaked Alito draft opinion is published by Politico
- 3 May 2022: Oklahoma signs into law abortion measures modelled on the Texas Heartbeat Act
- 5 May 2022: Connecticut signs legislation protecting people traveling to the state for abortions, those who aid them and in-state providers
- June 2022: Expected Supreme Court decision on Mississippi case

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