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***the* NOCTURNISTS:**  
**Post-Roe America**

**History of Roe v. Wade**



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## Before Roe v. Wade

In early 19th century America, abortions were self-induced or performed by midwives or Native American women. Techniques for inducing abortions ranged from using abortive substances containing toxic herbs, such as red cedar or Savin, to physical methods, such as hitting the pregnant person's abdomen. In most states, abortion was made illegal in the mid-1800s.

In the 1960s, strict anti-abortion laws were scaled back. In 17 states, abortion became legally available, even in cases where the pregnant person's life was not at risk.



Although abortion was available during this time, there were significant disparities in access and mortality rates associated with the procedure. Poor, young, and minority women often resorted to illegal abortion procedures to address unintended pregnancies.

Research conducted in New York in the 1960s found that 77% of low-income women reported attempting a self-induced abortion, with only 2% indicating any physician involvement. Further, 1 in 2 non-white women died as a result of an abortion-related hospital admission, compared to 1 in 4 white women.

**For references and more information, please visit:**

[Lessons from Before Roe: Will Past be Prologue](#). Guttmacher Institute, March 2003.

Haque, F. [America Before and After Roe v. Wade](#). *The New York Times*, June 2022.

Greenhouse L. Siegal R. [Before Roe V. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling](#). Yale Law School, 2012.

Acevedo, Z. [Abortions in Early America](#). *Women & Health*, Oct 2008.

## **Roe v. Wade**

In 1970, Jane Roe, a pregnant single mother in Dallas, wanted to have an abortion. However, at that time, the Texas Penal Code prohibited abortions except in cases where the mother's life was at risk. In response, Roe filed a lawsuit against Henry Wade, a Texas state official. The federal district court ruled in favor of Roe stating that the Texas statute was unconstitutional and infringed on Roe's 9th and 14th Amendment rights.

**9th Amendment:** *“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”*

**14th Amendment:** *“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”*

### **If the federal court ruled in favor of Roe, why was her case brought before the Supreme Court?**

The federal district court issued a declaratory relief stating that the Texas state was unconstitutional but denied an injunctive relief. A declaratory relief is a court judgment that establishes an interpretation of the law and clarifies the rights of both the plaintiff and defendant. It does not force either party to act in a certain way after the ruling. In contrast, an injunctive relief is a court order that ultimately requires the defendant to act in a different way. Therefore, although the court ruled the statute was unconstitutional, there was no legal standing to enforce the ruling.

### **What was the Supreme Court’s decision?**

On January 22nd, 1973, the Supreme Court issued a 7-2 decision in favor of Roe stating that access to an abortion is a constitutional right protected by the 14th Amendment. Although the Constitution does not explicitly mention the right to personal privacy, Supreme Court justices in favor of the decision argued that the “zone of privacy” implied in the Bill of Rights and the “liberty” protected by due process is broad enough to encompass a woman's right to an abortion.

In order to balance pregnant people's privacy rights with state interests in protecting unborn life, the courts proposed that in the early part of the pregnancy, a woman's right to privacy outweighs state interests. After the point of viability, or when the fetus is capable of living outside the womb, a state can ban abortion except to save the mother's life.

**For references and more information, please visit:**

[Roe v. Wade Case Summary: What You Need to Know](#). FindLaw, March 2023.

[Roe v. Wade \(1973\) | Wex | US Law](#). Legal Information Institute of Cornell Law School.

[Roe v. Wade: US women win abortion rights](#). *The Guardian*, Jan 2023.

## Post-Roe v. Wade

In 2018, Mississippi passed the Gestational Age Act, which barred abortions after 15 weeks except in cases of medical emergencies or severe fetal abnormalities. This 15-week limit falls several weeks short of the viability principle in *Roe v. Wade* and *Planned Parenthood v. Casey* (1992), a ruling that upheld the right to abortion established in *Roe v. Wade*. In response, Jackson Women's Health Organization, the last remaining abortion clinic in Mississippi, challenged this restriction in federal court through the Mississippi State Health Officer, Thomas Dobbs.

On June 24, 2022, the Supreme Court made a decision in *Dobbs v. Jackson Women's Health Organization* that reversed *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992)

**For references and more information, please visit:**

[19-1392 Dobbs v. Jackson Women's Health Organization](#). June 24, 2022.

Davis, M. [The state of abortion rights in the US](#). Int J Gynaecol Obstet, Oct 2022.

## Arguments

### **The State of Mississippi argued that:**

Abortion is not a fundamental right because the word "liberty" as written in the 14th Amendment only applies to rights that are "deeply rooted in US history and tradition." Many states had bans on abortion at the time of the 14th Amendment. They also argued that the standard of viability is too arbitrary.

### **Jackson's Women's Health Organization argued that:**

Physical autonomy and body integrity are "essential elements of liberty protected by the Due Process Clause" of the 14th Amendment. In response to concerns about the arbitrary nature of the viability standard, they stated that this standard has been universally applied in federal courts.

### **For references and more information, please visit:**

[Dobbs v. Jackson Women's Health Organization \(2022\)](#), Legal Information Institute of Cornell Law School

## The Dobbs Decision

The Supreme Court had to determine whether Mississippi's 15-week ban on abortion was constitutional and decide whether to overturn the 1973 constitutional decision.

Justices Alito, Clarence Thomas, Kavanaugh, Gorsuch, and Barrett voted to uphold the Mississippi law and overturn Roe v. Wade and Casey v. Planned Parenthood. Justice Roberts voted to uphold the Mississippi law but did not want to join the majority in overturning Roe and Casey. They argued the following:

*The right to abortion was not deeply rooted in American history and tradition.*

*Abortion is distinct from the right to privacy or autonomy because of the moral questions raised by ending fetal life.*

*Allowing people to act how they want is not ordered liberty.*

*It is up to each state to establish laws on abortion.*

Justices Kagan, Breyer, and Sotomayor voted to uphold abortion rights. They argued the following:

*Abortion rights, among others, are all rooted in the American tradition of allowing people to make private choices for their lives.*

*Eliminating the right to abortion is not grounded in new legal or factual developments and will undermine public trust in the courts.*

**For references and more information, please visit:**

Davis, M. [The state of abortion rights in the US](#). Int J Gynaecol Obstet, Oct 2022.

[Brief of amici curiae reproductive justice scholars](#), September 2021.

## What is the impact of Dobbs on reproductive health?

The impact of overturning Roe v. Wade varies across states. In states that protect abortion rights, individuals can continue to have access to safe and legal abortions. In states with restricted access to abortion, individuals will face barriers to safe and legal abortions, likely resulting in increased rates of unintended pregnancy. Additionally, similar to pre-Roe times, illegal and unsafe abortions are projected to rise. Moreover, this decision is expected to disproportionately impact people of color, who often have limited access to healthcare.

In addition to the impact on abortion rights, overturning Roe v. Wade could have broader implications for reproductive health. There is concern that this could set a precedent resulting in increased regulations on reproductive health services, including access to sex education and contraception. In fact, in a recent statement, Justice Clarence Thomas said he would support the elimination of previously upheld rights under the doctrine of substantive due process such as contraception access and same-sex marriage.

### **For references and more information, please visit:**

[Here's what could happen now that the Supreme Court has overturned Roe v. Wade](#),  
*NPR*, June 2022.

[What are the Implications of the Overturning of Roe v. Wade for Racial Disparities?](#)  
*KFF Health News*, July 2022.